**Acronyms and Glossary**

| | |
|---|---|
| ANDM | Amhara National Democratic Movement |
| Bund | Federal Government (Germany) |
| Bundesrat | Second Chamber (Germany) |
| Bundestag | First Chamber (Germany) |
| Canton | Name for the twenty-six constituent units in Switzerland |
| CAFPDE | Council of Alternative Forces for Peace and Democracy |
| CCI | Council of Constitutional Inquiry |
| Derg | Literally 'Committee,' widely used to denote the regime in power from 1974-1991 |
| EDP | Ethiopian Democratic Party |
| EPRDF | Ethiopian Peoples' Revolutionary Democratic Front |
| ESM | Ethiopian Student Movement |
| FDRE | Federal Democratic Republic of Ethiopia |
| HoF | House of Federation, the second or upper chamber in Ethiopia |
| HoPR | House of People's Representatives, the first or the lower chamber in Ethiopia |
| Land | Name for the sixteen units of the German federation (plural Länder) |
| MEISON | All Ethiopian Socialist Movement |
| OPDO | Oromo Peoples Democratic Organization |
| TPLF | Tigray Peoples Liberation Front |
| SEPDC | Southern Ethiopia People's Democratic Coalition |
| SEPDM | Southern Ethiopia People's Democratic Movement |

## I. General Introduction

This text is intended to serve as a guide in delivering the course on "Federalism" for LL.B candidates of Defense-in-Service students in Mekelle Univesrity School of Law. With due respect to the individual initiative that might be taken by every instructor of this course as to the manner of delivering the same, the content of the course should predominantly focus on the information spelt out in this guide, for this guide is prepared based on the National Modularization Curriculum for the LLB program in laws.

The course on Federalism covers the meaning, pros and cons of a system of federation, the types of federation, and general features observed in different federal systems. It discusses such issues like whether federalism helps in regulating conflicts, what the historical antecedents of federalism are in Ethiopia, how they contribute to analysis of the present situation, whether lessons could be drawn from other multicultural federations, how legislative and executive powers between the federal and state governments are divided - with particular focus on the Ethiopian federal system and the ongoing debate concerning the authority of the constituent states, how federal polities are distinguished from other forms of polities, the main institutions established in a federation, and the role of second chambers in legitimating federal government and process of policy-making.

The course also examines one of the consequences of introducing a federal system, i.e. intergovernmental financial arrangements in decentralized systems. Fiscal federalism analyses the theoretical and empirical basis of the division of expenditures and revenues between the levels of a government. The focus will be on the constitutional allocation and distribution of expenditure responsibilities and revenue-raising powers between the tiers of the government. This shall cover the vertical as well as horizontal fiscal imbalances in revenue capacity and expenditure needs among the constituent units, the processes and institutions of intergovernmental fiscal transfers and borrowing needed to respond to financial imbalances, and corrections for imbalances

## II. Course Objectives

After a successful completion of the course, students are expected to achieve basic knowledge and competence regarding:

- ✓ federalism, the reasons for its introduction and the various types of federation;
- ✓ the main features that distinguish federations from other polities;
- ✓ the necessary institutions for making a federation effective;
- ✓ the distinction between nation-state and multicultural federations;
- ✓ the manner and techniques of diving power and resources between federal and state governments;
- ✓ the context under which the 1995 Federal system has been established in Ethiopia as well as its development;
- ✓ the nature of the political crisis in the past and the challenges of building a multicultural state;
- ✓ the unique features of the Ethiopian federal system;
- ✓ the various mechanisms for adjudicating constitutional issues as employed in federal polities and the political choice adopted in Ethiopia;
- ✓ the principle of revenue sharing and expenditure assignment between the states and the federal government; and
- ✓ the objectives of intergovernmental transfer and the methods for correcting fiscal imbalance.

# 1. CHAPTER I: GENERAL OVERVIEW OF FEDERALISM

## Introduction

These days, particularly post cold war world, many nations has opted to federal system of government as one structural mechanism to tame long existing conflicts and problems of governance Twenty eight countries constituting 40% of world population either call themselves as federal or are generally considered to be federal.[1] Especially, almost all democracies with large population, territory, and diversity are federal. Federalism as one structural arrangement has been adopted in many post conflict nations such as Bosinia, Democratic Republic of Congo, Iraq, Sudan, and South Africa. Yet other nations including Sirilanka and Nepal are considering federalism as one option of government system.

Despite the horrific experience of interethnic tension and conflict following the end of the Cold War in the former USSR and Yugoslav federations, in the contemporary world, federalism as a political idea remains still popular for reconciling unity and diversity under a single political system. The European Union with its currently expanding vision seems to be evolving into a hybrid of confederal as well as federal institutions.

This chapter canvasses some preliminary ideas on the conceptual clarity of federalism. The chapter discusses the meaning and historical evolution of federalism, the rationales for countries adopting federal system of government, the merits and demerits of federalism, the way different federations are formed, and the types of federal systems.

## 1.1.**Meaning and Applicability of Federalism**

Like many other concepts there is admittedly some difficulty in defining federalism. Within the context of the older federations, it might mean the joining together of some semi-autonomous units for some common goals. Within the context of the EU it might refer to the coming together of the bulk of European states and the emergence of new institutions combining confederal as well as federal features. Within the context of former communist federations, federalism may mean the existence of some features associated with the division of powers in constitutional form

[1]George Anderson; Managing Water in Federations: Notes for an Address to the World Water ForumTheme Session on River Basin Management in Federal Countries, Forum of Federations, Istanbul, 17 March, 2009, p2

rather than in operational reality. In the African context, federalism is associated with the colonial experience of divide and rule. It might, therefore, mean different things to different people depending on historical and cultural context.[2]

Etymologically, the word "federal" comes from the Latin term "*foedus*", meaning "covenant and accordingly federalism has a traditional origin which, accordingly, is a solemn agreement among smaller polities to from a large perpetual polity.[3] A covenant signifies a partnership, or marriage, in which individuals or groups voluntarily consent to unite for common purposes without giving up their fundamental rights or identities. A covenant represents a theological concept and political idea that stands in contrast to (1) organic governments based on a common ancestor and (2) governments based on conquest or what Alexander Hamilton in 1787 termed governments based on accident or on force rather than on reflection and choice. Federalism and its related terms (federal and federations) refer to a type of government and governance that is established voluntarily to achieve unity while preserving diversity by constitutionally uniting separate political communities in to a single limited, but encompassing, political community, such as a nation-state.

Federal principle generally grow out of the ideal that free people can voluntarily enter in to a lasting yet limited political associations to achieve common ends and to protect certain rights without scarifying their respective integrities.[4] In this way, the federal idea rests on the belief that political and social institutions and relationships are best established through covenants, compacts or other contractual arrangements.[5]

Federalism as an organizing principle advocates a 'multi-tiered government combining elements of shared-rule through common institutions for some purposes and regional self-rule' for constituent units for some other purposes, thereby accommodating unity and diversity within a larger political union.[6] The essence of federalism as a normative principle is the perpetuation of

[2] Assefa Fiseha; Federalism, Teaching Material, Prepared under the Sponsorship of the Justice and Legal System Research Institute, 2009, p140

[3] Tsegaye Regassa; Ethnic Federalism and the Right to Self-determination as a Constitutional Legal Solution to Problems of Multi-Ethnic Societies, the Case of Ethiopia: University of Amsterdam (2001), p16

[4] Arshi Khan; Federalism and National Minorities in India, in G. Alan Tarr *et al* (eds.) 'Federalism, Sub-national Constituions, and Minority Rights', Praeger publishers, Westport, Connecticut, London, 2004, p200

[5] Id, p200

[6] Tsegaye; supra note 3, p15

both union and autonomy, in the latter for accommodating, preserving and promoting distinct identities within a large political union.[7] It refers to a union of separate states in which power is divided and shared between a strong union government and strong state government.[8] Moreover, as Elazar pointed out, the idea of federalism is all about the idea of "shared rule and self-rule" in an existing two layers of government in a polity namely, that of the center and the local government.[9]

Another author, Wheare, defines federalism from constitutional perspective, hence is a means that the national and regional governments are by law equal, autonomous and coordinate institutions that receive their powers from the constitution, and which also enjoy protection through the constitution in terms of their status and functions. Neither is subordinate to the other; both are co-ordinates.[10] More succinctly, Graham Smith puts it that "the federal idea in short, is generally conceived as a compromise, conveyed by the image of checks and balances between unity and diversity, autonomy and sovereignty, the national and the regional".[11] Another author defines federalism as a system of dual sovereignty ''in which some matters are exclusively within the competence of certain local units—cantons, states, provinces—and are constitutionally beyond the scope of the authority of the national government, and where certain other matters are constitutionally outside the scope of the authority of the smaller units.''[12] Kincaid on the other hand defines federalism as;

> *both a structure and a process of governance that establishes unity on the basis of constitution. Federations have arisen in very different circumstances, each being the unique choices by political leaders and larger historical forces. Being the result of unique choices of consent while preserving diversity by constitutionally uniting separate political communities into a limited, but encompassing polity, powers are divided and shared between constituent governments and a general government […]. The constituent units also have broad local responsibilities and sufficiently autonomous self-government*

[7] Assefa, supra note 2, p142
[8] John KinCaid; Values and Value Tradeoffs In Federalism: Journal Of Federalism (1995) p10
[9] Tsegaye, supra note 3, p15
[10] K.C. Wheare, Modern Constitutions (1992), p 27
[11] Getachew Assefa; Ethnic Federalism and Self Determination in Ethiopia: The Legal policy Framework: A panel Discussion on Ethnicity, Identity and the Right to Self-Determination (May 26, 2007), p1
[12] Robert Dahl, ''Federalism and the Democratic Process, in '' Democracy, Liberty, and Equality (Oslo, Denmark: Norwegian University Press, 1986, p114

*to carry out their responsibilities on behalf of their own people in concert with the whole people of the federal polity.*[13]

All the foregoing definitions and explanations revolve around three crucial features. First, federal system is a political structure in which the existence of regional units is constitutionally guaranteed. Thus a federal system has as its basis on a written constitution which can only be amended by certain defined and extra ordinary procedures. Second regional units have some degree of constitutionally guaranteed governmental autonomy which is achieved through the division of powers and fiscal resources. Third, the inclusion of regional provinces in central decision making is constitutionally guaranteed and entrenched. It should be stressed here that the powers and autonomy for regional units is not simply devolved but are constitutionally guaranteed and the incorporation of the regions in the contras decision making process can also be altered by extra-ordinary constitutional measures.

In any way, in federalism power is divided and shared between (1) a general (federal or national) government that has certain area-wide (or nationwide) responsibilities, such as national defense and monetary policy, and (2) constituent territorial governments (e.g. states, provinces, Lander, republics, or cantons) that ordinarily have broad local responsibilities such as education, land-use planning, highways, health care, and public safety and that are also represented, often equally, in the federal legislature. Most federations have two orders of government: national and regional

### 1.2.Rationale for Adopting Federalism

All federations that currently exist have different reasons and purposes for adopting federal state structure through the instrument of political leaders, only few generalizations can be made as to how and why federations are created and evolved. Anderson argues that federations have been formed in a series of historical waves over the last two centuries.[14] Accordingly, the first wave which lasted from the late eighteen century to the early twentieth century saw the creation of new countries with formerly independent units coming together in a federal form. The U.S.A federation after eight years of confederal experience (1781-1789) which established the first modern federation and the Swiss Confederation, after evolving five centuries of confederal

[13] John Kincaid, ‘‘Introduction,’’ Handbook of Federal Countries, 2002, eds. Ann L. Griffiths and Karl Nerenberg (Montreal and Kingston: McGill/Queen’s University Press, 2002), pp8–9.
[14] George Anderson; Federalism: An Introduction, Oxford University Press, Forum of Federations, 2008, p9

experience, ended up establishing a federal constitution in 1871 are under the first wave of federal evolution.

The second wave saw the emergence of federations created after ending colonial administration. These federations, also called post-colonial federations include India, Pakistan, Malaysia, and Nigeria. The third wave witnessed the emergence of new federations following the collapse of communism. Russia, Czechoslovakia, and Yugoslavia are federations under this stage of evolution. Another wave has witnessed the emergence of new federations created from formerly unitary systems including Belgium and Spain. The last wave as to formation of federations is federations emerged from post-conflict situations. Ethiopia, Iraq, and Democratic Republic of Congo are typical examples in this regard.

Coming back to the main concern, So many propositions have been made over the years concerning the need for recourse towards the initiation of principles and practices that are relevant to decentralization and federalism. Of course, the reasons for the adoption of federalism as a structural arrangement vary depending on the existing socio-economic and political conditions of a given state. According to McMahon's argument, there are two basic foundations for the historical appearance of federal systems, (1) the existence of body of entities closely connected by locality, history, race and other elements of communality, and (2) the existence of desire on the part of all the concerned to come together anticipating the attainment of the common good.[15]

In this historical scenario, such situation have led to the working out of compromise formulae which are often mediated by covenants and treaties which eventually reach the highest point in bringing about federal arrangements by putting an end to centrifugal rivalries and feuds.[16] By all accounts, the adoption of federalism by many states is to harmonize the diverse interests of widely varied and at times divergent elements on the basis of the consent of all stake holders.[17]

Beside the preceding justification for the employment of federalism, there are further institutional strategies behind it in modern nations with diversified society. In this respect the

[15] Kassahun Berhanu; Decentralization, local government and Federalism in Ehtiopia, in kassahun Berhanu, *et al* (ed.), Electoral politics, Decentralized Governance and constitutionalism in Ethiopia, Addis Ababa Univesty (2007), p36
[16] Ibid
[17] Id, p37

Indian federal experience is best example. In India, there are three inherited arguments about the need for federalism in the diversified Indian State by drawing attention to three different paradigms, namely administrative, contractual, and democratic.[18]

In the view of administrative paradigm federalism is seen as a mechanism to promote the stability, legitimacy and territorial integrity of a state. On the other hand, contractual paradigm defines federalism as one aimed at multicultural power sharing; against the specter of communalism, federalism was to enable constitutional negotiations between diverse nations. This paradigm gives emphasis to the pluralist feature of federalism. The last proposition, democratic paradigm, is interested in institutional arrangements that would encourage sub national communities to have a measure of autonomy in shaping the realities of their lives.

A point worth mentioning, the need to opt for federalism as one structural device varies depending on whether a state is a multiethnic nation or with homogenous society. In this regard A.Lovise concerning the justification for choosing federalism says 'threat of disintegration and the need to maintain unity are the major reasons why unitary states with multi cultural society opt for federalism.[19] In more general concept, the driving force behind forging a federal arrangement on the part of two or more power centers is under pinned by the quest for reaping mutual benefits in which there is no ultimate loser or gainer.

Another rationale for adopting federalism is conflict management and accommodation of diversity. Federalism as a structural arrangement has been devised by many states of diverse society as a technique used for accommodation and harmonization of the diversity. Horowitz, who has conducted a comprehensive study of various methods of ethnic conflict prevention, management and resolution, argues federalism and regional autonomy (together with equitable electoral devices) are important structural approaches of conflict management. [20] It is important to remind here that federalism is not the only way of managing conflicts and accommodation of diversity rather it occupies a middle ground where by it seeks to maintain the unity of the larger state, while giving recognition and empowerment to minorities. In another expression, it is one of

[18] Vasuki Nesiah; Federalism and Diversity in India, in Yash Ghai (ed.), 'Autonomy and Ethnicity': Negotiating Competing Claims in Multi-ethnic States, University of Hong Kong Cambridge press (2000), p59

[19] Aalen Lovise; Ethnic Federalism in a Dominant Party State: the Ethiopian Experience 1991-2000 (Bergen: Chr. Michelsea, Institut Development Studies and Human Rights, 2002) p14

[20] Donal L. Horowith; Ethnic Groups in Conflict, Berkley: University of California press (1985) pp 46- 47

the several institutional devices through which the twin goals of successful conflict regulation in multinational societies can be achieved.

Federalism can achieve the above mentioned and other intended purposes by dividing power territorially to groups that are geographically concentrated and share ethnic, linguistic, and/or religious ties through the creation of sub-national constituent units that share power with the federal government under the principles of self-rule and shared rule.[21] In summary, the advantages that federalism offers as discussed in the subsequent section can be taken to complement the rationales for states choosing federalism as their system of government.

### 1.3.Pros and cons of federal system

It is evident that federalism has an important place in the world's tool kit for democratic governance and this has been proven in a number of long established and prosperous democracies. However, there are strong sides and weaknesses of federalism when compared with other forms of democratic governance.

**A. Pros:**

i. **Administrative convenience and efficiency**:

Federalism has been praised for ensuring administrative convenience and efficiency especially in countries with large territory and population. This is because of the fact that federalism allows devolution of power to lower level of governments who are considered to be very close with local demand and realities of the society. This in turn makes the provision of public goods and services easy which otherwise would have been difficult for the central government to address all local demands and preferences.

ii. **Reduction of central tyranny:**

The inevitable constitutional devolution of power to sub-national governments results in the division of powers between the federal government and regional units. By doing so, federalism reduce the potential for tyranny which would have been a likely had power was concentrated at the center. This was the case of the US federation. Even though the true objective of the

[21] Arshi Khan, supra note 4, p200

American Constitution was not to limit power but to create more power (since the former confederate government was weak), the problem of checking ambition and abuses of power by office-holders is one aspect of the Federalists' concern.[22] U.S. scholars assume that one of the goals of federalism is to protect individual rights against encroachments on the part of the central government (or even against the "tyranny of the majority") by a number of institutional devices, such as a bicameral legislature in which one house is elected on the basis of population, while in the other house the subunits are represented equally. In addition, many competences are permanently granted to the subunits instead of to the center. Federal systems designed for such purpose are also called "*demosconstraining*".[23]

iii. **Accommodation of diversity**:

As mentioned elsewhere above, this one is one of the important benefits a federal system offers particularly for nations with ethno-linguistic, cultural and religious diversities. By maintaining the shared values (unity forces) to be the concern of the federal government, it recognizes and protects other values which are distinct to other identity groups. Federalism accommodates the diverse interests and identity of ethnic groups by providing the right for self-determination and autonomy.

iv. **Management of conflicts:**

Federalism is preferred for it serves as a means of taming conflicts between different identity groups. In this connection, there is an argument in support of federalism that it increases harmonization in a system in which territorially concentrated minorities are able to exercise autonomy or self-determination on matters crucial to their identity and continued existence without the fear of being over ridden by the majority group.[24] Accordingly, federalism provides a protection against domination by majority, an opportunity of self-fulfillment and self-development for minority; and maintains the ability of both groups to pursue their common destiny.

[22] Maxwell A. Cameron and Tulia G. Falleti; Federalism and the Subnational Separation of Powers , Publius/Spring 2005, p271

[23] Alfred Stepan; Federalism and Democracy: Beyond the U.S. Model, Journal of Democracy, Vol. 10, No. 4, 1999) pp 21

[24] R. Simeon and D.P. Conway; Federalism and the Management of Conflict in Multinational Society' in A.G. Gagnon and Tully (eds.), 'Multinational Democracies', (Cambridge: Cambridge university press, 2001), p339

v. **Serving as a tool for policy experiment**:

In a federal system, there are regional units which are vested with constitutional powers and autonomy within their jurisdiction. When the national government wants to introduce new policies that are intended to have nationwide implementation, it will have the opportunity to test the suitability and feasibility of the policy by experimenting on a single or some of the units so that duplication of efforts and wastage of resource can be avoided in case the policy is finally proved to be unworkable. Federalism helps to develop a shared purpose and commitments among local citizens, and ultimately facilitate 'novel social and economic experiments'.[25]

vi. **Enhancing democracy and public participation**:

It is true that federalism empowers the community at grassroots level by dispensing the right to self-determination as core democratic right of citizens. By affording the structural tool for the establishment of different administrative hierarchies (up to Woreda and Kebele level), federalism ensures the public at various levels to participate in matters that affect their public life. By bringing government closer to home, federalism helps maintain a sense of local community thereby facilitate and encourage citizens' participation in the government's decision-making process.[26]

B. **Cons;**

i. **May exacerbate conflicts and competition**:

Even though federalism is advocated for its ability in accommodating diversity and taming conflicts, it is blamed for exacerbating identity based conflicts and unhealthy competitions particularly in a nation with diverse population. On the view of its opponents, federalism is an important source of institutional potential to conflict because it gives a set of political tools and access to resources that make group mobilization more likely. As D. Elazar pointed out, ethnic nationalism is the strongest force against federalism.[27] Its critique goes to add that federalism can perpetuate and intensify the very conflicts it tends to manage. This is because it empowers

[25] Stephen Breyer; Active Liberty: Interpreting our Democratic Constitution, Alfred A. Knopf, New York, 2006, p57

[26] Ibid

[27] Daniel, Elazar; Federalism and the Way to Peace, Kingston, Ontario, Queens University, Institute of Inter Governmental Relation (1994), p. 167

minority elites who have a deep interest in sustaining and perhaps exacerbating the conflicts.[28] Furthermore, multiethnic federations create minorities in federal level and these results in majority-minority tension at federal level.

ii. **Risk of disintegration**:

Federalism is also blamed for it provides the institutional capacity for nation building; the ultimate use of which may lead to a plausible and viable secession in the future. The critique in this regard provides that, the existence of regional autonomy in federal states increases the desire for more autonomy and this leads to instability and increase nationalism.[29] Even if a multinational federation is successful in accommodating minorities there is a challenge for that state to maintain a stable federal system. As Kymilicka asserted, "the more successful multinational federal system in accommodation national minorities, the more it will strengthen the sense that these minorities are separate peoples with inherent rights to self-government, whose participation in the large political country is conditional and revocable."[30]

The risk on national unity is considered to be high in multicultural federations, for such type of federations likely encourage the establishment of ethnic based political parties which may not be good for national unity because such parties are likely to begin to advocate the exclusive concern of the ethnic groups they represent regardless of the consequence up on national unity.[28] This happens more when the culture of the parties is adversarial rather than accommodative.[31]

iii. **Administrative costly**:

The fact that running a federal system of government demand relatively high expenditure to be allocated to different levels of self governments is also mentioned as one disadvantage of federalism. In a federation, each level of governments is vested with their respective powers in which a parallel financial power is expected to be devolved to them. Allowing groups to have

[28] R. Simeon, supra note 24, p340
[29] Lovise, Supra note, p19
[30] Ibid
[31] Minassie Haile; 'The New Ethiopian Constitution: Its Impact up on Unity, Human Rights and Development, Suffolk Transnational Law Review, 1996.

their own self governing administration has direct financial implication that each newly established self governing unit claims a separate share from the regional or federal budget.[32]

### 1.4.Formation of Federal Systems

Federations have emerged within larger process of country formation and evolution in a variety of ways. A comparative look provides that there are three was through which federations may be formed; Coming together, holding together, and formation through the combined process of the two. Even if uncommon, there is also formation of a federation through the process called 'putting together. In coming together, federations are formed when previously separate units, independent states or colonies agreed that they have enough common interest and shared values and wish to join together in a federal arrangement. The states decided to join in a federal formula, instead of unitary one, mainly because the former permitted each unit to preserve some of its autonomy while pooling other aspects in the new community, federation.[33] The older federations like the United States (1789) and Switzerland (1848) are often described as center-seeking or 'coming together' federations. The regions which desired to unite, had all had a previous existence, although it is to be noted that none of them had a long history as a truly sovereign, independent state. In coming together approach, federalism is considered as the result of a bargain whereby previously sovereign polities agree to give up part of their sovereignty in order to pool their resources to increase their collective security and to achieve other goals, including economic ones.[34]

Holding together federalism (also called federalism by devolution, centrifugal federalism, etc) on the other hand is formed usually by country that may have originally been created with unitary and highly centralized (often authoritarian and undemocratic) structure. Under such federal formation, a previously unitary state devolves power to newly established autonomous states. In short, in holding together federalism, the centre creates the states. The eventual choice of federalism by a formerly unitary state may be attributable to the need to give response to democratic political pressure for devolution because of the country's multiple languages,

[32] Sarah Vaughan: Response to Ethnic Federalism in Ethiopia's Southern Region; in David Turton (ed.), Ethnic Federalism; The Ethiopian Experience in Comparative Perspective (2006), p191
[33] Anderson, supra note 14, p8
[34] Alfred Stepan, supra note 23, p 20

religions, ethnicities, and perhaps major economic differences between regions.[35] Federations such as Belgium, Nigeria, Ethiopia, and Spain are holding together.

A third possible way of forming a federal country is combining the above two process. Canada and India use this formation particularly Canada is emerged from the creation of Ontario and Quebec out of a previously unitary regime (thus holding together) and the addition of the other new provinces ( thus, coming together).[36] There is another approach of formation of federal systems; 'putting together'. This form of federalism is created after a heavily coercive effort by a nondemocratic centralizing power to put together a multinational state, some of the components of which had previously been independent states. The USSR was an example of this type of federalism. Since federal systems have been formed for different reasons and to achieve different goals, it is no surprise that their founders created fundamentally different structures.[37]

The difference in the process of evolution is not without implications for the ensuing federation. It affects not only the territorial autonomy of the states but also the operation of the federation. In center-seeking federations the autonomy of the states is constitutionally guaranteed requiring the approval by the states as compared to the new federations. As regards centrifugal federations, however, this is not equally true. The implications of how a federal system is formed on the functioning of a federation are discussed under chapter two.

### 1.5.Types of Federal Systems

#### 1. Symmetrical Vs Asymmetrical

Federal systems can be classified as symmetrical and asymmetrical based on the treatment of constituent units by the constitution regarding with allocation of powers. Usually, federations allocate the same power to all constituent states. However, in some federations, some states allocate with different powers than others. The terms symmetry and asymmetry are applied to relationships within a federal system: the ways in which a member state within a federal political system relates to the system as a whole, to the federal authority, and to each other member state.

[35] Anderson, supra note 14, p8
[36] Ibid,
[37] Alfred Stepan, Supra note 23, p23

The term symmetry is defined as "the level of conformity and commonality in the relations of each separate political unit of the system to both the system as a whole and to the other component units."[38] In an ideal symmetrical federal system each state would maintain essentially the same relationship to the federal authority, the division of powers between the federal and state governments would be virtually the same in every case, representation in the federal government would be on the same basis for each component polity, and support of the activities of the federal government would be equally distributed.

Asymmetry in a federal system, on the other hand, refers to a situation where the diversities within the larger society find political expression through component governments "possessed of varying degrees of autonomy and power."[39] In such system, a constituent unit would have about it "a unique feature or set of features" which distinguishes its relationship to the system as a whole, to the federal authority, and to each other state. To put it in brief, when federal constitutions allocate the same power to all states, it is called symmetrical federal system. However, if there is difference among states in relation to allocation of powers, it is called asymmetrical federal system.

The term asymmetry applies to many aspects of differences between constituent states of a federation such as asymmetry in political weight, asymmetrical group or language rights and status, asymmetrical power. It is true that different constituent units have different political weight because of their population, wealth, or strategic position.[40] Because of such difference, special and distinct provisions regarding group, linguistic, or religious rights within particular constituent units may be incorporated in federal constitutions and are frequent in federations with diverse populations.

Watts provides that there are two broad rationales for asymmetry within a polity: those that are politically driven and those that are capacity driven.[41] Political rationales for asymmetry relate to situations where a territorially defined group for reasons such as those related to regional demands for increased autonomy based on a claim to self-determination press for a differential

[38] Ronald L. Watts ; Asymmetrical Decentralization: Functional or Dysfunctional, Paper Presented at International Political Science Association , Québec City, Québec, Canada , August 2000, p6
[39] Ibid
[40] Anderson, supra note 14, p27
[41] Watts, supra note 38, p7

political relationship with central government. By contrast to politically driven pre-conditions for asymmetry, capacity driven asymmetry comes from diverging capacities to maintain effective sub-national governments that may make differentiated decentralization or non-centralization desirable.

Even though asymmetry can be recognized by federal systems, it's however (especially constitutional asymmetry, also called *De jure* asymmetry) usually limited because such asymmetry poses challenges in the management of a federation. Particularly, special treatment (asymmetry) for one constituent state can create pressure for the same treatment for others and can create pressure to limit the weight of representatives from that unit in the central decision making.

A number of federations such as Canada (regarding Quebec province), Malaysia (Borneo states), India (for Jammu and Kashmir states), and Spain (for Basque country and Navarre) do have non-constitutional arrangements that permit some asymmetry in different areas of powers of the states.[42] For instance, in Canada, Quebec effectively has non-constitutional arrangements (also called *de facto* asymmetry) in areas including pension, taxes and social programs. The Quebec (French-speaking province) is also known for steadfastly opposing most federal endeavors in areas of provincial concern and many Québecois see themselves as a "distinct society" within Canada and their reluctance to take part in many national programs is testimony to this perception.[43] There are also federations that provide a constitutional (*de jure*) asymmetry for some states. For instance, the Indian constitution authorizes the state of Kashmir to have its own constitution, making it the only state to have such authority.[44]

### 2. Nation State (Geographical) Vs Multi-Cultural (Ethnic, Linguistic) Federalism

Most federations existing today fall in either of the two main categories of institutional arrangements; ethnic based, better called Multicultural, or territorial one. In case of ethnic based federalism, the configuration of a state is to be made mainly along the nationality groups exist in that state. Such kind of federation embraces when the federal project aims at giving ethno-

[42] Anderson, supra note 14, p27
[43] John Eaton; The Nature of Canadian Federalism, Legal Information Management, 2003, p6
[44] Constitution of India that came into force on the 26th of January 1950 (as amended until 2003), Art.370

national groups territorial bases.[45] Multicultural federations aim at accommodating different forms of diversities based on religion and/or language that are not necessarily national minorities. In multicultural federations, giving political expression of an existing diversity is taken as key factor though not all federations give equal political expression to diversity.

In Multicultural federations, Ethno-regional communities are considered most appropriately represented through their spatial compartmentalization (states, cantons, provinces), predicated on the belief that ethno-regional communities should receive due territorial recognition. One should note that this is not to imply that multicultural federations are not territorial. Indeed, the territoriality principle is at the core of any federation. The point is simply that in case of multicultural federations, the territories are designed on the basis of major diversities that define a certain society. Such federations presuppose the existence of a territorially grouped diversity.[46]

However, in the territorial orientation, also called nation state federal systems, the federation is formed by dividing the state in to territorially organized sub-nations/provinces. In this respect, federalism has served as a means for aggregating large areas under the auspices of a single national government in a manner that is not similar to imperial control and subjugation.[47] These are federations aim at national integration or assimilation. Territorial federal system has little relevance as far as accommodation of diversity is concerned. That is to say, in territorial federal systems, the conventional division of power into geographically defined constituent units rather than linguistic, cultural, ethnic or other bases of identity.[48]

While ethnic/multicultural federalism is often adopted by states with ethno cultural and linguistic diversity, territorial/geographic federalism is usually preferred by states having relatively homogenous society; and while maintaining stable ethnic based federal state is often found to be difficult, territorial federalism is better in this respect. This is because where federations are arranged along ethnic line, ethnically organized competition, domination, or discrimination or exclusion from resource and political power is more likely to occur.[49] Thus, the task of integrating different ethnic and cultural groups as well as the questions of accommodating

[45] Getachew, supra note 11, p.2
[46] Assefa, supra note 2, p202
[47] Kassahun, supra note 15, p39
[48] Assefa, supra note 2, p13
[49] Getachew, supra note 11, p3

religious and other minorities within the boundaries of existing states have remained one of the main challenges of multicultural federations.[50] While Nigeria, Ethiopia, India and Switzerland, despite several differences among themselves, are multicultural federations, Germany and the United states are models of the nation state/geographical federations.[51]

### 3. Dual federalism Vs Cooperative Federalism

While the two variants of constitutional federalism (dual federalism and cooperative federalism) are both based on the idea of *double regimes*, they differ in their conception of how the two levels of government relate to each other. While the United States is a typical example of dual federal system, Germany and Switzerland belong to cooperative federalism.

The constitutional philosophy of dual federalism is based on the idea of dual sovereignty. The federal and the state governments are regarded as co-equals, which operate independently within their respective spheres. In this way, dual federalism rejects the idea of a hierarchical relationship between constitutional levels, the federal and regional.[52] In line with that federal philosophy, the constitutional architecture of dual federalism is based on mutually exclusive powers. The federal and the state governments operate independently in their respective spheres. The dualist federal principle thus needs to devise a method of dividing powers so that the general and regional governments are each, within a sphere, coordinate and independent. The hallmark of dual federalism is the existence of exclusive competence of two jurisdictions. Within their scope, only one authority exists and such exclusive powers are constitutionally guaranteed monopolies, for only one governmental level is entitled to act autonomously.[53]

Dual federalism is an approach where the allocation of executive authority is in principle considered co-extensive with the distribution of legislative responsibilities. This stems from the fact that, if the federal and state governments are to remain autonomous, then each must act directly towards the people in the process of enforcing its laws. As a result, it follows that not

[50] Assefa, supra note 2, p201
[51] Id, p5&6
[52] Robert Schutze; Dual federalism Constitutionalised: The Emergence of Exclusive Competences in the EC Legal Order, European Law Review, 2007, p1&2
[53] Ibid

only legislative but also executive, financial and judicial powers should be divided between the federal government and the states so that each will act autonomously.[54]

Assefa provides that in the context of the United States federal system, dual federalism constituted an amalgam of four distinct notions.[55] Firstly, it states that the federal government has one set of enumerated and limited functions and the states another set of non-enumerated reserve powers. Secondly, within their respective spheres the two governments are *co-ordinate* and *sovereign.* Thirdly, there is less overlap of power between the two governments and hence less sharing; there is rather a competition between the two levels of government as each legislates, executes and adjudicates its laws. At least in its formative stage, owing to the concept of states' rights, the dominant operative concept was that of competitive federalism which denoted a spirit of competition and rivalry between the federal government and the states. The states were conscious of their powers and rights and thus resented the growth of the federal power and its encroachment on the states domain. Fourthly, changes in the power distribution between the two can be accomplished only by constitutional amendment.

It should be noted however that in dual federalism everything is not within the exclusive power of either levels of government. Rather it is an avoidable fact that there is the constitutional arrangement which provides for shared competences of both levels. Such shared areas of competence will give rise to the possibility of conflict between the two "sovereigns, thus the question of hierarchical subordination. This potential conflict over shared jurisdictions generates the need for a conflict-resolution mechanism. Often federations resolve the conflict in the form of principle of supremacy of the laws of either level (usually supremacy of federal laws). Adhering to this supremacy solution, in effect, changes the relationship between the two governments from one of co-ordination to a relationship of subordination.[56]

Co-operative federal system on the other hand works, as its naming indicates, under the premise that the National Government and the States are mutually complementary parts of a single governmental mechanism all of whose powers are intended to realize the current purposes of

[54] Assefa supra note 2, p359
[55] Id, p360-361
[56] Schutze, supra note 52

government according to their applicability to the problem at hand.[57] Unlike dual federal system which focuses on the existence of exclusive competence, co-operative federalism works on the principle of mutually complementary jurisdiction in a federation. Under such system, some subject matters are assigned as exclusive power of either level of government and the bulk of powers are concurrent in which the central government sets framework legislations that the constituent states can complement (but not contravene) with their own legislation.[58]

In these federations administrative responsibility has not coincided with legislative authority, thus it is not mandatory for the federal government to establish its own federal agencies to execute federal laws. Administration for many areas of federal legislative authority is constitutionally assigned to the governments of the units. In Switzerland, for instance, national laws are invariably executed by cantonal civil servants and virtually no federal administrators outside the capital with the exception of post, railway, customs officials, some army personnel, and peoples staffing in certain federal institutions such as two federal polytechnics, the national museum and meteorological institute.[59] It should be noted however that in cooperative federalism the federal government may and make federal expertise available to states without imposing the will of the federal government.[60]

**Conclusion**

It is difficult to provide for a universal definition of federalism. This is because of many factors of which the fact that the term federalism means different things to each nations and scholars based on the specific context in which it is applicable. Etymologically, the term comes from a Latin word, '*foedus'* means a covenant, agreement, or compact. In constitutional jurisprudence, scholars try to define federalism from different angles. Some say that it is all about finding a delicate balance between self-rule and shared rule between two or more levels of government. Others provide that federalism refers to a union of separate states in which power is divided and shared between a strong union government and strong state government. Yet, the federal idea is

[57] Robert Schutze; Cooperative Federalism Constitutionalised: The Emergence of Complementary Competences in the EC legal order, European Law Review, 2006, p
[58] Anderson, supra note 14, p22
[59] Peter A. Shweizer; Federalism in Switzerland, in 'Genesis of the Ethiopian Constitution of 1994 (ed.)', Reflections and Recommendations from the Symposium on the Making of the 1994 Ethiopian Constitution, InterAfrica Group, Addis Ababa, Ethiopia, 17-21 May 1993, p156
[60] Breyer, supra note 25, p58-59

generally conceived as a compromise, conveyed by the image of checks and balances between unity and diversity, autonomy and sovereignty, the national and the regional. From the constitutional law point of view, federalism means that the national and regional governments are by law equal, autonomous and coordinate institutions that receive their powers from the constitution, and which also enjoy protection through the constitution in terms of their status and functions.

Despite the differences in defining federalism, most of the definitions and explanations revolve around three crucial features. First, federal system is a political structure in which the existence of regional units is constitutionally guaranteed. Thus a federal system has as its basis on a written constitution which can only be amended by certain defined and extra ordinary procedures. Second regional units have some degree of constitutionally guaranteed governmental autonomy which is achieved through the division of powers and fiscal resources. Third, the inclusion of regional provinces in central decision making is constitutionally guaranteed and entrenched. It should be stressed here that the powers and autonomy for regional units is not simply devolved but are constitutionally guaranteed and the incorporation of the regions in the contras decision making process can also be altered by extra-ordinary constitutional measures.

There are divergent rationales across countries in adopting federal system of governance. The difference in rationales is apparent between multi-cultural federations and those federations with relatively homogenous society. Even though the rationales are not equally applicable to all federation, majority of the reasons for countries to opt for federalism include, threat of disintegration and the need to maintain unity, management of conflict, accommodation of diversity, security advantages and protection of minorities.

Federalism as one system of government reflects both advantages and disadvantages. The advantages that federalism is believed to offer include, ensuring administrative convenience and efficiency, reducing the potential for central tyranny, accommodation of diversity and conflict management, serving as a tool for public policy experiment, and enhancing democracy and grassroots participation. The drawbacks of federalism include, administrative costly, exacerbating potential conflicts, and risk of disintegration.

The way federations are formed is not the same. Some federations may be formed after coming previously autonomous or independent units and create the center (coming together) while others may be formed when the central government decides to devolve power from formerly unitary state to new regional units (holding together). Yet, federations may be formed by the combined process of holding together and coming together.

Federations may be classified in to different categories based on different grounds. Federal systems can be classified as symmetrical and asymmetrical based on the treatment of constituent units by the constitution regarding with allocation of powers. Based on how regional units are structured, federations may be classified as territorial/geographical federal systems and multicultural federations. Finally, federations may be classified as dual federalism or cooperative federations taking in to account of their conception of how the two levels of government relate to each other.

**Summary Questions**

1. It has been argued by many authors that forming a successful multicultural federation is more challenging than establishing territorial/nation state federal system of government. Do you agree with the assertion? Why/why not?
2. Discuss the main advantages and disadvantages of federal system of governance
3. Explain the type/classifications of federal systems and their ground of classification.
4. Elaborate the concepts of ‘self rule’ and ‘shared rule’ in a federal context.
5. The rationales for adopting federal system of government are the same for all federations. Do you agree? Why/why not?

# 1. CHAPTER II: COMMON FEATURES OF FEDERATIONS

## Introduction

In the chapter one it is discussed about the different definitions that are given to federalism by different scholars. It is also discussed that divergent reasons are forwarded as rationales for countries to choose federal system of government. Even though the principles and ideals of federalism are not equally applicable to all federations, it is evident that there are certain features that almost all federations share together. By starting on a brief discussion on the concepts of federalism and federations, this chapter in the following three sections elaborates some of the general features that one observes among polities called federations. It also discusses some concepts for the purpose of conceptual clarity. The chapter also addresses the factors that contribute to the success or failure of federations despite they share the common features under consideration. Because every federation operates within a specific local context, overemphasizing on those common characteristics does not explain why federations evolve in different ways. Therefore, the last section considers some of the extra-constitutional factors explaining this pathway. The main contribution of this chapter is in analyzing the proper balance that should exist between self-rule and shared rule in the federal systems in general and in Ethiopia in particular.

## Chapter objectives

After completion of this chapter, students are expected to;

- ✓Appreciate the difference and relationships between federalism and federations;
- ✓Explain the common features that most federations share;
- ✓Elaborate the notion of coordinate theory in federalism and its exceptions;
- ✓Analyze the origin of federations and its implication on territorial autonomy of states; and
- ✓Elaborate the extra-constitutional factors that determine the success or failure of a federal system.

## 1.1.Federalism and Federations

It is common that the concepts federalism and federation have been conceived as similar concepts thus have been used interchangeably. Although earlier studies on federalism failed to make a distinction between federalism and federations, it is now very common to observe such a distinction. According to this distinction, federalism refers to an ideology: a normative principle, while federations refer to institutions. Federalism as a political philosophy is essentially an organizing principle. It refers to the 'coming together of humans as equals to establish political

bodies in such a way that all reaffirm their fundamental equality and retain their basic rights.' Federation on the other hand is descriptive concept referring to the actual system of governments. It refers to tangible institutional facts and structural techniques for achieving one of the goals of federalism.[1]

Despite the above distinction is made between federalism and federations, there are writers who contend the assertion that considering federalism as an ideology is a confusion. Accordingly, federalism is a system of government organization, not ideology, that any federal country, as global experience demonstrates, has adopted general federal principles to meet its unique social, economic and historical circumstances.[2]

### 1.2.Common Features of Federations

Every federation operates within a specific local context and from the very beginning it is presumed that the federal system is designed to fit the prevailing social, economic, and political realities of a given nation. This difference inevitably results variation among federation regarding with the conventional standards that a federal system is expected to comply with. Despite the possible differences however, there are some common features that most federations share together.

#### 1.2.1. Division of Powers

It is to be recalled in chapter one that federations are distinguished from other polities primarily by the fact that political power (commonly related to legislative, executive, judicial and financial functions) is constitutionally divided between the federal government and the states, and that both orders of government are autonomous with respect to the powers granted to them. This is indirectly based on the dual principle implicit in every federation of the desire to be united and to be autonomous. A common feature among federations has been the existence of, powerful motives to be united for certain purposes, on the one hand and deep-rooted motives for autonomous states for other purposes, on the other.

---

[1] Assefa Fiseha; Federalism, Teaching Material, Prepared Under the Sponsorship of the Justice and Legal System Research Institute, 2009, p142

[2] Rupack Chattopadhyay; Equality and Unity in Diversity for Development, in SandeepShastri (ed.), 'Federalism and the Democratization Process', Volume 2, 5th International Conference on Federalism, Forum of Federations, Addis Ababa, Ethiopia, 2010, pxii

Even though division of power is one of the common features that all federations manifest, there is however, no uniform formula of division of power between both levels of governments. Federal constitutions may employ different approaches while dividing powers between levels. Anderson provides that there are two broadly different approaches to the distribution of powers in federations: the dualist and integrationist models, yet many countries reflect elements of both models.[3] The dualist model, also called the classical model, typically assigns different jurisdictions to each order of government, which delivers and administers its own program. In this model, each order of government normally delivers all programs in its area of responsibility, using its civil service and departments as a result the federal government is required to establish its own agencies to implement federal laws. This approach is usually followed by countries adopting dual federal system.

The integrated model on the other hand provides for many shared competence and the constituent units' governments often administer centrally legislated programs or laws.[4] Under this model, some matters are exclusively assigned to one order of government while most powers are within shared competence. This approach is usually adopted in nations followed cooperative federalism.

Be it a dualist model or integrated model, the division of power has legal source that it is normally set out in the constitution. All federations have a provision in a constitution dealing with the allocation of powers between the central and constituent governments. However, there is no uniform formula of division of powers. While there is important communalities between federations regarding which powers are allocated to which order of government, there are also significant differences. Decisions on such issues should consider not only questions of efficiency and effectiveness, but also a critical view of what shared objectives are across the federation and what are of regional in their nature. Accordingly, the federal government is often empowered with those powers that are shared in common and the states with those powers considered relevant for the expression of regional identity, hence the famous expression that defines federations as shared rule through common institutions and self-rule for constituent units.

[3] George Anderson; Federalism: An Introduction, Oxford University Press, Forum of Federations, 2008, p21
[4] Ibid

Through the former, one of the cardinal values, unity is promoted and through the second, the other cardinal value, diversity is equally promoted.[5]

### 1.2.1.1.The Notion of Co-Ordinate Relationship

It is discussed that the constitutionally guaranteed division of power between the federal government and the states, in which both exercise their power autonomously within their own spheres, is a settled principle identifying federations from other forms of government. In federal system, there are at least two orders of government whose creation is guaranteed by the constitution in which each are autonomous and independent within their sphere. However, there is an endless debate as to whether in federations; the relationship between the centre and the states is *co-ordinate*, *balanced*, only *autonomous*, or even at times *subordinate*. K.C Where provides that in federations 'the constitutional division of power between the centre and the states creates a relationship that is co-ordinate [co-equal] not subordinate one.[6] It is also said that federalism is about balancing shared rule( forces of unity, also called centripetal forces) and self rule (forces of diversity, also called centrifugal forces) there by creates dual loyalty of citizens in which neither prevails over the other.

As canvassed under chapter one, G. Smith has reiterated the idea of federalism as a doctrine of balance aiming at finding equilibrium between forces of centralization and decentralization. The federal idea in short is generally conceived as a *compromise*, between unity and diversity, autonomy and sovereignty, the national and the regional.[7] According to the coordinate theory, faced with the circumstances of commonly shared interests among the states for which they are ready to assign to the federal government, and diversity in terms of cultural, historical, linguistic or economic, which they want to retain, the units enter into a compromise to create a half-way house between complete unity and complete separation and a federation results. The basic problem of federations has traditionally been for the federations to keep the centrifugal and

[5] Assefa, supra note 1, p113
[6] K.C. Wheare, Modern Constitutions (1992), pp1-2
[7] G. Smith; Mapping the Federal Condition: Ideology, Political Practice and Social Justice, in Graham Smith (ed.), '*Federalism: the Multi-ethnic Challenge'* (London: Longman, 1995), p p5-6

centripetal forces in *equilibrium* so that neither the planet states shall fly off into space nor the sun of the central government draw them into its consuming fire.[8]

### 2.2.1.2. Limitations to the Co-ordinate Theory

Theoretically, it is asserted that federalism is about finding the balance between forces of unity and diversity. But as a matter of federal constitutional law and federal practice, federations are clearly established with the federal government having some predominance over the states. This reality is apparently against the co-ordinate theory of federalism. Read the following excerpt for detail which provides on the limitation of co-ordinate theory of federalism [**taken from Assefa Fiseha; Federalism, Teaching Material prepared under the sponsorship of Justice and Legal Research institute, 2009, pp122-15]**

> Dikshit, who expounded and extensively reviewed the concept of co-ordinate relationship between the federal government and the states, has in the end admitted, albeit hesitantly, that although the balance is a necessary prerequisite, it should be so that the forces for unity slightly dominate over those for autonomy. The states merge into a federation only when the centripetal forces in some sense prevail over the centrifugal ones. If the communities involved are not prepared to submit themselves to an independent government, they have not achieved the federal requisite of having common interest, for which they entrust upon the central government. William Riker too states, 'the desire for either protection or participation [two reasons he considers vital for uniting within a federal system] outweighs any desire they may have for independence.' Of course this does not imply that the operation of the forces of unity and diversity perfectly concur with the formal and constitutional structure. The appeal of federations and federalism in the modern world owes much to its capacity for evolution. Depending on the combination of the factors for unity and diversity, the nature of the resultant federation may differ in operation but as far as the constitutional design is concerned, as one writer puts it, in federations the states create a superior general government to co-ordinate their actions, but retain some freedom from control by that superior.[4] One also needs to note that federalism does not determine the extent of the scope of state autonomy. The system remains still federal even if all decisions except one are made at the federal government level.

[8] Assefa, Supra note 1, p117

Ivo Duchacek reiterates the same idea. He states that although federal constitutions recognize the division of authority between the federal government and the states, 'their respective powers are none the less not and have not been meant to be equal: the central government is clearly favored.' Where federations are considered as evolving from a co-ordinate relationship between the federal government and the states, it is implied that neither intrudes upon the other, that neither is subject to the other, and that each has final say in its own domain. It implies that there is an equality of rank between the federal government and the states, which presumably means that they can never really be subject to the federal government. Where any conflict exists, it must be left open for any party to interpret. If both authorities are treated supreme and final within their respective spheres, it would imply only a mere treaty arrangement. In the established federations, however, neither government is granted absolute sovereignty. Both orders of government submit to the federal constitution, and within that frame work the constitution reserves the last word, when the authority of both orders comes into conflict, to the federal government. It is not by coincidence that many federal constitutions provide for the supremacy clause, which, among other things, states that in case of conflict between federal and state law, the former prevails.

Federations are viewed from a wider perspective as single political units with a coherent decision-making procedure. Theoretically speaking a perfect equilibrium or equality between the forces supporting unity, including federal unity and those opposing it, strictly implies the failure rather than the success of any projected union. This is to state that where unity is politically desired, it results from imbalance. Where the forces of national integration are equally balanced against those supporting the continued independence of the units, the result can only be a failure of the union. If federalism is advocated as a balance implying equality between them in which neither may prevail, it is simply an anarchy representing the actors within the system enjoying perfectly equal power so that none, not even a majority, can prevail. As a result King concludes that the formal promotion of federalism as a political philosophy of balance is normally incoherent. It is a single political union, not a conglomerate of independent states. The federal government is perceived as a coherent decision-making procedure which incorporates the states in various ways, and thereby it establishes the federal center to be supreme, without construing this to mean the central government as eroding the autonomy of the states or excluding the participation of the states. In short, a perfect balance can only lead to a deadlock.... It is not by sheer coincidence, therefore, that many federal constitutions declare the supremacy of federal law over state law.

The Ethiopian constitution however does not stipulate a direct 'federal supremacy' clause in case there is a conflict between federal and state laws. In the absence of federal supremacy, what possible options can our system have to address potential conflict between federal and state laws? Can interpretation by the House of federation be a solution? What about the role of Inter governmental Relations (IGR)?

### 2.2.2. Written and Supreme Federal Constitution

It is discussed earlier that federalism implies a political structure in which the existence and powers of constituent units is constitutionally entrenched and guaranteed. This in turn demands the existence of written and supreme constitution from which the powers of both governments are derived and to which both level of government subdue. The division of power in federal system is not a mere devolution of power at the discretion of the central government.

If one recalls to the etymological term, *foedus*, Federations originate from particular bargains struck at a particular time designed to serve for generations. In this sense, because federal constitutional arrangements are typically put together as a specific "compromise" among existing power holders and because these arrangements are typically part of a set of interrelated arrangements (a"package deal" or covenant),[9] written constitutions are, therefore, necessary records of the terms of the bargain. If federalism is a pact, the pact is enshrined in a written constitution which is supreme and each exercising direct authority over the people.

If we see the matter in terms of constitutional federalism, we talk of a supreme constitution to which both the federal government and the states should submit and in this respect both are strictly speaking not sovereign. It is important to note here that the autonomy of both levels of government is limited to the supremacy of a written constitution. They are only autonomous in as far as they have the power to act freely within the spheres assigned to them by the constitution. The federal constitution regulates their relations and so far as it regulates their relations with each other, it must remain supreme at least in all that concerns the division of authority between the two.[10]

[9] Vicki C. Jackson; Comparative Constitutional Federalism and Transnational Judicial Discourse, International Journal of Constitutional Law, January, 2004, p7
[10] Assefa supra note 1, p136

Many federal constitutions express the essential supremacy of the constitution. The United States Constitution declares 'this constitution, and the laws of the US which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the US shall be the supreme law of the land'.[11] The German Basic Law stipulates albeit more generally, the same principle. 'Legislation is subject to the constitutional order; the executive and judiciary are bound by law and justice.'[12] Equally, the Ethiopian Constitution too declares, 'the Constitution is the supreme law of the land...'[13]

In the preceding paragraphs, it is discussed federalism as a compact, is the result of consent based negotiation. However, it is important to ascertain if the initial impulse to adopt a federal system comes from internal or external forces or both. This point is important because it verifies whether a federal system in a given country has been imposed or desired. When one addresses these issues, it may be true that the notion of 'federalism as covenant' is not always true rather may have exceptions. Assefa argues that the assertion that federations are based on contracts needs to be adopted with a serious qualification for some federations may not be the result of covenant. He forwarded three reasons to support his argument.[14]

First, federations unlike confederations are not exclusively based on the presumed existence of sovereign states. Equally important is the individual citizen who is subject to two orders of government. Federal governments and the institutions that result there from are organized partly on the principle of majority based on population size and partly on representation of territories, which may grant the territories equal or unequal representation. Stating that federations are based purely on covenants gives too much emphasis to the role of the states during the federal bargain and ignores the role of the citizen as a source of legitimate authority.

Secondly, even referring to the states, which constitute the federation, they do not in all cases freely agree to enter or remain in the union. The 1848 Swiss federation was established following the military defeat of the catholic cantons (*Sonderbund*) that attempted to secede from the confederation in 1847. In the case of, indeed, the union is not considered at all as something

[11] The Constitution of the United States of America of 1789 (as amended until May 7 1992), Article VI Section 2
[12] The Basic law of the Federal Republic of Germany, 1948, Art.20 sub 3
[13] Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, 1st year, No.1, 21 August, 1995, Art. 9 sub 1
[14] Assefa, Supra note 1, p137-141

resulting from sovereign states. It was not altogether willingly that the 565 princely states of India were brought to the Union in 1948. In the United States, the delegates of the 1787 Philadelphia convention met in the context of the Articles of confederation which could be amended only by all thirteen states (Article XIII), and whose opening paragraph named all the states in order from north to south. Yet the new text that emerged stated that it was to become a constitution for those who ratified it when nine states did so. Besides, even if we agree that the compact maintains the continuity of the right of states to participate, then the union was under serious threat during the Civil War (1861-1865) and survived when the southern states were defeated by the northern states. The 1949 West-German federation too resulted from the imposition of the Allied forces following the defeat of the Second World War.

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

For the above mentioned reasons, Assefa concludes that the principle that federations are based on a 'compact' should be taken in a qualified sense. It is certainly true that some level of participation should exist when the federation is about to be set up. But beyond that is it difficult to prescribe any level of participation. Perhaps it is only safe to state that in order to guarantee continuously the autonomy of both governments and to prevent any possible encroachment of power by one level over another, the 'agreement' must be enshrined in a constitution that is both

supreme and written. The relationship between the federal government and the states must be established in such a document, which only in that sense may be considered as compact.[15]

### 2.2.3. Rigid Constitution

This feature of federalism is closely related to the existence of written and supreme constitution. Earlier, it is discussed that a federal system implies a political structure in which the existence of regional states and their powers is guaranteed in a written and supreme constitution. The entrenchment of regional units and of their powers requires the existence of rigid constitution. The rigidity requirement of a federal constitution implies the fact that the constitutional division of powers and existence of regional states can only be amended by certain defined procedures, and which does not allow the regional states to be alter or abolished without their consent.[16]

Indeed, the idea of federations as compact demands that if introducing formal changes to the federal constitution is deemed necessary then both the federal government and the states [through their government or their people] must participate in the amendment process. It is taken for granted that the participation of the states in the amendment of the constitution is a key feature of a federation. Furthermore, if the supremacy of the constitution is to be maintained, it should not be easily alterable, thus the amendment procedure should be rigid is also a requirement.

It should be noted however that the need to have a rigid federal constitution does not necessarily mean that the constitution shall not be amendable though there are federal constitutions that provide for non-amendable provisions of a constitution.[17] Rather it is obvious that Constitutions change and adapt new dynamics. The point is therefore, an agreed method for achieving constitutional adjustments as the need arises is often the key to the continued success of the federation. Such procedures and methods for amendment are often available in the constitutions themselves.

---

[15] Assefa, Supra note 1, p141

[16] Asfa Wossen Asserate; the Necessity of a Federal Structure for Ethiopia, in Genessis of the Ethiopian Constituion of 1994 (ed.), reflections and Recommendations from the symposium on the making of the 1994 ethiopian constitution, 17-21 May 1993, Addis Ababa, Ethiopia, p207

[17] For instance, Article 79 (3) of the German Basic Law (supra note 12) provides that the following, however, cannot be amended: laws affecting the division of the federation into Länder, laws affecting the principle of the participation of Länder in legislation and laws affecting human rights as stipulated in Articles 1-20 of the Basic Law.

Federal constitutions have special procedures and majorities for their amendment, often requiring some measures of consent by the legislatures or populations of the constituent units which makes their amendment very difficult. It is apparent that the federal principle leads to a role for constituent units in constitutional amendment, especially in coming together federations as opposed to formerly unitary federations.[18] Even though federations vary greatly in how much consent is necessary to change the powers of all constituent units, they often give an absolute veto power to constituent states over certain matters affecting them directly, notably changes in their boundaries or merger with other units.[19]

Federal constitutions differ significantly both as regards the specific procedures they prescribe and the degree of states participation for any amendment. On the one hand, we have federations that require the consent of every state for any amendment and on the other we have federations where the ordinary vote of the federal parliament may sometimes suffice for amending the constitution. The Indian constitution falls into the latter category. However, those provisions vital for the distribution of power between the federal government and the states can be amended only by special majority of parliament and ratification by at least fifty per cent of the states.[20]

In many other constitutions they are amended according to procedures that differ from the procedures for amending ordinary laws. In the US, amendments can be proposed by a two-thirds majority of each house in Congress or the legislative institutions of two-thirds of the states may request Congress to call a constitutional convention to consider and propose amendments. Ratification can also take one of two ways. It may require approval by three-quarters of the legislative institutions of the states or by three-quarters of the convention. In short, all amendments, even if they do not affect the federal distribution of power, require ratification by three-fourths of the states or the convention. The only exception to this is that no amendment may be made to alter the equal representation of the states in the senate.[21]

Yet, amendment in Switzerland can be effective only after it is approved by a referendum: both a majority of the electorate and a majority of the cantons must give their consent to complete or

[18] Anderson, supra note 3, p59
[19] Ibid
[20] Assefa, Supra note 1, p142 see also Federal Constitution of the Swiss Confederation of April 18, 1999 (as amended until March 3, 2002), Article 142 sub 3
[21] USA Constitution, supra note 11, Article V

partial amendment before either is finalized.[22] In Germany the Basic Law can be amended only by laws that expressly alter or supplement its text. Any such law requires the consent of a two-thirds majority of votes in both the *Bundestag* (lower house) and the *Bundesrat* (upper house) of the German parliament.[23] The procedure for amending the Belgian constitution seems to be different and complex. The federal Parliament must be dissolved, an election held, and only then can the newly constituted Parliament hold a vote on the proposed constitutional amendment. In order to pass, the proposal must receive support of a two-thirds majority in each chamber.[24]

If we see the Ethiopian constitution, though in principle, it does not incorporate non-amendable provisions; it seems to be more rigid compared to other federal constitutions. The constitution provides two different procedures of amending provisions of the constitution. The first procedure deals on amendment of fundamental rights and freedoms which are dealt under chapter three of the constitution. Accordingly, amendment of this chapter requires approval by the majority vote in all the states and by a two-thirds majority vote in each of the federal houses.[25] The second procedure involves the majority of the provisions, including those governing the relationship between the federal and state governments, and can be amended only if approved by a two-thirds majority vote in a joint session of both federal houses and a two-thirds majority vote of states.[26] Thus, looking in to the procedures, amendment of chapter three of the constitution is more rigorous than amending the remaining provisions of the constitution.

### 2.2.4. Umpiring the Federation

This is an important feature that a given federal system must possess. If division of powers between the two levels of government is the hallmark of federations, and if the principle of federalism proves that these powers are constitutionally entrenched, thus, it follows that there must be an independent tribunal that arbitrates any possible conflict on the division of power between the two. The existence of two independent orders of government in a federation creates a need for a constitutional arbitrator to resolve conflicts over their respective constitutional competence. All tiers of government in a federal system should be subjected to the principle of

[22]The Swiss Constitution, supra note 20, Article 142 sub 3 cum Articles 138-142
[23] German Basic Law, supra note 12, Article 79
[24] André Lecours; Belgium Federalism, Forum of Federations, 2002, p69
[25] The FDRE Constitution, Supra note 13, Art. 105(1) a, b, c
[26] Id, Art. 105(2)a &b

the rule of law, which is vital to counteract an oppressive government either at central or regional level.

In a federal system, there must be a national institution that serves as independent and impartial tribunal to resolve a potential disputes over the meaning of the constitution regarding with division of powers. Asserting on the need to have such impartial tribunal, Ronald Watts provides that "while a dual judiciary would seem to be the logical corollary of the dual polity inherent in the federal principle as traditionally formulated, a number of federal systems have concluded that a fully dual system of courts is not necessary as long as the independence of the judiciary from the executives and legislatures of both levels of government can be assured."[27]

Hamilton, the founding father of the US federalism stated that "the mere necessity of uniformity of interpretation of national laws… thirteen independent states [members of the federation at the time] with final jurisdiction over the same clauses arising up on the same law is a hydra in a government from which nothing but contradictions and confusions can proceed."[28] He added that, the national judiciary will be "the least dangerous to the political rights of the constitution; because it will the least capacity to annoy or injure them… has no influence over the sword or the purse…it may truly be said to have neither force nor will but merely judgment."[29] The whole idea of the quoted paragraph is that national tribunals that resolve potential disputes over the division of power is indispensible.

Assefa provides that there are at least two main reasons that may give raise to conflict between the two levels of government in a federal system.[30] First, the federal division of power is artificial, imperfect and a generalized skeletal thing. Political life cannot be perfectly or permanently compartmentalized. Certainly disputes about the terms of the division of power are bound to occur. Second, adaptation and the need to adjust and accommodate the division to cope with the new, the unforeseen and the unintended remains crucial and interpretation is one of such methods. Anderson on the other hand provides the possibility or ways where legal conflicts

[27] Maxwell A. Cameron and Tulia G. Falleti; Federalism and the Subnational Separation of Powers , Publius/Spring 2005, p255
[28] Federalist Paper No 80, in Madison, Hamilton and Jay, the Federalist Papers, Kranmick (ed.), London, Penguin Books, 1987, p446
[29] Ibid, Federalist Paper No.78 p437
[30] Assefa, Supra note 1, p, 145

between the two levels of government may arise.[31] The first possibility is when both orders of government have concurrent authority over a certain subject matter. In fact, federal constitutions usually often provide which order has paramount effect (usually federal laws). However, there are certain exceptions which may not be subject to such general role.

The other way through which conflict may arise is when both orders of government enact laws that conflict each other and both orders defend their respective laws are derived from their distinct powers. For instance, the central government may have power over internal trade, while the regional governments have the power over property, and they pass conflicting laws regarding the two areas. In such case, resolving the conflict requires the determination of which power-internal trade or property-is the more relevant. The third possible ground for conflict is when there is no actual conflict between two laws, but a government or private interest objects to a law passed by another government claiming that the law exceeds its legal jurisdiction. Yet, a conflict may arise on the ground that the law issued by one order of government contravenes a constitutionally entrenched right.

Ordinarily, a federal system has an umpire, usually a high court that can resolve intergovernmental and inter-jurisdictional disputes. Usually federations deal with conflict over the distribution of powers by using the courts, emergency powers, constitutional amendments, political compromise, and elections. However, the classic way to resolve such conflicts is by reference to the courts, though federations have more political process such as referendum and upper house.[32] In the United States this is achieved through the Supreme Court. In Switzerland which is based on the concept that ultimate sovereignty rests with the people, decides the validity of federal (not cantonal) laws by referendum. In Germany, the Constitutional Court takes the role of resolving such conflicts and of enforcing the supremacy of the Basic Law. In Ethiopia, the House Federation (HoF) has the final authority, subject to legal advice from the Council of Constitutional Inquiry.

### 1.3.**Origin of Federations and the Territorial Autonomy of Units**

[31] Anderson, supra note 3, p57
[32] Id, p29

It is repeatedly mentioned that in federal system the powers and territorial autonomy of states is constitutionally guaranteed. Unlike other forms of government, the centre has no right to create, extend or altogether eliminate local governments. To put it otherwise, the federal government does not have free hand or the unilateral power to reorganize the states as doing so would affect the constitutionally guaranteed autonomy of the states. Thus, it is typically difficult to make a change the area of existing constituent units in a federation once they are established. This does not mean however that constituent unit are immune from possible future change that may affect their territorial autonomy. Indeed, the need for adjustment to future territorial changes should be regulated by the constitution, as there is always a possibility of accession of new territories, regrouping or division of existing units, internal boundary changes or even secession.[33] Of worth mentioning, the fact that many federations does not limit the number of constituent units reflects the possibility of redrawing boundaries as a result of merging or splitting existing units, which apparently impact the territorial autonomy of the states.

The whole idea is therefore, it is normally very difficult to make a change or reduce a territory of a state during normal periods of democratic governments. Often the constituent units must agree themselves; sometime through a procedure involving referendum while at times central governments may redraw boundaries without states have any say on that.[34] The role of states to have a say on matters that affect their territorial autonomy varies across federations and this is mainly dependent on the origin and evolution of the federal system; i.e. whether a federation is formed as coming together (centripetal federations) or holding together (centrifugal federations).[35]

Accordingly, those federations that are formed by coming together are likely to be in a better position to defend their territorial autonomy, thus with better bargaining power on issues affecting their territory. The older federations like the United States (1789) and Switzerland (1848) are often described as centre-seeking or 'coming together' federations. The regions which desired to unite, had all had a previous existence, although it is to be noted that none of them had a long history as a truly sovereign, independent state. They evolved slowly into their present form from formerly semi-independent states. In both cases, awareness of being a separate

[33] Assefa, supra note 1, p146
[34] Anderson, supra note 3, p19
[35] Assefa, supra note 1, pp146-155

territorial community preceded the federation.[36] Such awareness and feeling of being previously separate territorial community help them to defend their territorial autonomy and discourage, if not prohibit, central governments to make a proposal that have an impact on territories of the states. This is what one may infer from the constitutional jurisprudence of these two federations. Under the US constitution any alteration requires the consent of the states.[37] In fact, similar procedure has not been explicitly laid down in the Swiss constitution and principally speaking one could even argue the possibility of territorial changes by a simple Constitutional revision; however, such a solution is incompatible with the constitutional sprit of the confederation. The fact that the canton of Jura (canton lastly established) is created from an existing canton of Bern after a complex referendum is a proof.[38]

On the other hand, there federations that are formed as holding together. In such case, the federations evolved from a decision undertaken at the centre to constitutionally diffuse power to newly established units or states. In this group of federations the fact that the states are by and large new creations of the federal bargain or even a unilateral decision of the centre at later stages, rather than entities having a prior existence. For instance the Indian federation is not the result of the agreement of the states that comprised the federation rather is created by an act of the constituent assembly.[39] The constituent states do not exist at the time of the bargain or if they do exist they are in a very premature state. For this reason, they are in a weaker position compared to their counterparts in 'coming together' federations. The case of 1949 West German federation, the Indian federation of 1950, the Nigerian federation of 1960 and the 1995 Ethiopian federation belong to this category. It is important to note however that the degree and role of states in these group federations still varies.

The process of evolution of these centrifugal federations is not without implication that they are, relatively to coming together federations, open to easy change on their territorial autonomy. For instance, of the eleven Länder that constituted 1949 Germany, only three (Bavaria, Bremen, and Hamburg) retained their essentially traditional boundaries. The other eight and the Länder of former East Germany were (artificial) creations from parts of the traditional states and lacked

[36] Id, p147
[37] USA Constitution, supra note 11, Article IV section 3
[38] Anderson, supra note 3, p20
[39] Arshi Khan; Federalism and National Minorities in India, in G. Alan Tarr et al (eds) 'Federalism, Subnational Constituions, and Minority Rights', Praeger publishers, Westport, Connecticut, London, 2004, p202

strong regional identities.[40] Even though the Basic Law stipulates that at least the population directly concerned with the on-going territorial modification shall have the possibility to express their opinion, the final decision lies with the federal legislature.[41]

The case of India represents another extreme case in which the territorial autonomy of the states is completely within the hands of the central government. The central parliament has the constitutional power to do this without state consent. The Indian Constitution under Article 3 provides that the lower house, by a simple majority vote, could eliminate any state, carve new states out of existing ones, or change their names. Accordingly, the federal parliament has decided in the mid-1950s to systematically redraw state boundaries typically to reflect major linguistic differences as a result of which India has gone from fourteen states to twenty eight states.[42]

The Ethiopian case however seems to reflect a different scenario of other holding together counterparts. The constitution leaves the matter of reorganizing states almost entirely to the states, rather than to the federal government. The Constitution stipulates procedures and assumes the demand for the establishment of new states to come from one of the groups within the multi-ethnic units of the federation and accordingly prescribes that such a demand has to be approved first by a two-thirds vote of the members of the Council of the ethno-linguistic group at local government level. This again assumes that every ethnic group has either a state of its own or if that is not the case has a local government of its own, to whom the petition is submitted. Once the two-thirds majority vote is secured, the demand is sent to the state council. The state council is required to organize a referendum within a year and if the concerned ethno-linguistic group approves by a majority vote in the referendum, then they can have their own state.[43] In short, state formation requires the approval of the local government and the consent of the concerned people as expressed by a referendum.

[40] Assefa, Supra note 1, p151
[41] The Basic Law, Supra note 12, Art.29
[42] Anderson, supra note 3, p20
[43] The FDRE constitution, Supra note 13, Art.47(3)

### 2.4. Extra-Constitutional Factors

It is apparently true that no two federations can be exactly alike. Despite the variations among federations, there are however common features that all federations manifests as discussed in the preceding section. Yet, the fact that federations share the above mentioned common features does not guarantee that they all achieve a successful federation. Rather, with all these common features, some federations fail while others succeed. A consequential question is therefore, why some federations fail while others with similar features succeed?

Different justifications are forwarded for the divergent path ways to success that federations experienced. One of the reasons is that the study of federalism goes beyond the constitutional and institutional structures that are formally established. Rather the forces economic, social, political and cultural realities of a society have an impact in determining the success or failure of federal system. This is because of the fact that federal institutions are reflections of the federal qualities of society.[44] Thus, the success of a federal system may be determined the federal qualities of the society within the federation, which is in fact beyond the constitutional and institutional factor. The other extra-constitutional factor relates to the problem of a federation in implementing the proclaimed values. Federations must be federations in reality, i.e. they must be federations both in form and in operational reality.[45] Therefore, the failure or success of a federation may be attributable to the commitment of the federation in its operation with the proclaimed values and principles of federalism.

The other factor may be attributable to democracy. Democratic pluralism and the existence of decentralized party system are crucial for the success of a federal system for federalism cannot exist without democracy. Democracy and federalism are mutually reinforcing. Democracy is a precondition to federalism and the success of the latter is unthinkable without the former. [46] If, for instance, federalism is about self rule and shared rule, then democracy becomes a precondition for the success of federalism for the federal accommodation of self rule and diversity demands a robust democratic environment. To put it otherwise, self-determination in a

[44] Assefa, Supra note 1, p158
[45] Id, p159
[46] Alem Habtu; Federalsm and the Democratization Process in Ethiopia, in Sandeep Shastri (ed.) 'Federalism and the Democratization Process', 5th international conference on federalism, forum of federations, Addis Ababa, Ethiopia, 2010, Vol2, pp4-6

federal system is meaningless in the absence of democracy since only a person with free democratic right can exercise self-determination. Therefore, the existence of democracy and effective democratic institutions are indispensable for federations to succeed.

The existence of pluralist political party system is inseparable with democracy. It is sometimes argued that an authoritarian one party system which by definition concentrates all political power in the hands of one group at one central point is incompatible with the federal concept of divided power. Let alone a total absence of democracy, democratic centralism (a situation where there exists a dominant party at the centre) is antithetical to federalism.[47] Indeed, this factor seems to explain the differences between the Nigerian and Indian federations. Although both federations remain multicultural, India's centralizing feature is moderated by the political party system, particularly since 1967 in the states and since 1989 at union level. The Nigerian federal system, however, operated for a long time under strong military influence. Still others emphasized the fact that not only should the beginning of the federal process be voluntary but also that the process thereafter should have an inbuilt spirit of sense of partnership between the different actors in a federation.[48] Political parties and electoral systems in federal systems play a critical role in shaping how a written federal constitution operates in practice. The character of political parties and the party system reflect political cleavages within the population and partisan history.[49]

The other important factor, which is more relevant to multicultural federations, is problems related to the political expression of diversity. As discussed under chapter one, federalism in diverse nations serves as a structural mechanism of accommodating diversity and manage conflicts. If this purpose is to be achieved, federations must give an appropriate political expression of the existing diversity in a way it absorbs an existing diverse interests.

**Conclusion**

It is up to each nation to select among the principles of federalism to be incorporated in the federal structuring. This contextual application of the principles and ideals of federalism inevitably results in different types of federal systems. Despite the possibility of special features that federations may

[47] Id, p16
[48] Assefa, Supra note 1, p159
[49] Anderson, supra note 3, p49

manifest, there is however some common features federations share together of which the following are important. Firstly, there must exist two or more orders of government each acting within its constitutionally defined sphere directly on its citizen without intervention of one to another.

Secondly, a formal constitutional division of legislative, executive, judicial and financial matters between the two orders of government ensuring some area of genuine autonomy for each order is vital. Even though the conventional federal principle provides that both orders of government are co-equal and coordinate, considering the theoretical difficulties with the co-ordinate theory and observing federal practice, federalism emerges if the desires for the common good or unity predominate, albeit slightly, over the forces of diversity. It is for this reason that many federal constitutions provide for supremacy of federal laws law over state law when the two contradict each other. However, the notion of federal supremacy is missing in the Ethiopian constitution.

Thirdly, a supreme and written constitution which will not be subject to unilateral amendment by one order of government but rather requiring the participation of the federal and the constituent states is important. This feature of federal constitutions ensures not only the division of power but also the continued interest of the actors in the federal process. Fourthly, an umpire to rule on the interpretation of cases involving the division of power specifically and on the rule of constitutionality in general, guarantees the rule of law to the contending actors. Fifthly, processes and institutions to facilitate intergovernmental collaboration in those areas where governmental responsibilities are shared or overlap is also important. Last but not least, almost all federations have provisions for representation of regional interests in the federal policy-making process and this is often done through the second chambers based on the principle of territorial representation as distinct from the lower house commonly composed on the basis of population size (the next chapter takes up this point).

These general features, however, are moderated by the extra-constitutional factors that explain the divergent pathways of the federations. Even though federations reflect the above mentioned common features, some have able to succeed while others prove a failure in federal practice. Such difference is principally related to factors that are beyond constitutional-institutional dimension federalism that are formally established in a given federal system.

Another important point is that even if a federation reflects the above mentioned common features, the territorial autonomy that each constituent unit enjoy varies across federations. The difference in the

territorial autonomy that states exercise is mainly related to the way federations are formed; coming together or holding together. In federations that are formed though coming together there is relatively strong territorial autonomy of the units while in federations formed through holding together, the territorial autonomy of states is vulnerable to easy alteration with little or no say of the states.

**Summary Questions**

1. Discuss the common features that federations share together.
2. Explain the difference and similarity between federalism and federations.
3. How do you understand the idea that federations must have a constitution that is rigid? Does it mean that it should not be amendable?
4. Despite the similarity in formal structures and institutions among federations we observe that some have failed, others remain in transition and some working ones? Why do you think this happens?
5. Do you agree with the idea that in federations the self-rule aspect and shared rule aspect should find their delicate balance? Does this mean that neither the forces of unity (centripetal forces) nor the forces of diversity (centrifugal forces) shall slightly prevail one another?
6. The Ethiopian federation is formed through the process of holding together and as a result the territorial autonomy of regional states is likely to be affected by the decision of the federal government. Do you agree with the assertion? Why/ why not?

## 3. CHAPTER III: FEDERATIONS AND SECOND CHAMBERS

### Introduction

It is discussed in the preceding chapters that federalism is all about compromise between shared rule and self-rule. The self-rule aspect of federalism is reflected through the autonomy that regional units may exercise in relation to matters that are peculiar to their identity and/or regional interests. The shared rule on the other hand is the shared values that all citizens of a federation have in common and usually is vested to the federal government. Thus, regional units have a stake on the powers of the federal government which are normally presumed to be the reflection of the shared interests of all citizens and regional units of a federation. The next question is then, how the diverse regional groups will have say in relation to their shared interest at federal level? This demands the establishment of an institution at federal level through which the diverse regional interests are accommodated at federal level. This chapter is therefore in essence a continuation of the general discussion on federalism and federations covered by the preceding chapter. It is argued that a second chamber based on a different composition and representing the interests of states, more specifically less populous states, is an institution that reflects the normative diversity inherent in federalism. It is also suggested that second chambers reflecting the entrenched representation of the states distinguishes federations from other types of polities.

This chapter, comparative in its approach, commences by considering the underlying rationale for having second chambers and then proceeds to their manner of composition, election and more importantly, the powers entrusted upon them by their respective constitutions. The main point that this chapter canvassed is the idea that the Ethiopian Constitution, by establishing a non-legislative upper house, seems to run with the risk of concentration of power at the centre, without significant representation of states at central decision making. In this way, the Constitution does little in ensuring the constituent units' proper place in the institutions of power sharing as well as in the process of policy-making at federal level and by doing so it seems to deviate from the federal idea.

### Chapter objectives

Up on completion of this chapter, students will able to;

- ✓Explain the nature and rationales of establishing second chambers in a federal system;

- ✓Comprehend the various composition approaches of second chambers across federations;
- ✓Elaborate different selection mechanisms of members of second chambers in federations;
- ✓Explain the nature and scope of powers of second chambers as practiced in federations;
- ✓Analyze the implication of the powers assigned to second chambers in serving the very purposes for which they are deemed to be established in a federal system;
- ✓Identify the interests that are considered to be represented by second chambers;
- ✓Comprehending the nature of House of Federation as a second chamber in light of the principles of federalism regarding with the rationales, composition, selection, and powers of second chambers; and
- ✓Explain the role of the House of Federation in Intergovernmental Relations (IGR).

### 3.1. Rationales

In order to maintain their legitimacy and effectiveness, central governments should meet their constitutional responsibilities, foster national unity, develop national identity, protect rights and minorities, and promote the healthy functioning of the federation. In practice, their success, even their commitment to these goals, can depend heavily on the choice of institutional arrangements and practices.[1] Federal governments are made up of formal and informal institutions and practices, which in turn, strongly affect the nature and functioning of, not only the central government, but of the whole federation. Second chambers, also called upper houses, are therefore one of those relevant institution that may be established at federal level to achieve the goals.

If not inherent in federations (bicameral houses can also be found in unitary systems), owing to the federal idea, second chambers are more common in federations. Almost all federations have a second chamber except some countries (e.g. Venezuala and United Arab Emirates).[2] The prevalence and primary consideration of second chambers is associated with the idea that the population and the constituent states are part of what makes a federation. To put it otherwise, second chambers are established as important features for ensuring the entrenched representation

[1] George Anderson; Federalism: An Introduction, Oxford University Press, Forum of Federations, 2008, p43
[2] Tadesse Melaku; Introduction to Constitutional Law, Volume one, 2012, p98

of the regional units in central policy making within the institutions of shared rule that are essential elements for the effective operation of a federation.

To ensure that regional interests are well considered in central decision making, second chambers together with the first chamber (lower house) are vested with law making power at central level. It is important at this point to note that representation in the lower house is based on the democratic principle of 'one man one vote', thus representing the population while second chambers represent the constituent units in a procedure different from the democratic 'one man one vote' principle.

The rationale for vesting second chambers with law making power is justified by different reasons. One of the rationales is the need to limit majoritarian tyranny. The need to have two legislative houses (chambers) in federations is to blend two different but complementary expressions of popular sovereignty: the people as 'one people' (democratic ideal) and the people as 'state residents (federal ideal).[3] Stated otherwise, federalism as enshrining both unity and diversity, qualifies to a certain extent the 'one man one vote' principle of democracy on the one hand, and ensuring an equally important value, the promotion of diversity on the other hand. In federations, the people are taken as a single entity, in one sense, but as plurality of entities in another; the people are represented as *whole* and *as parts*.[4] Thus the federal parliament in a federation is expected to reflect the unity of the country in the lower house (elected by a democratic principle of popular vote) on the one hand and the diversity of the country in an upper house representing the states or some other regional interest, on the other.

In this manner, Second chambers in federations provide a protective mechanism against federal derogation and the overstepping of delegated authority, and the impairment of the interests of one or more of the units. The protective mechanism is necessary because smaller and more sparsely populated units feel potentially threatened by more densely populated states which will obviously possess more seats in the lower house. In this regard, Assefa asserts that the second chamber should be useful and strong or else it will be useless and for it to be meaningful, it should represent the federal principle (representation by territories) as distinct from the demo-

[3] Ibid

[4] Assefa Fiseha; Federalism, Teaching Material, Prepared under the Sponsorship of the Justice and Legal System Research Institute, 2009, p164

cratic principle (representation by size of population).[5] In short, the need to balance representation by population and representation by constituent states in central legislatures, thereby ensuring that possible majoritarian tyranny in the lower house is limited is one rationale to establish second chambers vested with law making power.

The second rationale for establishing second chambers' legislative power is defended by the need to ensure power sharing in a federation regarding matters that are assigned to the federal government. The political division of power in itself is premised on the idea that federations are principally organized on the concept of 'self-rule' for some purposes and 'shared-rule' for other purposes. Self-rule in a federal context means that an entity can decide certain matters autonomously over competencies within an overarching federal system. This concept encompasses all the domains where the different levels of government have the power to decide independently. Shared rule, on the other hand, refers to shared competencies as well as shared institutions through which federal units are accorded special participation and input in the decision-making process at the level of the federal entity. The sub-national entities as such have an institutional right of co-determination of central ruling and policy, thus need to have a say on decision that are to be taken at federal level.

It is important to note here that when states transfer certain powers and functions to the centre during the federal bargaining, this implies that they are part of the 'shared' rule. The shared rule aspect of federalism implies that the constituent states are made part and parcel of the powers assigned to the federal government in general and of the federal law-making process in particular, thus an institution that represents the constituent states on central decision making is crucial. To have the existence of constituent units guaranteed, they must also be given an opportunity to protect their regional peculiarities and interests at central decision making process. Thus second chambers serve as a 'watchdog' institution and enables regional states to have direct access to the national political machinery.[6]

Almost all the federations considered in this study illustrate the case for second chambers with legislative functions, though the role of each second chamber in federations significantly varies

[5] Id, p165

[6] Asfa Wossen Asserate; The Necessity of a Federal Structure For Ethiopia, in Genesis of the Ethiopian Constitution of 1994 (ed.), Reflections and Recommendations from the Symposium on the Making of the 1994 Ethiopian Constitution, 17-21 May 1993, Addis Ababa, Ethiopia, p214

depending upon which of the above rationales is predominant. The 1995 Ethiopian Constitution seems to stand in sharp contrast in this regard. It fulfils the minimum requirement of having a second chamber but with a totally different function as will be discussed in subsequent section. Despite the common rationale for having second chambers, however, there are significant variations in the manner of composition, election/appointment and more importantly in their power. Thus, in the subsequent sections the composition, selection of members and powers of second chambers is addressed.

### 3.2.Composition

In this section, we are going to see the principles of representation based on which second chambers in federations are composed of. It is discussed earlier that federations often have two legislative house which are expected to be constituted based on different representation principles; the second chamber usually a formula of territorial representation and the first chamber/ lower house based on representation by population. The principle is that the federal, not democratic, representation is usually embodied in second chambers. As a result, representation in the second chambers is frequently based on equal representation of each constituent unit (also called territorial representation).

Despite the that principle that second chambers are composed based on equality of territory, the federal practice reveals that there is a great difference among federations as to how representation in second chambers should take place. In fact, the question as to the number of representatives in the second chamber is often addressed based on the compromise achieved during the constitutional negotiation. Generally however, there are three scenarios showing how second chambers in different federations are composed of. The first possibility is representation based on the principle of territorial equality in which all constituent units, irrespective of disparity in their population, will have equal representation in the second chamber. The second practice shows that federations which try to balance between territorial representation (federalist ideal) and equality of citizens (the democratic principle of one man one vote). The last possibility is representation in the second chamber in almost similar principle with that of representation in the lower house (population based/proportionality principle). In the strict sense, the latter two possibilities reveals unequal representation of constituent states in the second chamber though the degree of inequality varies in both cases.

The United States, Australia, Switzerland, Argentina, Brazil, Nigeria, Russia, Mexico, and South Africa apply equal representation of all constituent states in their second chamber.[7] In the United States, for instance, the Senate (second chamber) embodying the principle of equal representation of the states, notwithstanding disparities in their population, was the price that the larger states had to pay for the participation of the smaller states in the federation. When there is a wide variety among the states in population, area, wealth or other elements of diversity, a straightforward application of the democratic principle of representation according to population (as it is applicable in the composition of the lower house) would result in a federal power permanently controlled by the few more populous states. Accordingly, second chambers based on equal state representation are instituted to take care of the concerns of the less populous states from being swamped by the legislature composed by a popularly elected lower house.

To this end, the US Constitution provides 'the Senate of the United States shall be composed of *two Senators from each state*.'[8] This is further reinforced under Article 5 which stipulates that '... no state, *without its consent*, shall be deprived of its equal suffrage in the Senate.' Accordingly, each of the 50 states enjoys formal equal representation in the upper house, although there is a glaring disparity, for instance, between the tiny state of Rhode Island and the most densely populated state California.[9] The Senate with such equality among the states is designed to check the potential of majority tyranny coming from the lower house.

Switzerland follows similar equality representation formula with slight difference. The constitution clearly declares the equal representation stating 'it [federal parliament] has two chambers, the House of Representatives and the Senate; which have equal powers.[10] Each of the twenty cantons will be delegated by two representatives while the remaining cantons have one representative for each. [11] The twenty cantons in Switzerland are called full cantons and the other two cantons are called half cantons.

There are other federations which give paramount weight to representation of small constituent states. Brazil represents the extreme in which senators from states having eight percent of the

[7] Anderson, supra note 1, p47
[8] The Constitution of the United States of America of 1789 (as amended until May 7 1992), Art.1 section 3(1)
[9] Assefa, Supra note 4, p175
[10] Federal Constitution of the Swiss Confederation of April 18, 1999 (as amended until March 3, 2002), Art.148 (2)
[11] Id, Art.150

population holds over 50 percent of the seats while Russia ensures equal representation for all constituent units despite the smallest unit is 1/450$^{th}$ of the size of the largest unit.[12]

Equal representation is criticized on the ground that it goes contrary to the democratic principle of 'one man one vote' that ultimately gives states with smaller population an unfair advantage over the larger ones. It is fair to argue that the greater the representation of the less populous states (and therefore the underrepresentation of the more populous states), the greater the *demos-constraining* potential of the upper house will be. One author argues, for instance, "because of the original small states' concern, the United States constitution continues to entrench most forcefully its most deeply anti-democratic provision, namely the design of a federal upper house with two members for every state regardless of size....[13]

However, advocates of equal representation argue that the democratic principle of 'one man one vote' should be balanced with equally relevant federalism principle, equality of constituent units. Thus, what is distinctive about federations is not the fact that the people are viewed as sovereign, but that the expression of sovereignty is tied to the existence and entrenchment of the units in federations.[14] It is true that the deviation from the one citizen-one vote principle that federalism necessarily implies may be seen as a violation of the principle of equality. Overrepresentation in the upper house, combined with constitutional provisions requiring a supermajority to pass certain kinds of legislation, could, in certain extreme cases, lead to a situation in which legislators representing less populous electorate are able to thwart the wishes of the vast majority. This raises serious questions for the efficacious and legitimate functioning of democracy.

However, if one were interested only in creating a system that best reflects the demos and that functions as an effective democracy, a case could be made that the democratic values of participation, decentralization, and equality would be better addressed in a unitary system that has decentralized participation than in a federal system. But if a country has great linguistic diversity, is multinational, and is very large, its chances of being a democracy are much better if it adopts a federal system. Therefore, equal representation in second chambers ( which have

[12] Anderson, supra note 1, p48
[13] Tadesse, supra note 2, p99
[14] Assefa, supra note 4, p164

demos-constraining aspect) in federation is considered as basically good, because it can help protect individual rights from being infringed by the central government's potential for producing populist majorities.[15]

The German approach of representation is different from both the US and Switzerland that it tries to balance between the principle of equal representation of citizens and proportional representation. It tries to address the tension between the two distinct principles of representation, the equality of states and the equal entitlement of the citizen to vote. The second chamber *(Bundesrat)* weighted vote according to population size but prevents the dominance of larger states (*Laender)* by limiting the range of vote difference that would exist among *Laender* had proportional representation is fully applied. The Basic Law limits the range of vote/representation to be between the minimum of three and the maximum of six. Accordingly, each land (regardless of population size) will be represented by a minimum of with three votes; a land with population of more than two million four votes; a population of up to six million, five votes; and a population of seven million or more, the maximum of six votes.

Representation in the Indian second chamber follows almost similar approach to the German federation with slight variation as to the range of difference of votes between states; i.e. it gives much weight to population size.[16] Like the German counterpart, Indian representation in the second chamber tries to minimize the gap in the inequality between the citizens of the different states.

The composition of the Ethiopian second chamber (House of Federation) does not correspond to the principles of representation discussed in the preceding paragraphs. Rather it seems endorsing almost the same principle of composition as the lower house, representation based on proportionality. Article 61(2) of the Constitution stipulates 'each Nation, Nationality and People shall be represented in the House of Federation by at least one member. Each Nation or Nationality shall be represented by one additional representative for each one million of its population.' This clearly indicates that except the minimum representation by one vote and, as Assefa asserted, that there is a significant difference in the number of constituencies, 100,000

[15] Alfred Stepan; Federalism and Democracy: Beyond the U.S. Model, Journal of Democracy, Vol. 10, No. 4, 1999), pp24-26
[16] Anderson, supra note 1, p47

for the HoF and one million for the House of Peoples Representatives (HPR),[17] the representation in the HoF adopts the same formula as the lower house (HPR). Nor does the constitution even apply any rational upper limits of representation in the HoF like the German one.

According to this arithmetic, the population or ethnic group with the largest number will have as many seats as its size may allow in the HoF, as in the Lower House, and this puts into question the rationale for setting up a second chamber in a federation. Since the coming into force of the federal Constitution, there have been two terms and the figures are indicative of this fact. During the first term (1995-2001) out of the 108 members of the HoF, Amhara had 18 (two seats for other minorities), Oromia 17, Tigray (three ethnic groups) 6, SNNPRS (with more than 45 ethnic groups) 51, Gambela (five ethnic groups) 4, Harari 1, Somalia 4, Benshangul/Gumuz (five ethnic groups) 4, and Afar 2 representatives. And in the second term (2001-2005) the seats of the HoF are distributed as follows: Amhara 15, Harari 1, Somalia 4, SNNPRS 51, Oromia 18, Benshangul-Gumuz 3, Gambela 3, Afar 2, Tigray 3. The figures indicate that more populated nationalities have more seats and that there is as such no upper limit to the number of seats.[18]

### 3.3. Selection of Members

An equally important standard to the composition of second chambers is how the members are selected. The selection of members of second chambers has an important consequence for the functioning of a federation. It is discussed earlier that second chambers represent regional interest as a whole as opposed to representation of individual citizens. This reality has an impact as to how members should be elected if they are to represent regional interests. In fact the methods of selection of members of second chambers vary greatly among federations.

In most federations, members of the second chamber are elected directly (e.g United States and Australia) by the people while some federations such as Austria, Belgium, India, and Spain elect all or some of the members indirectly.[19] In Canada, members of the second chamber are appointed by the Governor General on the recommendation of the Prime Minister while

[17] Assefa, Supra note 4,
[18] Id, p179.The figures are considered as they exist during the time the cited material is written.
[19] Anderson, supra note 1, p47

members in Switzerland are directly elected by the people.[20] Article 150 of the Swiss constitution states '... six half Cantons elect one and the remaining twenty each shall elect two senators.' In both federations the citizens of the states directly elect the members of the second chamber. And the states are aggregates of electors who vote directly to choose members of the second chambers.

In India, members of the federal second chamber are for the most part indirectly elected by the state legislature. Federal appointments are also provided as a means for ensuring representation of some particular interests and for this reason it provides for twelve such appointments out of an overall total of 250 members to be made by the president of the federation. Article 80 sub 4 states that the elected members of the legislative Assembly of the State shall elect the representative of each state in the council of states.

Selection of members of the second chamber *(Budesrat)* in Germany represents a different procedure and the members are simply delegates of the *Laender* government and are appointed by same.[21] The members are usually ministers or presidents of land governments. The members of *Bundesrat* are delegates of their *Land* cabinets, holding office in the federal second chamber *exofficio* as members of their *Land* executive and voting in the House in a block on the instruction of their *Land* governments. Each *Land* Government sends members of its cabinet to represent the interests of the *Land* in the *Bundesrat*. As these officials are simultaneously delegates for the *Bundesrat* and officials of the *Land* government, they can be instructed and recalled by the *Land* government.

In the Ethiopian situation Article 61(3) of the constitution envisages two possibilities. Members of the House of Federation may be elected indirectly by the state legislatures or the state legislature may decide the members to be elected directly by the people. Thus, ultimately, the legislature of regional states is vested with the power to decide on how to select members of the

[20] Kurt Nuspliger; Federalism in Switzerland , Paper for the Panel on Panel on Comparative Federalism – Lessons for Canada from the World at the Conference 'Constructing Tomorrow's Federalism: New Routes to Effective Governance' Regina, Saskatchewan, Canada ,March 25-26, 2004 , pp8-10

[21] The Basic Law of the Federal Republic of Germany, 1948, Art.51

second chamber. So far, experience indicates that all members are indirectly elected by the states.[22]

The difference in the manner of election of such members seems to have had an impact to the variation of interests to be represented at federal level. There are divergent opinions as to which interest is represented by second chambers. Assefa argues that in federations where members of the second chamber are selected based on territorial principle and directly by the people, theoretically speaking, the representatives are expected to stand for the interests of the states though he provides that it is doubtful whether the Senators (members of second chamber) represent the interest of the citizen, the state or some regional interest.[23] Another author concur with Assefa saying according to the classical dualist model where there is territorial representation of members, the second chamber of the national parliament represents the component polities primarily in order to safeguard their autonomous spheres against federal encroachments.[24] Anderson however argues otherwise that where members of second chambers are elected directly by the population, they tend to vote along party than regional lines and to be quite independent of their constituent units' governments.[25] Yet another author points out that the method of election (directly) of the Australian Senate renders it most unlikely to be dominated by either the government or the opposition.[26]

In the German system, members of the *Budesrat* are delegates of the regional/land governments. As a result, it appears that they represent the *Land* government, and more specifically the regionally governing party. The *Bundesrat* is fairly frequently dominated by the opposition which ultimately can reduce the *Bundesrat 's* effectiveness as a house of review of law issued by the federal government.[27]

In Ethiopia, Article 61(1) of the Constitution provides that the HoF is composed of representatives of nations, nationalities and peoples. Membership in the HoF appears to be not

[22] Assefa, supra note 4, p181
[23] Id, p181-182
[24] Stefan Hammer; Techniques, Structures, and Processes, in Ronald L. Watts and John Kincaid (eds.) 'Interaction in Federal Systems', Unity in Diversity: Learning from Each Other", 4th International Conference on Federalism , New Delhi, 5-7 November 2007, p48
[25] Anderson, supra note 1, p67
[26] Wilfried Swenden; Federalism and Second Chambers: Regional Representation in Parliamentary Federations - the Australian Senate and German Bundesrat Compared, International & Comparative Law Quarterly, 2005
[27] Ibid

based on the principle of territoriality but on what the Constitution defines namely nations, nationalities, and peoples. But the net effect as such may not be significantly different, because the Constitution defines the states in terms of ethno-linguistic identities. If a certain ethnic group does not have a state of its own, owing to its number or due to any other administrative factor, then it will have a local administration at a lower level. As can be observed from the Preamble and Article 8 it does not begin by the familiar formula of 'We the people of Ethiopia.' It rather stipulates 'We, the Nations, Nationalities and Peoples of Ethiopia.'

Article 8, one of the fundamental principles of the Constitution, seems to reinforce this assertion. It unusually declares that all sovereign power resides in the nations, nationalities and peoples of Ethiopia. Actually the Constitution is considered as nothing more than an expression of their sovereignty. It is, therefore, claimed that what is represented are the nationalities, the authors of the Constitution. This stand is confirmed by Alem who says " the HoF is a non legislative upper house which is not a house of the constitutive states but the house of the sovereign ethno-linguistic groups..."[28]

In general, there is no one formula as to which selection procedure is better in serving the very purposes for which second chambers are established. The nature of a federation may have an impact as to which mode of selection is better and it may be a matter of taste for each federation to prefer. For instance, Swenden argues that in a relatively homogeneous federation, the representation of State interests can be assured only by adopting a second chamber which is nominated by State governments and thus unelected, on the German model.[29] In light of the above discussion, it can be stated that the federal role of the second chamber may range from being the forum for expressing the preference of state governments (Germany) to being an institution directly reflecting a pattern of electoral preference weighted in favour of the residents of the smaller units of the federation (Switzerland and the US) and pretension of house of nationalities in Ethiopia.

[28]Alem Habtu, Federalsm and The Democratization Process in Ethiopia, in Sandeep Shastri (ed.) 'Federalism and the Democratization Process, 5th International Conference on Federalism, Forum of Federations, Addis Ababa, Ethiopia, 2010, Vol2, pp9-10

[29] Wilfried Swenden, supra note 26

### 3.4. Powers

There is no consistent pattern to the powers assigned to second chambers in federations. The difference between second chambers is even more obviously seen when one looks at their constitutionally assigned roles in the law-making process in general and other powers in particular. It is not clear whether or not the second chamber is to function as co-equal legislature as in the lower house, in the sense of guaranteeing both participation and protection of state interests or is required to remain a subsidiary house, for instance only making sure that the interests of states are taken into account in the process. In some federations, they have both all the powers of the lower house and other additional powers; for example, over treaties, declaration of war, and high appointments. At the other extreme, some second chambers are little more than a mere revisionary chambers, with limited power to amend or delay legislation with the possibility of an override by the lower house.

The range of arrangements of powers of second chambers in federations includes those related to the scope of the powers of second chambers (type of legislations and government actions it may involve in and affect) and the strength of these powers (i.e. whether it has veto power or only power to delay, right to force a joint sitting of the house to resolve a deadlock). Accordingly, there are those that are fully symmetrical second houses where the two chambers are co-equal in power and are directly elected. Under this category, second chambers in the United States, Switzerland, Brazil, Argentina, and Australia have an absolute veto power over all legislations, though in Australia a deadlock can be broken by a joint sitting of both house after special election is conducted.[30]

In the United States, the two chambers are co-equal in power and are directly elected. We have already seen that in the United States all legislative powers are vested in both houses thus the senate (second chamber) has all the powers of the House of Representatives (first chamber). The power of the Senate is not limited to the lawmaking process rather it is the only organ that approves key appointments (such as ambassadors and judges of Supreme Court), declaration of war, and treaties. It is also the only organ that can impeach the president of the federation.

[30] Anderson, supra note 1, p49

As in the American Senate, each canton in the Swiss confederation has the same number of votes in the Senate. In addition, the chambers of parliament have exactly the same powers, and no federal statute can be enacted without the agreement of both of the chambers. The law making process at the federal level is significantly influenced by the cantons for the following reasons. Firstly, the cantons must be consulted within the law drafting process, and their opinion must be taken into account. Secondly, there are two chambers of parliament (first chamber and second chamber), and they have exactly equal powers. Both chambers must agree to the proposed law, otherwise it will not be enacted. In case of a difference in opinions between the two chambers, there is a mediation process in order to find consent.[31] However, the influence of the cantons through the Senate is practically said to be limited due to the fact that the cantonal governments are not permitted to instruct their representatives in the second chamber.[32]

The *Bundesrat* of German Federation represents another scenario of power. This is the institution for *Länder* participation in federal legislation. There are two categories of bills. The first category of bills are referred to as objection bills *(Einspruchsgesetze* ). These can be opposed by a *Bundesrat* majority, but will enter into force if the *Bundestag* (lower house) overrides the *Bundesrat* objection with an absolute majority or a two-thirds majority if two-thirds of the *Bundesrat* votes have been cast against the bill. The power the *Bundesrat* exercises under such category of bills is called suspensive veto power. The second category of bills is the so-called consent bills (*Zustimmungsgesetze).* These are bills over which the *Bundesrat* has an absolute veto power. These type of bills cover those affecting *Länder* mainly in two ways*;* that they either affect administrative powers of the *Länder* (they must implement federal legislation) or have financial implications for the *Länder*.[33] In this category of laws, the final say is reserved for the upper house, not even a unanimous vote of the lower house could pass the law, so long as it is not approved by the former.

Even though the *Budesrat* does not have absolute veto power over all federal legislations, since more than half of all federal legislation has fallen into the category of consent bills, the federal government (with its parliamentary majority in the *Bundestag*) is often dependent on the consent of the *Bundesrat*. When *Länder* governments are formed by parties who are also opposition

[31] Kurt Nuspliger, supra note 20 , p8-9
[32] Ibid
[33] The German Basic Law, supra note 21, Articles 77, 83 and 84

parties at the federal level, and when they represent the majority in the *Bundesrat*, they may try to make use of their numerical strength. In order to avoid a *Bundesrat* veto, the federal government has to make concessions. Bargaining processes, which are often not transparent, may result in compromising solutions.[34] Giving the *Bundesrat* an absolute veto in legialtions which constitutes more than sixty per cent of all federal legislation is part of the attempt to compensate the incursion on state autonomy, and it may be for this reason that the *Budesrat* is said to represent one of the more effective houses in a parliamentary system.

The role of the *Budesrat* is not limited to participation in federal law making process. It also serves as an important formal institution through which *Länder* governments are represented on issues that directly affects them. In this way, it serves as a formal way of establishing executive federalism and intergovernmental relations between the two levels of government. Thus, in constitutional terms and practice, the *Bundesrat* is both the legislative organ of the *Länder* at federal level and at the same time, the federal organ of administration in the 'whole state'.[35]

The Indian case represents a second chamber with weak power to influence central decision making. It represents a second chamber with a general power to revise legislation potentially able to amend bills but only with a suspensive veto. Although there appears to be a difference of opinion about the Indian Council of State, the constitutional provisions confirm the idea that the upper house has a reversionary function. In fact, the Indian Constitution stipulates, 'bills shall not be deemed to have passed by the houses of parliament unless it has been agreed to by both houses, either without amendment or with such amendments only as are agreed to by both houses.'[36] The House also has important powers in amending the Constitution under Article 368. It is also the sole house that can pass binding decisions calling parliament to enact law-covering matters included in the state list as provided under Article 249 of the constitution. However, its power can simply be overridden by the decision of the lower house.

There are two category of powers to which the Indian second chamber may have a say. The first category of Bills is governed under Article 109 of the Indian constitution. These are money bills and, not only the bills that are introduced in the lower house, but the last say is also reserved to

[34] Rudolf Hrbek; The Reform of German Federalism: Part 1, European Constitutional Law Review, 2007, p3
[35] Assefa, Supra note 4, p187
[36] Constitution of India that came into force on the 26th of January 1950 (as amended until 2003), Article 107(2)

it. The second category of bills relates to those other than money bills and according to Article 108 of the constitution, the veto of the second chamber can be overridden by a majority in a joint sitting of the two houses.

The Ethiopian second chamber (the House of Federation) represents a house with a completely different power. As one can inferred from the experience of other federations discussed above, second chambers are vested with power to participate at central law making process or policy decisions, either with an absolute veto power or suspensive veto power. Even though the constitution under Article 53 stipulates that "there shall be two Federal Houses: The House of Peoples' Representatives(HoPR) and the House of the Federation (HoF)", in its strict sense however, the HoF plays no role in normal legislation though it can reject budget bills on the grounds of its fiscal allocations to states. Rather the house is entrusted with other powers as provided under Article 62 of the constitution, including addressing disputes between states and acting as the final interpreter of the constitution (which is not common in second chambers of other federations).

One may tempted to say that the HoF has some degree of law making power since it participates in amendment of the constitution with veto power (Article 105), determination of civil matters to be issued by the HoPR (Article 62(8)), the division of revenues derived from joint Federal and State tax sources and the subsidies that the Federal Government may provide to the states (Article 62(7), and determination of tax issues which are undesignated taxes (Article 99). This way of argument is however hardly sound; for one thing, amendment of the constitution is different from law making power. For another thing, its role in relation to the determination of civil matters to be enacted by the HoPR is mere recommendation and the HoF cannot participate in the law making process of such matters with its veto power. What can be said to have a power to make law is in relation to determination of undesignated powers of taxation, if this is said a law making power. Even in such case, its role is not clear. Article 99 of the constitution says "the House of the Federation and the House of Peoples' Representatives shall, *in a joint session*, determine by a two- thirds majority vote on the exercise of powers of taxation which have not been 'specifically provided for in the Constitution."

The provision does not clearly indicate the role of the HoF regarding how the vote in the joint session is to be casted. In this regard, one may come with two possible scenarios of

interpretation. The first can be that the HoF has the power to pass a decision on the issue by two-third majority vote of its members as casted and counted independently. The other possible interpretation may be that the two-third majority vote is to be casted and counted all together with the members of the lower house. If one sticks to the latter possible interpretation, obviously the role of the HoF becomes insignificant for the total number of members in the HoPR is far beyond the number of members of the HoF, thus can be easily overwhelmed by the former. Therefore, it is only if the procedure is based on the first scenario that the HoF may have some role. To put it briefly, even in the above mentioned cases, it is far from clear whether this role is legislative or otherwise, though the fact that it has some role to be played by it.

Therefore, what one may soundly claim is the HoF is with no significant law making power at federal level. This is confirmed by the constitution itself which under Article 55(1) in more specific and clear manner point that the HoPR exercises exclusively the legislative functions assigned to the federal government. If this is the case, can one say that the HoF serves the very purpose for which second chambers in federations are established? Can we say that regional states participation at central decision making is constitutionally guaranteed? Is the federation said to be effective in protecting the minorities from being overwhelmed by the decisions and interests of the majority as reflected in the lower house?

Regarding this, Assefa argues that Ethiopian Constitution deviates from the federal idea significantly since the territorial units have neither the minimum participatory role nor the even greater functions assigned to upper chambers.[37] This is not without implications. The non-inclusion of the states may pose the question of legitimacy of the federal government. The division of authority between the centre and the states may not be enough to preserve the union. This is likely to be true if the central government, which reserves for itself jurisdiction over certain matters, is in the hands of a group which differs from those who control the regional governments. This may cause great antagonism in view of which the right of those in power in the capital to decide everything for the whole country could be questioned. This strain could be mitigated somehow if the central government includes representatives of the states. This inclusion would lead greater legitimacy to its decisions.

[37] Assefa, Supra note 4, p172

Additionally, the fact the states are organized on a purely linguistic basis, there is an immense disparity among them in terms of population and geographic size, resources, administrative capacity and other elements of diversity. The power to legislate on federal matters is left to the exclusive authority of the HoPR organized on a proportionality basis. As a result, the existing glaring political asymmetry among states is constitutionally further reinforced at the centre. There is no mechanism for the smaller states to check the decisions of the HoPR. It is completely in the hands of the largely populated states.[38] In this regard a prominent Ethiopian writer, as quoted by Assefa, has rightly made the following observation;

> *The Ethiopian Constitution reflects this danger [the danger of the centre being hijacked by a few more populous ethnic groups which may affect the aim of nation building] when it provides that the number of the House of Peoples' Representatives shall not exceed 550 ... Discounting the minority seats, the number of members of HoPR will not exceed 530. ... In the HoPR, the two populous ethnic groups [the Oromos and the Amharas] could have about 304 members, a clear majority of the total membership of the HoPR. In accordance with the Constitution, unless otherwise provided, all decisions of the House shall be by a majority vote of members present and voting and the quorum requirement is the presence of more than half of the members of HoPR. Therefore, the combined vote of the Oromos and the Amharas would more than suffice for most of the business of the House.*[39]

Thus, considering the composition of HoF is similar to the lower house and its roles in central decision making is very insignificant, one may soundly question whether the country only belong to the majority within the nation then the minorities will feel discriminated as permanent losers within the majoritarian democracy. Or can the constitutional interpretation power of the HoF prevent and/or ameliorate the potential threats of the majority against the minority? Given the fact that the composition of the house is almost population based, what if two dominant groups conspire (knowingly or unknowingly) to outvote all the smaller groups represented in the house? After all, what is the point of representation in the HoF when you don't have the power to at least influence decisions at central level?

[38] Assefa, Supra note 4, p173
[39] Ibid

Generally, looking at the very rationales for which second chambers are established is very crucial when one deals with the power of second chambers. As discussed earlier, one of the rationales to establish second chambers is to constrain potential tyranny of the majority as represented in the lower house. Thus, second chambers can serve the rationale only if they have significant competence in central policy and law making powers. One may easily propose that the greater the competences of second chambers, the more the *demos*-which is represented on a one person-one vote basis in the lower house--is constrained. In the United States, the lower house has a somewhat more important role than the Senate in budget initiation, but if one takes into account the Senate's constitutionally exclusive prerogatives to advise and consent on judicial, ambassadorial, and major administrative appointments, the two houses come fairly close to policy-making parity. On this variable, Brazil has the most *demos-constraining* system in the world. There is no area that the Brazilian Senate does not vote on, and there are 12 areas where it has exclusive competence, including authority to set limits on how much states can borrow.[40]

On the other hand, The German, Spanish, and Indian systems are less *demos-constraining*, because their upper houses are less unrepresentative and less powerful. In German for instance the *Budesrat* (which said to be strong second chamber in parliamentary federations) is less *demos-constraining* at least for the following reasons, First of all, the *Budesrat* cannot participate in the two most important legislative votes, those for government formation and government termination. This power is the exclusive competence of the lower chamber. Second, *Budesrat* can delay, but not veto, bills that do not directly involve the *Länder*. Third, on the approximately 50 percent of the bills that the upper chamber can theoretically veto because they do relate directly to the *Länder*, it seldom does so after closed-door reconciliation meetings are held in the joint committee representing both houses.[41]

### 3.5. The Role of the HoF in Intergovernmental Relations

Before looking at the role of the HoF in intergovernmental relations, it is important first to see the term Intergovernmental Relations (IGR). It is difficult to put a single explanation for inter governmental relations. One author briefly explained intergovernmental relations as the interaction of entities with some level of political independence, but not sovereignty, within the

[40] Alfred Stepan, supra note 15, p26
[41] Ibid

same country.[42] It is the interdependence between two levels of governments and addresses issues such as how politicians, civil servants, citizens and other stakeholders try to influence outcomes in jurisdictions other than their own. Intergovernmental relations arise between the federation and component units on matters cross-cutting federal and regional spheres, among which health care and environmental protection are important examples. It is important to note here that intergovernmental relation is not unique to federal systems rather it may also exist in unitary systems.

Elsewhere above, it is discussed that federalism combines self rule with shared rule, or unity with diversity. Typically, this involves creating or preserving two levels of government, each with a direct relationship with the people, and by dividing power between them. Traditionally, unity is achieved through the exercise of power by the central government, in relation to all the people. Diversity comes through the exercise of power by constituent governments representing sections of the people, generally territorially identified. The boundaries of power between the two spheres of government are protected by a written constitution, which is interpreted and applied by a court or similar tribunals.

However, the experience of federations throughout the world showed that, whatever the theory, it is neither possible nor in some cases desirable for member governments in a federal polity to exercise their powers entirely in isolation from each other. However carefully powers are allocated between the spheres of government, substantial interaction and co-operation is inevitable because of the complexity of social organization, increased economic integration, and the exigencies of politics. These factors indicate the need to co-operate between levels of government through the mechanism of intergovernmental relations.

Interdependence between governments is inevitable and significant, particularly in federations where the constituent unit governments deliver many federally legislated programs or laws, where there is extensive concurrency or joint responsibility in many areas and where the constituent units depend heavily on conditional financing from the federal government.[43] Intergovernmental relations can be either horizontal (relations between regional states) or

[42]Valeriano Costa; Mechanisms of Intergovernmental Relations: International Experiences and Challenges for Brazil, Forum of Federations, Brasília, September 17 and 18, 2003, p3
[43] Anderson, supra note 1, p64

vertical (relations between regional states on the one hand and the federal government on the other). The main focus of intergovernmental relations is however usually vertical relations between the central government and the constituent units. Horizontal relations between constituent units tends to be less relevant and developed though there are federations (Switzerland and Canada) where constituent units have mechanisms to coordinate their activities and promote the development of common positions in their dealing with federal government.[44]

Federations use various institutions and process for intergovernmental relations. These can be formal or even constitutional, but often they are informal. Most federations manage intergovernmental relations through many kinds of political and legal instruments. Heads of governments, ministers, legislatures, and political parties may play an important role in intergovernmental relations with varied degree of influence. However, the level of intergovernmental coordination, consultation, and coordination greatly varies among federations, especially between dual federal systems and cooperative federal systems.

For instance, the dualist constitutional model of the United States provides for no formalized cooperation between the orders of government, and due to the dispersal of powers in its presidential/congressional form of government, most informal cooperation patterns have not been institutionalized permanently. Thus, intergovernmental co-operation remains not only informal but also fluid. Thus, the United States approach tells us the relative absence of intergovernmental relations and states rely heavily on lobbying within Congress to promote their interest.[45] Australia, despite its dualist constitutional design, recognizes intergovernmental relations only to a very limited extent, but has developed an elaborate sub-constitutional network of institutions for intergovernmental cooperation, which, in a few instances, has gotten closer to features of integrated federalism than allowed by the Constitution.[46]

By contrast, the integrated/ co-operative model of federalism provides a nucleus upon which various intergovernmental structures can be established in line with the essentially cooperative spirit of the constitutional design. The German constitution which typically represents co-operative federalism provides for cooperative institutions beyond the federal chamber

[44] Id, p65
[45] Hammer, Supra note 24, P62
[46] Id, P64

*(Budesratt).* In Germany, the so-called *joint tasks* framework, which include post-secondary education, regional planning, and agriculture, are subject to joint public financing determined in joint planning committees in which the federation and the *Länder,* taken together, have an equal share of votes.[47] In South Africa's integrated federalism, the Constitution provides for cooperative intergovernmental bodies in addition to the federal chamber to represent the provincial governments and the Indian Constitution provides for a number of institutions of cooperation between the Union and the states.[48]

The degree of intergovernmental relations also varies among federations depending on the role of executive and legislative branches. In federations where there is strong executive branch, it tends to focus on executive/cooperative federalism in intergovernmental relations while federations with weak executive tends to have an intergovernmental relations dominated by the legislature. In modern federations however, the executive branch is typically dominant relative to the legislative organ particularly in parliamentary federations. [49]

Of institutions involved in intergovernmental relations, discussing the role of second chambers is important. Second chambers representing regional interests can influence the relative weight of constituent units within central institutions though, in practice, few are said to be important in intergovernmental relations. As already discussed elsewhere above, the Geramn *Bundesrat* plays an important intergovernmental relations by formally bringing executive federalism in to legislative process, with the *Länder* governments voting on issues directly affecting them.

The Ethiopian HoF is an institution that plays an intergovernmental purpose though the scope of power and degree of influence may be limited. As discussed earlier, its role in articulating and representing interest of states at central decision making is very limited. Its role in intergovernmental relations is limited to financial and fiscal matters. It is in the field of fiscal transfers that the HoF is playing a crucial role. According to the federal Constitution, 'It [HoF] shall determine the division of revenues derived from joint federal and state tax sources and the subsidies that the federal government may provide to the states.'[50] Accordingly, the HoF is

[47] Id, P56
[48] Id, P57-58
[49] Anderson, supra note 1, p65
[50] Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, 1st year, No.1, 21 August, 1995, Art.67(2)

vested with dual powers; determination of the criteria for the allocation of concurrent tax (Article 98) and the subsidies that the states receive from the federal government (see the role of the HoF in this regard on chapter 9 and 10).

Even though the role of the House is crucial in light of the states' dependency on fiscal transfers, the fact that its composition is more or less similar with the lower house creates a problem in the decision-making process. Despite the difference in the size of electoral districts, the net outcome of both houses, despite the widely held view that the HoF is the house for nationalities, is majoritarian in much the same way as the lower house. These days, the relatively populated states are pushing the House to increase the weight of population size (and it has increased over the years from 30 per cent to 65 per cent) in the allocation of shared revenues and grants. The less populated states are consistently becoming the losers.[51]

**Conclusion**

From the survey of the institutions in light of the normative requirement that federalism incorporates unity and diversity is that it can be stated as a general conclusion the second chamber, though not exclusively, which is expected to reflect normative diversity as we tried to indicate. If not all, most federal system establish second chambers though the there is a significant difference among federations as to the rationales for the establishment of second chambers, the way they are composed of, the method of selection of members, the interest they represent, and the powers that is vested to them.

Though many rationales may be forwarded, protection and prevention of potential tyranny of the majority at the lower house and serving as institution of shared rule (power sharing) are the two important reasons for the establishment of second chambers. However, the effectiveness of second chambers in serving the two purposes to greater extent depends on the way the members are elected, the principle based on which of their composition is determined and the power given to them. In this regard, there is huge difference among federations.

The United States and Switzerland represents federations with the most powerful second chambers possessing with almost all powers and at times with additional powers to that of the

[51] Assefa, supra note 4, p195. Note that the figures are taken as they stand during the cited author prepared the material.

first chambers. The Indian second chamber is certainly less powerful compared to the lower house. The German *Bundesrat* represents a strong parliamentary second chamber with two types of roles; absolute veto power and suspensive veto power. the federal idea of maintaining diversity at the center is to be something other than mere rhetoric. First, second chambers ought to be empowered to exercise some veto powers regarding key issues that affect the interest of the states. It does not matter whether the states represent diversity as in Switzerland or other interests as in Germany as the interests might differ from one federation to another.

The second chamber in Ethiopia represents a unique federal practice where it appears that the states have no mechanism for checking the laws enacted at federal level since, particularly, the HoF is devoid of significant powers to influence decisions at federal level. Regarding this, there is an important federal element missing in the Ethiopian situation. Thus, it is demonstrated that the federal system in Ethiopia lacks sufficient institutional avenues for guaranteeing shared functions to the units as policy-making is not shared between the two levels of governments. Beyond that, states should also be able to defend other regional interests, which they might deem vital, against the centre. Hence, not only should the HoF be a legislative house, it should also have some veto powers over matters deemed important by the states. The revisionary function of all second chambers is also vital as it brings a second thought to the bills adopted by the lower house.

The interest represented by second chambers lacks uniformity among federations. In the German federations, the *Bundesrat* represents regional government (ruling executive organ) while the United States senates, arguably, seems to represent the regional states. The interest represented by the HoF however seems to be still unique that it is said as if it represents the interest of each Nations, Nationalities and Peoples.

**Summary Questions**

1. What are the main rationales for establishing second chambers and vesting them with law making power at federal level?
2. Explain the approaches that are practiced by federations as to the composition of second chambers.
3. Do you agree with the assertion that second chambers in all federations represent the interest of regional states? Why or why not?
4. Do you think that the House of Federation can attain the main purposes/rationales for which second chambers in federations are established? Why or why not?
5. Explain the mechanism of selection of members of the House of Federation.
6. Do you agree with the argument that representation in the second chamber though the principle of territoriality (equal representation of all states regardless of size) is contrary to democracy? Why or why not?

# 4. CHAPTER IV: FEDERALISM AND ACCOMMODATION OF DIVERSITY: THE ETHIOPIAN EXPERIENCE

## Introduction

It is to be recalled that one of the advantages of federalism is its institutional mechanism of accommodating diversity thereby forging unity out of diversity. This advantage makes federalism as the best choice especially for countries which have diverse ethno-linguistic and religious diversity. This chapter is devoted to the context of multicultural federations like Nigeria, India and Switzerland. These are federations that unlike nation-state federations which aim at national integration or assimilation, whose main concern is the accommodation of ethno-linguistic, religious and regional diversities either because they have national minorities or because they are inhabited by different national minorities, none of them constituting a majority. It begins with a brief introduction that sets the context of multicultural federations and then the remaining sections are devoted to the Ethiopian case.

More specifically, the chapter, in a comparative perspective, addresses the concept of diversity and its accommodation in federal countries, the historical evolution and origin of the Ethiopian federal system, its federal features, the issue of language policy, the distinct features of the Ethiopian federation, and the various contending views that the Ethiopian federal system has entertained so far. It also canvases the issue of secession in federal systems in general and the Ethiopian case in particular, conflict management under the federal system, the issue of minority protection, and the challenges to democratization process in the federation.

## Chapter objectives

After completion of this chapter, students are expected to;

- ✓Explain the role of federalism in accommodating diversity;
- ✓Comprehend the difference between multicultural federations and nation-state federations;
- ✓Explain how multicultural federations accommodate diversity;
- ✓Identify the challenges that multicultural federations face with in accommodating diversity;
- ✓Elaborate the origin and historical antecedents of the Ethiopian federation;
- ✓Identify the federal features of the Ethiopian federation;

- ✓Mention the distinct features of the Ethiopian federation;
- ✓Analyze the issue of language policy in federations in general and in Ethiopia in particular;
- ✓Explain the contending views on the Ethiopian federal system;
- ✓Comprehend the relationship between federalism and secession;
- ✓Explain the role of federalism for conflict management in Ethiopia;
- ✓Elaborate minority protection arrangements under the Ethiopian federation; and
- ✓Identify the challenges and limitations of the democratization process in the Ethiopian federal set up.

### 4.1.Multicultural Federations and Accommodation of Diversity

The concept of diversity in a country has many dimensions. The diverse features of a multicultural society create conditions that cannot be changed because they are rooted in a common history. Nor can they be effectively modified by violating fundamental human rights such as religion or language. Compared to economic diversities that can be changed in a society by improved equality or by political decisions approved by the majority, these diversities are not quantitative but qualitative, thus, cannot be changed only by a majority. Furthermore, they are often rooted in symbols and emotions.[1]

Traditionally constitutions either denied diversity as a basic element for the nation-building, pretending rather that the nation is composed only of citizens, or they built on the majority culture of the nation. Recently, it is reminded that "diversities are not to be considered as a burden but as an asset that states can build upon".[2] Diversity as an asset implies that the interest of diverse groups be duly considered at the federal level, and not merely relegated to autonomous institutions. Even though diversity is often considered by politicians as a problem that states have to accommodate, on the contrary, one has to consider diversities as an opportunity for states that are enriched by different languages, cultures, religions and traditions. Some have pointed out that social fragmentation and diversity themselves are not threat to integration, but they become a fertile ground for the same if the political system is not able to let the articulation of diversity

[1]Khtar Majeed *et al*; Building on and Accommodating Diversities, in Ronald L. Watts and John Kincaid (eds.) 'Building on and Accommodating Diversities', 4th International Conference on Federalism, 'Unity in Diversity: Learning from Each Other', Volume one, New Delhi 5- 7 November 2007, p5
[2] Id, p4

manifest itself and if the political institutions are designed to reflect the interests of only some fraction of society.[3]

In other words, there must be a reflection of diversity in the appropriate political institutions and that is the way to translate diversity into the political process. Only if a state is able not only to cope with and accommodate diversities but also to build on the diversities and cherish its diversities will it be able to contribute to a sustainable peaceful development. Thus, a more specific value to accommodate diversity could be federalism, direct democracy or the bottom up process of a consensus driven democracy with a concept of regional autonomy close to collective group rights.[4]

This is not however implying that diversity does not provide a problem to a nation rather it becomes a "problem" on specific circumstances. One author puts two reasons as to why diversity within the state territory becomes a problem; one, when the social, cultural, or racial differences become the basis of group inequality, and two, when the different groups perceive one another as inferiors or superiors.[5]

Whereas some countries chose federal structures because federalism is an additional tool to limit governmental powers (e.g. USA and Germany), others made the choice for federalism mainly because it accommodates their diversity (e.g. India, Canada, Ethiopia, South Africa, Spain, Switzerland and many others). Federalist structures, by experience, provided the best possibilities to accommodate diversities and, in many cases, it was the only possible compromise to build on a common consensus for the structure of a multicultural state.[6] In fact, accommodating diversity is not unique to federal systems rather unitary states, though do not build on diversities, can accommodate diversities partly by centrally determined decentralization. The point is however, federations can provide at the same time not only constitutionally guaranteed regional self-rule for the federal units, but also shared-rule at the central level, such as by a two chamber system or even in the organization of the executive, installing mechanisms

[3]Assefa Fiseha; Federalism, Teaching Material, Prepared under the Sponsorship of the Justice and Legal System Research Institute, 2009, pp203-204
[4] Majeed *et al*, supra note 1, p10
[5] T.K. Oommen; Nation Building and Diversity, in Ronald L. Watts and John Kincaid (eds.) 'Building on and Accommodating Diversities', 4th International Conference on Federalism, 'Unity in Diversity: Learning from Each Other', Volume one, New Delhi 5- 7 November 2007, p22
[6] Majeed *et al*, supra note 1, p4

for peaceful management of conflicts among different diversities, recognizing diversities with the formation of new constituent units, special procedures for the protection of vital interests of minorities, organization of the executive with several members representing diversities, and other special arrangements.

Unlike nation state federations which often aim at national integration or assimilation, by destruction of diversity, in contrast, multicultural federal states calls for the accommodation of diversity; it is an institutional innovation to govern democratically culturally diverse peoples located under one political roof. Multicultural federations mainly concerns in the accommodation of ethno-linguistic, religious and regional diversities either because they have national minorities or because they are inhabited by different national minorities, none of them constituting a majority.

Many federations chosen federalism as a means of accommodating diversity and reducing tension within a former unitary State. These days, there is widespread use of federalism throughout the world to accommodate diversities and the variety of arrangements that have been developed for doing this in different federations (e.g. Belgium, India, Nigeria, Ethiopia and Switzerland). By combining elements of shared rule in larger units and self-rule in smaller regional units, multicultural federal political systems provide the closest institutional approximation to the complex multicultural and multidimensional economic, social and political reality of a nation. Thus, multicultural federations are established primarily on the desire to express distinctive identities through smaller, directly accountable self-governing political units able to give expression to historical, social, linguistic or cultural diversity and ultimately reconcile the forces of unity and diversity.

One should note that this is not to imply that multicultural federations are not territorial. Indeed, the territoriality principle is at the core of any federation, be it nation state federation or multicultural federation. The point is simply that in case of multicultural federations, the territories are designed on the basis of major diversities that define a certain society. Such federations presuppose the existence of a territorially grouped diversity. Traditionally, federations have always been taken as territorial. The fact that the territorial autonomy of the

states in federations should be constitutionally guaranteed simply follows from that. [7] What is rather crucial in the attempt by multicultural federations in trying to reconcile unity and diversity is the political expression of diversity. Not all federations give equal political expression to all forms of diversity. It appears, however, that the greater the diversity in a federation, the greater the need to find institutions as a means of articulating such diversity within the domestic political system. Obviously, the requirements for accommodating diversity will always depend on a particular country's circumstances, including its specific diversity mix (e.g. nature of diversity, territorial distribution, respective proportions in the over-all population, etc.). Each multinational state will be faced with these types of conundrum, to which there is no ready-made answer.[8]

Ethiopia is obviously a multicultural federation since 1991 *de facto* (during the transitional period) and 1995 *de jure* which aims at accommodating the diverse interests in the nation. By constitutionally dividing political power among various ethnic groups, allowing different ethnic groups to create a strong federal state without losing their identity or compromising their interests, the Ethiopian federal structure seems to be committed, not only in recognizing diversity, but also institutionalizing it for accommodation. The commitment of the constitution in recognizing and accommodating diversity is inferable from the fact that diversity is considered as a source of diversity by vesting sovereign power in the hands of the diverse Nations, Nationalities and Peoples.[9]

The major issue of multicultural federalism is how to democratically reconcile political and cultural (ethnic, religious, linguistic) pluralism? Consequently, federalism can democratically meet multicultural challenge only if it becomes intrinsic part of democracy, i.e. if not only unity, but also diversity becomes a constitutive principle of democracy. If that is not the case, federalism fails to meet its major challenge: not to radicalize the differences to which it was supposed to be a solution. It means that federalism should address and accommodate structural causes of mistrust and intolerance in a given society (for instance, constitutional conflicts as *per se* ethnic conflicts). This is why multicultural federalism has an immanently built-in paradox:

[7] Assefa, supra note 3, p203

[8] Johanne Poirier; Autonomy and Diversity in Ronald L. Watts and John Kincaid (eds.) 'Building on and Accommodating Diversities', 4th International Conference on Federalism, 'Unity in Diversity: Learning from Each Other', Volume one, New Delhi 5- 7 November 2007, p43

[9] Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, 1st year, No.1, 21 August, 1995, Article 8(1)

Multicultural federalism starts with a low level of legitimacy due to the lack of trust and tolerance.[10]

### 4.2.The Origin and Historical Antecedents of the Ethiopian Federation

Every federation is the result of its own unique experience. It is indispensable for a federal system to reflect this historical and context if it is to be successful. Thus discussion on the historical antecedents of the existing Ethiopian federal structure is very crucial to have a full account of the challenges and prospects the federal system is faced with. Though Ethiopia has a long history of statehood, it had continued to be prone to persistent war especially in the 20th century which ultimately had brought about 'state failure' in the nation. One of the most contested issues in the public discourse of Ethiopian politics remains the difficulty one gets in interpreting state failure in the twentieth century. While there is a general consensus about the fact that both the Imperial (1930-1974) and the military regimes (1974-1991) failed to address among other things central political and economic issues, there is less consensus on the causes of state failure and in interpreting the conflict. While some illustrate the cause of the conflict as resulting from '*Biherawi chikona'* or 'national oppression, others contend that the conflict is merely political, not ethnic, as the bone of contention is state power. Assefa however contends that there is no merit in reducing each factor in diagnosing the conflict, for each explains to a certain degree the character of the Ethiopian state in the 20th century and hence urges for a broader comprehension of the issues.[11]

The way the Ethiopian empire was created, and the way it evolved, made it easy for contending interpretations of Ethiopian history. There are different theses developed in the public discourse as to the cause of long and persistent conflicts and war in Ethiopia during the 20th century. These include the national oppression thesis, the instrumentalist thesis, the nation building thesis, and the colonial thesis. A detail account on each thesis is not warranted here for it should be addressed in constitutional history of Ethiopia. However, a brief discussion on each thesis is in order.

[10] Lidija R. Basta Fleiner; Nation Building and Diversity, in Ronald L. Watts and John Kincaid (eds.) 'Building on and Accommodating Diversities', 4th International Conference on Federalism, 'Unity in Diversity: Learning from Each Other', Volume one, New Delhi 5- 7 November , 2007, p87

[11] Assefa, Supra note 3, p72-73

The 'national oppression' thesis came into the Ethiopian political discourse with the ascendancy of the Ethiopian Student Movement (ESM) in the 1960s. The gist of the view is that ESM believed there was 'one oppressor nation' whose political system, culture and language dominated the others and on the other, many 'oppressed nationalities' that were politically and economically marginalized, culturally and linguistically dominated. The (Showan) Amhara was identified as 'oppressor nation' and the rest the 'oppressed nationalities.' Wallelign Mekonnen's prominent article, a student leader killed in 1973, was a breakthrough in this regard. He wrote,

> *Is it not simply Amhara and to a certain extent Amhara-Tigre supremacy? Ask anybody what Ethiopian culture is? Ask anybody what the Ethiopian language is? Ask anybody what Ethiopian religion is? Ask anybody what the Ethiopian dress is? It is either Amhara or Amhara Tigray. To be a genuine Ethiopian one has to speak Amharic, to listen to Amharic music, to accept Orthodox Christianity*.[12]

This was a fundamental challenge to the nation-building project and to the then discourse of multicultural Ethiopia; a challenge to the 'one Ethiopia, one nation' thesis. This paved the way to the nation, nationality right to self-determination under the present constitution.

According to advocates of the national oppression thesis, the present-day Ethiopia is mainly the result of the incorporation process of Emperor Menelik, who ruled from 1889 to 1913 and subsequent centralization by Emperor Haile Sellassie (1916-30 as regent and 1930-74 as emperor). The 1931 Constitution and the 1955 revised Constitution were important instruments to reduce the power of regional lords and consolidate his personal rule.[13] Thus, to advocates of the 'national oppression', in the name of "Ethiopian Unity", there was an attempt to suppress all non-Amhara identities. Political domination was aggravated by cultural domination and economic exploitation. To be within the state structure, all non–Amhara people were expected to speak Amharic and adopt the culture and religion of the

[12] Id, p 83

[13] Leulseged Tadesse; Can Diversity be Accommodated? The Case of Ethiopia, in 'Policy Issues in Federalism: International Perspectives' 4th International Conference on Federalism, 'Unity in Diversity: Learning from Each Other', Volume five, New Delhi 5- 7 November 2007, p4

ruling class. This discriminatory policy resulted in an uneven representation of various ethnic groups in central government.[14]

Thus, the characterization of the modern Ethiopian empire by political exclusion, economic exploitation, and cultural domination by elites mainly from single nationality group followed by the ignorance of the military junta or Derg that seized power in 1974 to questions of the self-determination caused different political movements, either regional or ethnic, who started to violently resist the imperial and military regimes which ultimately brings persistent war in the country until 1991.

The instrumentalists on the other hand contend that the characterization of the conflict as ethnic is not tenable. In fact, advocates of the instrumentalist approach agree that the over centralization of power and economic resources by the 'dominant' group, principally from Showa which despite genealogical mixtures defined itself and the state along this narrow perspective, and the subsequent marginalization of others should be considered as the underlying factor in exacerbating the prolonged war in Ethiopia. However, they contend that a closer observation of these writers seems to suggest that the outbreak of ethnicity in public discourse is the result of this marginalization and hence cannot be considered as a factor on its own to analyze the conflict: to be specific, ethnicity is the consequence, not the cause.[15]

Instrumentalists continue to argue that ethnicity certainly is a factor in the conflict, since in nearly all cases the opposing parties belong to groups with different ethnic identities. Whether such differences in themselves are sufficient cause for conflict is debatable and to define the conflict a *priori* as ethnic is questionable'. However, the cause of the conflict is political because the bone of contention is state power; thus, ethnic identity is being used to *construct* social differences that were not there before'. [16] The ultimate theme of the instrumentalist is therefore, the conflicts cannot be categorized as ethnic at all and if the conflict manifested itself as ethnic, ethnicity is simply an instrument for gaining access to political power and resources. Instrumentalists view religious and ethnic groups as a means to achieve some political and economic goal and having no relevance thereafter.

[14] Ibid
[15] Assefa, Supra note 3, p73
[16] Id, p72-74

The nation building thesis is another perspective of interpreting the Ethiopian history of the 20th century. For advocates of the thesis, the process of incorporation of territories of the South, East, and Southwestern by the empire builders is considered as reunification of territories which were previously autonomous within the nation.[17] They consider it was all a normal process of "nation building" and hence consider the liberation struggle as a form of tribalism to the instrumentalists. In this regard, the nation building thesis relies on the instrumentalists to justify the process of incorporation of territories and defend the various ethno-linguistic struggles.

However, the interpretation of the Ethiopian sate crisis by advocates of the 'nation building' thesis is challenged by scholars for different reasons. Part of the reason why the "nation building" project in multiethnic/multicultural/multinational societies becomes problematic is that the process is based on a wrong transplantation of Western ideas that assume the existence of a dominant national group that commands clear democratic majority. In many parts of Africa including the Sudan and Ethiopia, the nation building project aimed at politically and culturally integrating the various groups into a narrowly defined state values: in the case of the former Arabic language and Islam and in the latter Amharic language and Christian religion. This raises conflicting perspectives on the identity of the state.[18]

The process of centralization, some would prefer to call it "nation building" was not without consequences. Firstly, the incorporation of the South, the Southwest and the Eastern sides from their previously autonomous position to complete absorption meant that the notion of the state, its values, institutions and culture were imposed on the incorporated kingdoms. Secondly, it brought about all sorts of diversities in terms of religion, language, tradition and culture. However, as the state failed to accommodate this diversity, the religious, lingual, cultural as well as political and economic dominance gave birth to the "question of nationalities." Thirdly, the state became extremely centralized at the expense of regional rulers. The political marginalization of the bulk of the community led to civil wars whose cause fundamentally

[17] Merara Gudiana; Contradictory Interpretation of Ethiopian History" in David Turton (ed.), 'Ethnic Federalism: the Ethiopian Experience in Comparative Perspective', Addis Ababa University Press, Addis Ababa, (2006)
[18] Assefa, Supra note 3, pp80-81

differed from earlier ones. This time resistance not only called for state reform but even at times challenged the state itself.[19]

A nation-building process needs to generate, for all members of a nation, the feeling of belongingness in the sense of the "we" in relation to the "others". For composed nations such a nation-building process needs to unite diversities through common values shared by the respective ethnicities and distinct from values of the particular nations. Even in countries where universal values such as rule of law, democracy and human rights is respected, these by themselves will not bring diversities together because they apply too broadly to mankind and not particular federal polities.[20] Therefore, certainly the "nation building" process despite its own contributions in terms of creating Ethiopian nationhood is challenged by its critique for its attempt to assimilate the different groups into the ruling class's identity.

Lastly, there are those who advocate a colonial thesis in interpreting the creation of empire, and argue for a separatist political agenda.[21] At the other extreme, ethno-nationalist groups such as the Oromo Liberation Front (OLF) claim that Abyssinia (central and northern Ethiopia, the historic core of Ethiopian polity) colonized roughly half the territories and peoples to form a colonial empire-state in the last quarter of the 19th century. From the ethno-nationalist vantage point, Ethiopia is a colonial empire that needs to undergo decolonization where "ethno-national" colonies become independent states. Its image is one of Ethiopia as a *colonial*-state.[22]

Distinct from the instrumentalist, colonial and Greater Ethiopia version of the story came the view that holds that Ethiopia should be viewed as a multicultural state and the nationalities need to be treated equally and have to be 'liberated from' the degrading situation they were put in, be it in the south or the north. Despite the contending interpretation of the crisis of the Ethiopian state, advocates of the 'national oppression' which has its root with the ESM and latter by the TPLF won the struggle. In a nutshell, however, it could be stated that the state failure could be analyzed in terms of failing to build a multicultural state (touches all spheres of the state, political power, resources, identity and language issues) from all the diversities that the modern

[19] Id, p208
[20] Majeed *et al*, supra note 1, p10
[21] Merara, supra note 17
[22] Alem Habtu; Ethnic Federalism in Ethiopia: Background, Present Conditions and Future Prospects, Paper Submitted to the Second EAF International Symposium on Contemporary Development Issues in Ethiopia , July 11-12, 2003, Ghion Hotel, Addis Ababa , Ethiopia, p9

state has brought together during the second half of the 19th century and the relevance of federalism as an idea for forging unity out of diversity springs from this.

Thus, after a long period of attempted centralization in the country, the present federalism was introduced in Ethiopia in 1991 when the Ethiopian People's Revolutionary Democratic Front (EPRDF) came to power and launched the idea of self-determination for nationalities up to and including secession, developing political, administrative and economic power to ethnically defined regional states. These rights were granted to nationalities since the EPRDF convened a conference to endorse a transitional charter which became the legal basis of four years of interim rule under EPRDF dominated legislature and executive leadership. The devolution and making of the new constitution was completed in 1995 and the Federal Democratic Republic of Ethiopia was officially proclaimed under Art 1 of the constitution. The present Ethiopian federation appears to be a response to Ethiopia's long standing question of ethnicity and avoid ethnic repression and exploitation.

### 4.3.Federal Features

At this point, it is important to see the origin of the federation, i.e. whether it is formed by 'coming together' or 'holding together'. Reading at the text of the constitution and considering the facts existed before the federal restructuring of the nation; one may reasonably say that the formation of the existing federal system manifests both coming together and holding together approaches. The coming together aspect of the federation is inferable from the reading of different provisions of the constitution.

The first constitutional signal that shows the formation is a coming together is the preamble. Unlike other constitution which in their preamble start as 'We the people…', the Ethiopian constitution starts its preamble saying 'we the Nations, Nationalities and Peoples of Ethiopia … are strongly committed in full and free exercise of our right to self-determination ...". Further, article 8(1) of the constitution provides that 'all sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia.' The constitution also uses ethno-linguistic criteria as the main basis for the creation of regional states that constitute the federation.[23] Of most important, the constitution under Article 39 provides that all Nations, Nationalities and Peoples of Ethiopia

[23] The FDRE constitution, Supra note 9, Art.46, 47

are entitled to the unconditional (that cannot even be derogated during state of emergency) right to self determination up to secession.

The cumulative reading of the above mentioned provisions of the constitutions seems to tell us that the foundation of the Ethiopian state as well as its continuance now requires the consent of each nation, nationality and people. As a result, the Nations, Nationalities and Peoples are ultimately entitled to reassert their powers of sovereignty by changing or abolishing the government if the federal government abuses their right to self-administration. From the spirit of the constitution and as can be grasped from the mentioned stipulations it may give one the impression that the federal state is a union formed through the free consent of each of the nations, nationalities and peoples, thus coming together.

The federation also reflects a 'holding together' aspect. To allege that the federation is built from the nationalities in a way that is coming together will be naïve and exaggerated. One writer boldly asserts that "…Ethiopia can rightfully be described as (largely) durable coming together modern federation".[24] To say the federation is formed by coming together, one should first establish that the constituent units establishing the existing federations have had a previous existence and autonomy from which they surrender substantial portion of their power to the central government. This is not however the reality. Even though some territories in the country (eg. Tigray, Assab, Eriteria) experienced a *de facto* autonomy in the pre-1991 period, many of the constituent states that now form the federation had no such experience previously. One cannot mention any of the constituent states had experiences of autonomy similar to the Cantons of Switzerland and states of the United States of America. The truth is therefore, the federation is established from a formerly unitary state and the states have had no prior existence as states and if any one existed, it is only as a province in a highly centralized imperial state, a military dictatorship, or during brief transitional period (1991-1994). The overriding power of the federal government in practice, the limited role of the constituent states in influencing the federal law-

[24]Genenew Assefa; Specific Features of the Ethiopian Federal Design, in Sandeep Shastri (ed.) 'Federalism and the Democratization Process, 5th International Conference on Federalism, Forum f Federations, Addis Ababa, Ethiopia, 2010, Volume two, p50

making process can also be mentioned as additional evidence that explains its 'holding together' aspect.[25]

Since 1995, the constitution established a multicultural federal republic comprising nine regional states created on the basis of predominant ethnic group, except the Southern regional state formed by 46 ethnic groups, and except two federal territories, Addis Ababa and Dire Dawa. With a view to addressing the age old cause of the state crisis, the federal system intends to decentralize power and resources and resolve the "nationalities question" by accommodating the country's various ethno-linguistic groups. Among other things, the Constitution states that the federal government and the states shall have legislative, executive and judicial powers.[26] The constitution also divides power between the levels of government by granting the federal government with enumerated and limited powers (Article 51) and the states hold residual powers (Article 52) and some enumerated powers (Article 52(2)).

Although there is no exact congruence between the territory of the states and the ethno-linguistic groups, every attempt has been made to make sure that the major nationalities have their own 'mother states.'[27] The constitution also provides that the nationalities are entitled to a full measure of self-government that includes the right to establish institutions of government in the territories that they inhabit and to equitable representation in state and federal government (Article 39 (1-3)). The constitution (Article 50 sub 5) empowered states to draft, adopt and amend their own state constitutions subject to the supremacy of the federal constitution as provided under Article 9 of same.

The federal constitution also guarantees for separation of state and religion (Article 11), transparency and accountability of government (article 12), human and democratic rights (Chapter three of the constitution), and structure of the federal and regional states. The constitution also recognizes equality of languages and language pluralism (Article 5 sub 1). Accordingly, each regional state has the right to choose its own working language (Article 5 sub 3) while Amharic is the working (not official or national) language of the federal government (Article 5 sub2).

[25] Assefa, Supra note 3, p215
[26] The FDRE constitution, Supra note 3, Article 50(2)
[27] Assefa, Supra note 3, p217

The federal system operates within a parliamentary form of government (Article 45) with two Federal Houses; The House of Peoples Representatives (HoPR) and the House of Federation (HoF) (Article 53). The former is composed of members elected by the people for a term of five years in a direct and fair election and contains 547 members, 20 of which are allocated to minorities. The members of the House are believed to be representatives of the Ethiopian people as a whole and not of a specific group (Article 54). Although on appearance one may get the impression that the two-chamber parliament is responsible for policy-making at federal level, it is only the HoPR which has the sole power of legislation in all matters assigned to the federal government yet the same House is the highest authority in the federal government.

The constitution established the House of Federation (upper house), whose members are representatives of each nation and nationality (Article 61), as the guardian and interpreter of the federal constitution (Article 62 sub 1). The HoF is also vested with the power on the determination of revenue derived from joint federal and state tax and subsidies that federal government grants to the states (Article 62 sub 7). It is also important to note that the constitution enshrines symmetrical federation by stating "'all states have equal rights and equal powers' (Article 48 sub 4) in spite of the vast inter-state differences in terms of demographic and territorial size, natural endowment, and cultural capital.

The constitution also established a federal executive consists of the ceremonial president and a powerful Prime Minister along with his cabinet. The federal President, who is the head of state, is nominated by the HoPR from among its members but approved in a joint session of the two Houses by a two-thirds-majority vote for a term of six years. The powers of the President are nominal and symbolic. The President opens a joint session of both Houses every September, signs a draft law before its promulgation and receives credentials of foreign ambassadors.[28] The constitution also allows further decentralization from regional state to zonal and woreda (district) levels (article 50 sub. 4).

However, the constitution provides little guidance to management of federal-regional relations. Dealing with inter-state border disputes, Article 48 stipulates settlement by bilateral agreement among the disputant states. If the parties fail to reach an agreement, the House of Federation will

[28] The FDRE constitution, Supra note 9, Articles 70, 71,

decide on the basis of settlement patterns and the wishes of the people concerned. Article 50 only stipulates the general need for mutual, reciprocal respect between federal and regional governments.

### 4.4.Language Policy

It is a well-established normative claim of classical liberalism that public and private spheres should be separated as strictly as possible, and that only in the former sphere may the state legitimately act, while leaving the latter one to be regulated by individuals themselves. According to this proposition, one's own cultural identity 'markers', including the linguistic one, fall into the private sphere and as such do not constitute legitimate objectives of a liberal state's policies. On the traditional account, then, the state is not there to mitigate potential conflicts based on identity 'markers.'[29] This stance is best exemplified in the United States' policy of not recognizing an official language at the level of the federal state.

The problem with the claim of classical liberalism is of disestablishment or public disengagement, is that it cannot be the best response of public institutions to different linguistic, preferences and identities because disengagement from language is impossible. This is because public services must be offered, and public business transacted, in some language(s) or other. Therefore, even when no particular language is proclaimed as "official", as in the United States, decisions still need to be made about the *de facto* language(s) of public communication.[30] Languages are not merely innocent means of communication. They stand for or symbolize peoples, i.e. ethno-cultures. Regarding this, G. Cohen asserts:

> *While there are, without doubt, strong connection among language, ethnicity and other forms of identity, these connections vary between groups and their individual members. Language is therefore an unreliable marker of ethnicity. In the absence of any more reliable*

[29] Anshu Srivastava and Miodrag A. Jovanoviæ; How Important is Language Policy as a Conflict-Resolution Tool? The Cases of India and Serbia, in 'Language Policy as a Conflict-Resolution Tool' 4th International Conference on Federalism, 'Unity in Diversity: Learning from Each Other', Volume five, New Delhi 5- 7 November 2007, pp30-31

[30] Id, p31

> *markers, however, language often remains ethnicity's most visible characteristic: the use of language is the most easily observed feature of belonging to a particular ethnic group.*[31]

Language has a great impact on public services (in their internal functioning, as well as in the external communication with citizens and third parties), courts and legislatures, as well as educational facilities. To a certain extent, it may have an impact in the sphere of the private language usage (e.g. on public sites, in private corporations and businesses). Consequently, every decision on the official language of state, be it in the form of the formal or *de facto* rule, significantly affects not only the overall status of individual members of the society not belonging to the majority linguistic group, but also the nature of the nation-building process in that state. Thus, the this old policy of liberalism is untenable for in contemporary societies every potential of generating language conflicts in a multilingual society; and these are inextricably related to nationalist conflicts, and so addressing issues of linguistic diversity is central to the larger political project of 'containing nationalism'.[32]

Thus, in multilingual nations, it requires, if not to the establishment of the full ethno-linguistic equality, which is at times hardly reachable ideal, than to some form of *ethno-linguistic democracy*, that is, to the substantial recognition of linguistic diversity. Therefore, the real question is not whether deviations from official mono-lingualism are justified, but rather under what terms linguistic minorities would voluntarily consent to the constitution of the larger society.[33] In a nutshell, the issue of adopting one or more official languages is one of the thorny points in multicultural federations. Regional and ethno-linguistic groups usually press for the official recognition of their language, both at regional and federal levels. One reason is that language is seen as highly related to the cultural self-identity, and survival of groups. Another is that it is intertwined with the power position of ethnic groups. To a certain degree it affects access to national jobs and therefore the participation of members of ethno-linguistic minorities at the center.

The point is therefore, the quest for equality of languages and the issue of choice of working languages becomes a fundamental issue to be reckoned in multilingual federations. To opt for a

[31] G. Cohen; The Developmetn of Regional and Local Languages in Ethiopia's Federal system. In David Turton (ed.) Ethnic Federalism the Ethiopian Experience in Comparative Perspective (2006), p173
[32] Srivastava and. Jovanoviæ, supra note 29, p32
[33] Id, pp32-33

single language is difficult because it is impossible for a state to remain language neutral in its communication activities or in its contact with the public. It is also impossible for a state to give public service in all the languages existing in the nation. Thus, if the state has to have a working language, the choice of one or more working languages is unavoidable.[34]

In any ways, multi-lingual nations have two options in choosing working languages; choosing for a single working language or choosing for more than one working languages. The adoption of more than one official language may be a substantial burden, but it is a necessary price, which must be paid where otherwise only an imposed single language is likely to disrupt the state.[35] The counterargument is that a single national language encourages inter-ethnic communication and serves both as lingua franca and as a means for promoting national unity.[36]

With the adoption of the 1991 transitional Charter of Ethiopia, a significant departure was made by abandoning the long established assimilation policy. For the first time in the history of the country, the multi-lingual make up of the nation is officially acknowledged thus paved the way for accommodative language policy. The 1995 Federal Constitution attempts to balance the interest of maintaining national unity on the one hand and the ethno-linguistic groups demand for cultural preservation and distinctiveness on the other. It declares Amharic as the working language of the Federal Government but does not spell the official language for communication between the federal government and the states although as a matter of practice, Amharic remains to be so. In this regard, Tsegaye concludes that "Ethiopia's federal government is surprisingly mono-vocal and monolingual."[37]

The present Constitution entitles member states to determine by law their respective working languages.[38] This opens the way for the states to adopt their own official languages. Looking at the practical records of the regional states, three different approaches seem discernible. First, some states have adopted their own majority language as the working language of their

[34]Abera Degefa; Principles Guiding the Choice of Working Languages in Multi-Lingual Societies: Some Reflections on the Language Policy of Ethiopia, in Tsegaye Regassa (ed.) 'Issues of Federalism in Ethiopia: Towards an Inventory', Constitutional Law Series, Vol.2, Addis Ababa University, Faculty of Law, May 2009, pp80-81
[35] Assefa, supra note 3, p221
[36] Abera, supra note 34, p82
[37] Tsegaye Regassa; Issues of Federalism in Ethiopia: Towards an Inventory of Legal Issues, in Tsegaye Regassa (ed.) 'Issues of Federalism in Ethiopia: Towards an Inventory', Ethiopian Constitutional Law Series, Vol. 2, Addis Ababa University, Faculty of Law, May 2009, p14
[38] The FDRE Constitution, supra note 9, Article 5 sub 3.

respective regional administrations. Amhara, Tigray, Oromia, Afar, and Somali fall into this category. Other states which do not have a majority ethnic group (Benishangul-Gumuz, SNNPRS and Gambela) have chosen Amharic as their respective working languages. The third trend is the one adopted by the state of the Harari Regional State, where Harari and Oromiffa have been chosen as official languages. What is particularly interesting in this development is its significance in portraying how sub-regional political actors may opt to deal with the language issue under the general constitutional framework.

The policy choice taken by the federal constitution is not however without challenge in political and public discourse. Some contend that it would have been appropriate if multilingual policy at federal level so that the dominant languages serve as equal working languages.[39] Others argue that Amharic should have been considered as the national language of Ethiopia.[40] While the former observation seems to be correct in light of other multicultural federations like Switzerland with seven million people and well-developed economy, in the Ethiopian context, it should be seen against the background of over eighty million people and poor economy. The latter view simply closes its eyes to the fact that accommodation of diversity is an equally important value in federations. In fact, the choice of Amharic as a working language of the federal government is not without implication. Among other things, it will create a problem on equal access to federal institutions (federal public service, the judiciary, legislature etc) for those who cannot speak the language.

Tsegaye has rightly pointed out the consequence saying "note that to say that the working language of the federal government is Amharic means that its organs and officials in their day-to-day routine activities, in their dealing with their citizens, in their communications with the states, even in their dealings with other actors in the international community, they use Amharic."[41] However, one might wonder if multi-linguality/multi-vocaltiy of the federal government is equally desirable, just, feasible, and affordable in the real context of Ethiopia.

[39] Tsegaye Regassa, Ethnic Federalism and the Right to Self-determination as a Constitutional Legal Solution to Problems of Multi-Ethnic Societies, the Case of Ethiopia: University of Amsterdam (2001), p63

[40]Minassie Haile; 'The New Ethiopian Constitution: Its Impact up on Unity, Human Rights and Development, Suffolk Transnational Law Review, 1996, p11

[41] Tsegaye, supra note 37, p14

Note however, that the language policy in Ethiopia is said to be sufferer from other practice problems whereby some peoples, despite they have common belief as to membership of a particular nationality group, they are denied to exercise the rights being exercised by ethnic groups for whom they claim to belong because they cannot speak the language of that ethnic group. A good example of this tendency are the Kambata who returned to the Kambata weredas of Kambata Alaba-Tembaro (KAT) zone after 1991 but supposed to migrate to the areas designated for their mother tongue in Amhara region mainly in Gojjam because they failed to speak the local languages.[42] This seems because of the fact that an overwhelming importance is given to language in state reconfiguration. But in this respect it needs policy formulation regarding to language in away to harmonize the use of several languages, and facilitating a more equal Ethiopian state, not to create inter linguistic competition and to consider language as a single marker of ethnicity or identity.

### 4.5. Distinct Features of the Federal System

#### 4.5.1. Explicit Recognition of Nations/Nationalities as Building Bricks of the Federation and its Implications

One of the unique features of the federation is that it assigns sovereignty to the ethno linguistic groups (Nations Nationalities and Peoples of Ethiopia) retaining their sovereign right to exit from the federation via the secession clause. The constitution in its many provisions reveals the utmost importance attached to the right of Nations Nationalities and Peoples of Ethiopia. The constitution's special concern on the nationality groups starts in its preamble which says "We the Nations, Nationalities, and Peoples of Ethiopia". The Constitution under article 8(1) states that "all sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia". It further assures that even the Constitution itself is "an expression of their sovereignty" (Article 8 sub 2) and their sovereignty is expressed through their democratically elected representatives (Article 8 sub3). The same Constitution grants the nations, nationalities and peoples the right to self-determination (Article 39). Therefore, in the Ethiopian federal system, sovereignty lies with the constituent ethnic groups themselves.

[42] Cohen, supra note 31, p173

The explicit recognition of the Nations Nationalities and Peoples in the constitution is not without implication. One of the consequences is that Nations Nationalities and peoples are entitled to establish their own administrative level including the right to establish a regional state (Article 47 sub 2). This is further confirmed if one looks at the organization of the constituent states on "the basis of settlement patterns, language, identity and consent of the people concerned."[43] While this provision does not in so many words state that they are organized along ethnic lines, most analysts and practice so far make it clear that the key factor in delineating the states seems to have focused mainly on the criteria of language. By doing so, the constitution tries to grant every Nation, Nationalities and Peoples their own "mother" states though all Nation, nationalities and Peoples do not practically established so. Theoretically, however, every nation/nationality can have its own state and hence we can imagine no less than eighty states.

Accordingly, the Constitution enumerates nine member states of the federation (Article 47 sub 1). It is important to point out that seven out of the nine constituent states (the only exceptions being the SNNPRS and Gambela) are named after the major nationalities that "dominate" the respective states. Addis Ababa and Dire Dawa are specially administered autonomous city-states directly accountable to the federal government and do not fall within the territory of any of the constituent states. Their position is, therefore, less autonomous compared to the constituent states.[44] It is also important to note that the fact the number of constituent states is not limited makes nations, nationalities and peoples that do not establish their own state so far will have a right to establish same in the future.

Another important implication and consequence is that if the federal government abuses the rights of the various ethnic groups, they are entitled to reassert their powers of sovereignty in the form of "an unconditional right to self determination, including the right to secession" (Article 39). Consent of each nation, nationality, and people, therefore, lies at the heart of the Ethiopian federal system.

In a nutshell, many multicultural federal systems like India and Switzerland provide one way or another recognition and accommodation to groups. But the most striking feature of the Ethiopian federal system, from many others, is the "explicitness, at constitutional level, of its affirmation of

[43] The FDRE constitution, Supra note 9, Article 46(2)
[44] Assefa supra note 1,

the national self-determination, the logical consistency with which it attempts to institutionalize that principle, and ultimately guaranteed the right to walk away from the federal pact after passing through strict constitutional procedure.

### 4.5.2. Unicameral Legislature and Adjudication of Disputes

As discussed in the preceding chapter, almost all federations have a bicameral legislative house in which the second chamber, if not the same in all federation, is entrusted with some degree of legislative power that may influence central law making process. It is true that the extent and scope of the powers entrusted to second chambers varies from federation to federation. However, it is evident from federal practice that second chambers have some power to say in the law making process at federal level particularly if the matter has something to do on the interest of constituent unit. The reality in the Ethiopian federation seems to be in contrast with the established norm of bicameralism. The fact that Article 53 of the constitution maintains that there are two federal houses suggests that Ethiopia is a federation with bicameral parliament. However, given the fact that the HoF has little, if any, legislative power, it would have perhaps helped better to resolve the issue that the federation is with a unicameral legislature.

Another special feature of the Ethiopian federation is that the power to interpret the constitution in general and adjudicate dispute over the division of powers is vested to the HoF. The question of why it is granted this extra-ordinary power of serving as the guardian of the constitution is always debated in Ethiopia. The answer the framers would give is that because the owners of the constitution are 'nations, nationalities, and peoples, it is only the institution that represents them that can best preserve and conserve the constitution in their interest.[45] Notwithstanding the cogency and clarity of the reasons, one may still question the wisdom of this decision considering the technical-legal nature of the interpretive task and the problem of varying representation of the diverse ethno-national groups in the house.

There is also a question of legitimacy as to the neutrality of the house to discharge its interpretive power. Given the fact that the house is politically affiliated, it may result in to susceptibility of political manipulation of the constitution as interpreted by it. On top of this, considering the fact that the house is dependent on the HoPR for its budget and the HoPR is the ultimate legislative,

[45] Tsegaye, supra note 37, p47

financial, and political power in the federation (arts 50(3), 55(1), and 56), it is understandable that the house apparently is open to manipulation and that the house will not easily control the HoPR and uphold the supremacy of the constitution. In this regard, Assefa argued that the House as a political body may be legitimate in adjudicating issues of constitutional interpretation involving the several federal institutions or in umpiring federal disputes between both orders of government, but it is doubtful if the House is to be an effective one for instance in the cases involving enforcement of fundamental rights and freedoms as well as other issues of less political significance.[46] One may still wonder as to the power of the house (its actual capacity) to force parties to comply with its decisions over constitutional disputes. What can it do to force the execution of its judgments?

There is also extra-constitutional factor that one may invoke to question the competence and appropriateness of entrusting the extra-ordinary constitutional interpretation and adjudication power to the HoF. That is to say, practically, members of the House are at the same time active members within the regional government and meets infrequently (often only twice annually)[47] accompanied by the fact that the work in the Council of Constitutional Inquiry (CCI)[48] is taken as part-time work of members who are full-time employees elsewhere with other responsibilities clearly raises doubt about its institutional competence as a regular federal body.

### 4.5.3. Viable Federal Units?

This is another peculiar feature of the federation and is the consequence of an explicit recognition of the nations, nationalities, and peoples of Ethiopia as a building bricks of the federal system. In many other multicultural federations, the federal outcome arose in response to a particular sort of problem, namely the problem of competing nationalisms within a single state. It evolved out of piecemeal democratic negotiation and in response to particular nationally mobilized groups,[49] thus autonomy and self determination rights are recognized as a result of

[46] Assefa, Supra note 3, 190
[47] Consolidation of the House of the Federation and the Definition of its Powers and Responsibilities Proclamation, Proclamation No. 251/2001, 7th, Year No. 41, Addis Ababa, 6th July. 2001. Under Art.46 (1), the proclamation provides that the house shall convene its meeting at least twice annually.
[48] The Council of Constitutional Inquiry (CCI) is established by Proclamation No. 250/2001 and based on Art.82 and 83 of the federal constitution to give professional support to the House of the Federation.
[49] Assefa, Supra note 3, p226

such negotiations. In Ethiopia however, the way autonomy and self determination both at regional and below is given to different groups under a different historical set up.

It is true that the decision to create the federation came from the victorious national liberation movements under a circumstance where the military and security apparatus of the unitary state was practically abolished. The Ethiopian approach is therefore, as Assefa pointed out, "revolutionary in its straightforward grant of self-determination and self-rule to all nations and nationalities".[50] The FDRE constitution therefore envisages autonomy to nationalities both at regional and local level not only for those who had been mobilized and struggle for it but also for those who had not yet expressed a democratic desire for it. This is further confirmed by Kymilika stating,

> "*The government is trying to persuade these groups that they shall identify themselves as 'nations' or 'peoples', with right of self-determination, (rather than say as branches of larger group, or loose confederation of clans, or as communal contenders, or as trans border pastoralists.*"[51]

Certainly, there were dozens of ethno-nationalist movements claiming some form of regional autonomy and even at times secession. However, it is also true that not all groups within the Ethiopian state were mobilized and if mobilized, they were not necessarily mobilized on a nationalist basis. The point is that federal autonomy has been accorded including groups that had not in fact been politically mobilized.

The generous grant of autonomy by the constitution to different nationality groups to establish their own state is not without implications. Because the groups have not mobilized for it and because some of them failed to articulate regional interests as political entities, not as anthropological units, some of the constituent units have not yet been able to evolve into viable entities as expected, even after two decades of federal experience. Assefa mentioned that there are many contributory factors to their crisis.[52] The first factor is that there was a historic marginalization of political power, resources and infrastructures to some of the regional states.

[50] Id, p227
[51] Will Kymlicka; Emerging Western Model of Multi-national Federalism: Are they Relevant for Africa, in David Turton (ed.), 'Ethnic Federalism the Ethiopian Experience in Comparative Perspective' 2006, p 48
[52] Assefa, supra note 3, p229

From the inception, most of the constituent states lacked skilled manpower and resources to man the newly established local institutions. There were only a few hundred experts, for example, in Afar, Somali, Gambela and Benishangul-Gumuz regional states in 1995/1996 and the situation remained the same until the Ethiopian Civil Service College took the responsibility of training civil servants for these regions with a view to breaking the historic marginalization from political power and resources.

Historic marginalization also meant that there was little or no infrastructure in the less integrated regions, making self-rule difficult. Less integration in historic Ethiopia also implies that the inhabitants of low land regional states, in relative terms, being mostly pastoralists lacked the tradition of indigenous settled administration and a disciplined ruling party capable of articulating regional interest. Thus there is lack of not only disciplined and institutionalized local parties but the local politics operates under a socially fragmented and sectarian political elite.

It is these and other factors facilitated governmental and party interference from the center. The low level of political development in these regions means that the ruling party plays a greater role in local administration than in other constituent states. Thus close observation of the performance of some of the states suggests that they have not yet been able to articulate distinct regional interests, a viable political unit that can compete with the federal government in intergovernmental relations.

For the above mentioned reasons, the federal government is applying asymmetrical federal practice in relation to states who failed to appear as viable units (Afar, Somali, Gambela, Benshangul Gumuiz) by Providing assistance and coordination and integrate supports of other federal organs under the auspicious of the Ministry of Federal Affairs.[53] This practice seems to be contrary to the federal constitution which states under Article 47(4) that "Member states ...[of the Federation]... shall have equal rights and powers" claiming for symmetrical federal set up. Thus, one may soundly argue that there is *de facto* asymmetry in the Ethiopian federal arrangement and contend the constitutionality of such practice.

[53] Proclamation that Defines the Power and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, Proclamation No.691/2010, Federal Negarit Gazeta, 17th year No.1, 2010, Art.14 (1) f & g

### 4.5.4. Institution of Shared Rule

It is to be recalled that federalism is the balance between shared rule and self rule. To build a successful federation, compromise between shared rule especially in law-making (constitution, legislation and, eventually, executive) processes, and regional self rule (autonomy) including group rights is essential. Federations, should provide at the same time not only constitutionally guaranteed regional self-rule for the federal units and but also shared-rule at the central level, such as by a two chamber system or even in the organization of the executive. When we say shared rule we mean that the federation should be built on the needs to unite diversities through common values shared by the respective ethnicities distinct from values of the particular nations. When we say that federations should keep the balance between self-rule and shared-rule, the various diverse groups can foster their own culture and identity if they have a measure of autonomy, i.e. different communities are able within the overarching federation to enhance their own interests based on their special identities by enjoying at the same time both the advantages of profiting from being members of the superior federation and retaining their cultural identity through the guarantee of autonomy for their cultural development.

All federations are not the same in the weight they attached to shared rule or self-rule. Some federations tend to emphasize the "shared rule" dimension of federalism, rather than "self-rule". But such strategies are more likely to be workable and effective in some contexts rather than others. They may be more successful in societies with a single dominant culture and a broad variety of minorities; more successful in immigrant societies, where new groups have arrived within a homogeneous society that now has to learn to adapt to the new politics of difference; and more successful when the minority groups are dispersed throughout the society, rather than territorially concentrated. However, they will be less successful in circumstances when the minority constituent groups have a long established presence within the larger society; when they are concentrated within a particular geographic area; and when their political identities are strong and politically mobilized.[54]

[54] Richard Simeon; Managing Conflicts of Diversity, , in Ronald L. Watts and John Kincaid (eds.) 'Building on and Accommodating Diversities', 4th International Conference on Federalism, 'Unity in Diversity: Learning from Each Other', Volume one, New Delhi 5- 7 November 2007, p63

A federation (especially with heterogeneous population) that fails to keep the delicate balance between self-rule and shared-rule is likely to be less viable federation; it either reinforce *de facto* unitary operation of the federation or encourage disintegration. If greater weight is given to self rule, it may go contrary to national unity and ultimately may result in disintegration. If it gives much weight to unity, it may end up to be not a real federation since it may oppress regional peculiarities and autonomy. The required degree of balance between the two has always been subject to debate but their importance is beyond doubt.

Thus, to ensure unity, successful operation of shared rule is important. A successful application of shared rule in a federation can be realized when regional interests are represented at central decision/lawmaking powers. This is particularly true when there are diversity and minority groups in the federation. The accommodation of regional interests at central level can be manifested through different mechanisms, including representation at federal institutions (legislature, executive and judiciary), military, civil service, and accommodative electoral systems.

When one looks the issue in the Ethiopian federation, there is diversity of ideas. It is true that the constitution has taken the right to self-rule seriously. Looking at the preamble, Art.8 (which provides that nations, nationalities and peoples are sovereign power holders), Art.39 (1) (which gives nations, nationalities and peoples the right to self-determination up to secession), Art. 46 (2) (delimitation of states) and Art.47 (nomenclature of states after the name of dominant ethnic groups), the constitutions commitment to self rule is beyond doubt. Accordingly, some argue that the federal arrangement by territorializing the state concretizes self-rule and as a result "fragments" the state.[55] On the other hand, the constitution provides for mechanisms through which regional interests is accommodated at central level. For instance, the constitution provides for equitable representation of nations, nationalities and peoples at federal government (art.39 sub3).

However, there is contention that the federal system did little to integrate what it "fragments." Assefa in this regard argues that problems related to proportional representation in election and federal institutions practically make the shared rule less important than the self-rule.[56] He adds

[55] Assefa, Supra note 3, p230
[56] Id, pp230-231

that even the representation right at central institutions as provided under Art.39 (3) of the constitution is practically applicable to executive power sharing and not legislative power sharing. This may be attributable to the fact that the HoF as a federal second chamber is devoid of significant law making power at federal level. Similar reason applies to fiscal transfers. In both cases the role of the smaller nationalities is becoming less significant and the HoF that is supposed to be their guardian is evolving along the interests of the more populous states and nationalities.

The fact that its composition is more or less similar to the lower house may create a problem in the decision-making process. The most populated states may push the House to increase the weight of population size in the allocation of shared revenues and grants. The less populated states may become the losers and it seems it is hardly possible to reverse this trend.[57] Generally, the absence of clear and effective mechanisms through which regional interests are represented at central level may be mentioned as one distinct feature of the Ethiopian federation.

### 4.6.Some of the Contending Views on the Federal System

#### i. Why ethnicity the primary basis?

Since its inception, the Ethiopian federal structure has entertained many contending views. Majority of the arguments deal with what type of federal system should be adopted and the issue of whether federalism should be chosen as a system of government has attracted little attention. Considering the previous persistent and perennial conflicts and war that the nation witnessed during the unitary regimes, the choice of federal system of government was accepted by majority of the then actors. Thus, the issue was whether the federal system should be structured after the territorial principle or mainly based on ethno-linguistic considerations. In this connection, the framers of the constitution advocated for a federal arrangement which takes ethnicity as its primary basis while the opponents, though accepting the choice of federalism, opt for a territorial type of federalism.

As most argue, perhaps because the dominant political actors existed post 1991 were mainly ethnic-based political parties and/or due to the political terrain of Ethiopian history is riddled

[57] Ibid

with ethnic conflict, the need for decentralization takes ethno linguistic line.[58] Such justification was re-affirmed by the transition president, Meles Zenawi:

> *The key cause of the war all over the country was the issue of nationalities. Any solution that did not address them did not address the issue of peace and war. (…) people were fighting for the right to use their language, to use their culture, to administer themselves. So without guaranteeing these rights it was not possible to stop the war, or prevent another one coming up.*[17]

In support of the above paragraph, the proponents of the ethnic based federalism, mainly the EPRDF, justifies the federation since the transitional period by invoking many reasons. Accordingly, the first rationale to choose the present federalism is the common desire to institute self-government and self-determination as the critical demand of the various nation, nationality and peoples of Ethiopia. Second, which is the major factor to the overwhelming operation and enthusiastic acceptance of the federalism in Ethiopia is the negative historical legacies of inequality and ethnic repression under unitary monarchy and unitary dictatorship.

Besides the arguments in support of Ethnic criteria in Ethiopian federalism, the various oppositions of the federation that has been contended against the chosen federal type since the transitional period. Most political parties accept the adoption of federalism but strongly oppose the concept of ethnicity in the federation. All the major political parties like the Oromo National Congress (ONC), Council of Alternative Forces for Peace and Democracy /Southern Ethiopia People's Democratic coalition (CAFPDE/SEPDC) and the Ethiopian Democratic Party (EDP) accepts Federalism but oppose the restructuring along ethnic line.[59] Beyene Petros, Chairman of CAFPDE/SEPDC assert his party's difference with the ruling party's proposition by saying the following statements.

> *Our difference with the ruling party is on the criteria they use for defining the regions. Ethnicity and linguistics is not applicable for the major parts of Ethiopia, may be only for Tigray, Afar and Somali. Even for these regions the population is not homogeneous … there is a wide spread population movement in the country and in the Amhara region there is a*

[58] Aalen Lovise, Ethnic Federalism in a Dominant Party State: the Ethiopian Experience 1991-2000 (Bergen: Chr. Michelsea, Institut Development Studies and Human Rights, 2002, p 40
[59] Id, p43

> *large area with Oromo's. In southern region there are around 45 different ethnic groups. To make a region for each of these is economically not viable. In all regions the urban areas have a large group of Amhara. They cannot be simply discounted.*[60]

The argument by the opponents is too strong and plausible. Owing to the cost of federalism, and the economic non viability of Ethiopia, the success of the existing federalism will not be easily achievable. Let alone at regional level, the application of the existing federal system at local level is hardly easy and economically very costly. Such was the case in SNNPRS where issues of local-self-determination arose in Semein Omo (North Omo) mainly to get better budget allocation and other resource competition from the federal and regional governments.[61]

However, it seems that there is a blind judgment by many people and scholars that the Ethiopian federation is purely ethnic based. In fact it is undeniable the federation is established predominantly along ethnic line. But it is hardly possible for one to get purely homogeneous regional state in Ethiopia. The least heterogeneous regions are Afar and Somali while the least homogenous state is the SNNPRS which constitutes with its 45 to 50 ethnic groups. Particularly, taken the application of federalism at SNNPRS, it will not be sound to conclude that federalism in Ethiopia is purely ethnic based.

The fact that majority of the regional states are named after the dominant ethnic group/s) and grant the same a mother state has not brought about homogenous regional states in Ethiopia. Thus, the Ethiopian federalism seriously applies a territorial principle especially in those states which has heterogeneous society like SNNRP. This is because the grant of mother state for nationalities as provided under Art 47(2) of the FDRE constitution, which is one expression of self-determination can best be achieved through the creation of states whose borders concedes with the nations/ nationalities. But this is far beyond absolute application in the federation.

### ii. Other Contending Views of the Federation

The diverse opinion as discussed in the preceding topics in relation to ethnicity as a primary basis has brought about other diverged suggestions and arguments both locally and externally

[60] Id, p44
[61] Sarah Vaughan, Response to Ethnic Federalism in Ethiopia's Southern Region; in David Turton (ed.), 'Ethnic Federalism; The Ethiopian Experience in Comparative Perspective', 2006, p201

about the viability of the Ethiopian federation. The restructuring the federal system mainly along ethnic line called for a perennial contradiction among scholars and politicians as to the future of the federation. The controversy whether the present federalism is viable to accommodate diversity as promised in the preamble of the constitution creates a degree of pessimism and optimism about the future of Ethiopian federation.

The opponents' argument revolves around the conclusion that the Ethiopian federation continues to be fragile and will be no longer exist. Especially the pan-Ethiopianists go to the extent of saying the ethnic federalism as 'tribal' and ignore the issue of ethnic politics at all.[62] They propose different justification for their skeptics on the future of the federation. Some of the justifications are the following.

Their contention is that the grant of referendum in relation to self-determination and secession for regional states and at local level coupled by the fact that the decision making procedure in the unicameral federal legislature is based on majority fashion could lead to the termination of Ethiopian federal existence. This is because the procedure of majority may lead the two lager ethnic groups (Oromo and Amhara) if they wish so can adopt any decision of their choice.[31]

Another argument by the skeptics is that the constitutional emphasis given to 'ownership' of land by ethnic groups and the designation of some of the regional states of the federation as a 'mother state' of their respective specific ethnic groups has encouraged groups, especially in states where there is no purely dominant ethnic group, to claim their own state, even they do not constitute a majority of its members. Regarding this, some writers make reference to the Gambella crisis where the Anywaa (Anuak) claim to control territorially-based political power by declaring that the land, Gambella, belong to them despite the fact that the majority are Nuers.[63]

The critique further contention on the viability of the Ethiopian federalism is made by making cross-reference to the crisis and disintegration happened in communist federations, like Yugoslavia which were structured based on ethnicity. Accordingly, they contend that the former federations of USSR and Communist Federation of Yugoslavia came to an end because of

[62]Tsegaye, supra note 39, p119
[63]Dereje Feyissa; The Experience of Gambella Regional State, in David Turton (ed.), 'Ethnic Federalism The Ethiopian Experience in Comparative Perspective', 2006, p223

mainly the states were restructured ethnically.[64] There is also an argument for the existing federal system that the creation of ethnically divided regional states for the purpose of establishing federal system of government creates ethnic minorities in each regions which are exposed to be permanent minorities without any likely of getting political representation. Minassie Haile (strong pan-Ethiopiansist) argues to this end by stating that, "since minorities with in each region cannot successfully challenge the dominant '*tribe*' for political power, the latter tends to be arrogant in power and may also neglect the welfare of the minorities."[65]

Another argument by the opponents says that establishing federalism mainly along ethic line adds a reason for political parties to form along ethnic territorial units. According to this argument, ethnic federalism creates ethnic minorities in each regional state which may permanently hinder them from holding political power and encourage the undemocratic majoriterian fashion.[66] Moreover, such type of federation encourages the establishment of ethnic based political parties which may not be good for national unity because such parties are likely to begin to advocate the exclusive concern of the ethnic groups they represent regardless of the consequence up on national unity and this happens more when the culture of the parties is adversarial rather than accommodative. To show the consequence when ethnically delimited regional states are ruled by ethnically based political parties, one author confesses in the following manner;

> **…** *it enables the parties in control of the regional government to use institutionalized force to champion at both regional and federal levels, the interest of the tribes which they represented. The effect of this at federal level is particularly unfortunate. It causes the federal government to be regarded as a single huge cake, already baked, of which it is the duty of each tribal party to secure for its tribe as large a share as possible… The resulting consequence will be one of continuing intertribal enemity and hostility.*[67]

Furthermore, the opponents argue that the ethnic based federalism and the local level 'ethnic zonation', as being practiced in SNNPRS, is easy to be manipulated by local elites and political

[64] Assefa Fiseha; Theory Versus Practice in Implementation of Ethiopians Ethnic Federalism, in David Turton (ed.), 'Ethnic Federalism; The Ethiopian Experience in Comparative Perspective', 2006, p133
[65] Minassie, supra note 40
[66] Ibid
[67] Ibid

parties and may have a consequence of ethnic conflict. They mentioned a case where the Walayta ethnic groups mobilized enthusiastically to establish their own zone from the former Semien Omo Zone (constituted of Walayta, Gammo, Gofa, and Dawro ethnic groups) so that they will be benefited from budget and federal expenditure in the guise of ethnic question of self-determination.[68]

Finally, the fact that all regions are not established on the basis of officially professed ethno linguistic criteria creates a problem of boundary demarcation which in turn results for inter-ethnic conflict among regions which have claiming over territories and natural resources. This was the case in Harrar, Dire Dawa, and the various Oromo- Somali and Somali- Afar conflicts. Therefore, the federation may face challenges to ensure the accommodation of diversity and resolving ethnic tension. More so, the ethic federalism is argued as it frustrates the country wide free mobility and pursues one's own livelihood.[69]

The foregoing arguments being some of the familiar arguments against the ethnic based federalism in Ethiopia, however, there are still optimistically proposed arguments by proponents of the federal structure of Ethiopia. The more optimistic arguments in favour of federalism in Ethiopia justify the ethnic based federal structure as a solution for the perennial problem of the 'nationality question' in Ethiopian. In response to the arguments given by the critiques, they assert that '*Ethiopia has never been as united and Ethiopia has never been founded on a firmer foundation of peoples' will and self-interest'* thus, they view the existing ethnic tensions as developmental difficulties which will curtail in time.[70]

More optimistically, the advocates of the federal system argue that ethnicity is the only viable alternative not only for Ethiopia but also for other multiethnic states in Africa. More persuasively, D. Turton provides three basic justifications to be analyzed in order to recognize the existing federalism as viable.[71] First, there is no another system applicable to Ethiopia, if it is to have a future of multiethnic or multination state with democratic institutions. Second, considering the level of internal conflicts, military violence and repression by agencies of the

[68] Vaughan, supra note 61, p201
[69] Asnake Kefale and Hussien Jemma: Ethnicity as a Basis of Federalism, in Kassahun Berhanu *et al* (ed.), 'Electoral Politics, Decentralized Governance and Constitutionalism in Ethiopia', 2007, p72
[70] Amanuel Gebru; Ethnic Conflict, Education for Peace and the Ethiopia Federation; A Paper Presented at the Third International Conference on Public Management, Policy and Development, Addis Ababa, June 2001, p8
[71] David Turton; Ethnic Federalism: The Ethiopian Experience in Comparative Perspective, 2006, p28

previous Ethiopian regimes, the restructuring of Ethiopia as an ethnic federation has been an undeniable success. Third, if one measures the success of Ethiopian federalism, not against the record of previous regimes, but *against the essential requirements of a genuinely federal division of powers*, one can only conclude that its main challenges lie ahead of it.

Another argument by the proponets is that a clear recognition of difference is far more constructive than a frightened silence about difference. This argument is made in line with the basic UNESCO recommendation which says that '*understanding and respect for all peoples, their culture, values and ways of life including domestic ethnic cultures is a positive step towards unity*.'[72] Accordingly, recognition of the rights of individual ethnic groups has produced a feeling of Ethiopianness, not a sense of otherness. Furthermore, Young, asserts the viability of the Ethiopian ethnic based federation saying;

> *Ethiopia is implementing a radical programmed of decentralization state power to ethnic based regional units, which could be of interest to other countries in Africa faced with demands of ethnic communities for a greater role in the state. This apparent empowerment of ethnicity represents a complete reversal of the country's past practice consciously adopted, and is the joint product of the legacy of ethnic domination and marginalization in the Ethiopian state and secondly, it is a product of a long course that EPRDF followed in the conduct of revolution struggle and not 'a leap in dark' as some tends to describe it. Though its struggle is against ethnic domination and in the end to liberate nations, nationalities and peoples and confer them the right to self-determination.*[73]

The preceding paragraph tells us so much more about the rationales and justifications behind the Ethiopian federal system. By creating regional governments whose boundaries fit with at least some of the major nationalities, the federal system is being justified as an attempt to serve as a conflict management device since it creates relatively homogenous states. Furthermore, an optimistic argument by T.S. Tewibell asserts that an '*ethnically blind*' Ethiopian constitution could be dangerous as experienced from past history that when constitutions ignore ethnic groups and oppress them at the same time, they failed to succeed and this would be true, owing

[72] Amanuel, Supra note 70
[73] Assefa Fiseha: Federalism and the Accommodation of Diversity in Ethiopia: a Comparative Study (2005), p250

to the history of Amharic domination; ignoring ethnic consideration in the new constitution could make a single ethnic group a dominant one and oppress minority groups.[74]

Nonetheless, neither of the foregoing opponent-proponent arguments provide to us with conclusive prediction of the future of the Ethiopian federation. The success and failure of the federal system depends on many incidents. For instance, concluding the existing federal system of Ethiopia fearfully as a ready bomb waiting to explode in near future cannot be logical. Nor does the critics of the federation as vulnerable to disintegration by making reference to the communist federations is persuasive. This is because, first, the country is experienced a two decade of federalism with relative peace and development. And second, the communists, in particular Yugoslavia, did not collapse because they were ethnic based federations but because they were not genuinely federal states where there was a deep centralism under a hegemonic control of a single communist party.[50] To this end Istavan Bibo thoughtfully asserts;

> *In polarizing state of fear which asserts that freedom's progress endangers the interests of a national, one cannot take full advantages of the benefits offered by democracy. Being a democrat means, primarily not to be afraid: no to be afraid of those who have different opinions, speak different languages, or being to other races. The countries of Central and Eastern Europe were not fully developed democracies, and they could not become fully developed mature democracies because they were afraid.*[75]

It is, therefore, based on the above assertion that Getachew stresses an ethnic federal arrangement properly negotiated among all concerned ethnically conscious groups in the country and properly administered, and that takes care of the rights of individuals and minorities is a better solution to inter-ethnic conflict and a better system of governance that fosters democracy than any other possible alternatives.[76]

However, it should be noted that when the federal system tries to protect the nationalities on the other hand it may create a problem for minority ethnic groups to be under hegemonic control of dominant ethnic groups in most regional states.[53]Therefore, despite there has been a considerable

[74]T .S. Twibell; The Structure of the Ethiopian Government and the New Constitution's Ability to Overcome Ethiopia's Problems; Journal of law, 1999
[75]Getachew Assefa; Ethnic Federalism and Self Determination in Ethiopia: The Legal policy Framework: A panel Discussion on Ethnicity, Identity and the Right to Self-Determination (May 26, 2007), p3
[76] Ibid

implementation problems and increase of inter ethnic tensions in post federalism Ethiopia, the effect of "plural minded political reform" and self-determination cannot be blindly under estimated.[54] In this respect Assefa makes a good remark;

> *There is always a problem of integration in a state with minorities and more so in multicultural federations. Multicultural federation is also attempts to contain the threat of secession but by the mere fact that they are multicultural, they cannot avoid altogether. After all, multicultural federations are potentially (in the worst case scenario) many nation-states in the making. It is not, therefore, endemic to Ethiopia nor is the ruling party to be blamed for institutionalizing it.*[77]

Thus, what one should understand is that all multiethnic federations are at continuous challenge of both the idea to accommodate diversity and the threat of fragmentation. More logically, the nation's peace is a function of the ethnic justice and equality in the constitution and tolerance compiled by genuine federalisms and party pluralism that will also determine the future of the Ethiopia federation. The existence of relative peace in post-federalism Ethiopia is without doubt. But neither the claim of absolute success by the proponents nor blind pessimism will determine the viability of Ethiopian federation; what matters is not whether the restructuring has to be territorial or ethnic based as it is now, but whether the federalism functions genuinely or not.

### 4.7.**Federalism and Secession**

Since long, the issue of secession has sparked mixed emotions and public opinions among scholars and politicians across different jurisdictions including Ethiopia. There is no standard constitutional approach of dealing with the possibility of secession. Federal experience regarding secession is diverse that many federations exclude the possibility of secession while some exceptions allow. For some countries, secession has grown to become a political taboo not to be talked about openly. International law too recognizes the right to secession only in cases of severe abuse of human rights of a population and of decolonization, yet international community is often hostile to secession because it can destabilize, not only the nation concerned, but international relations.[78]

[77] Assefa, supra note 73, p237
[78] George Anderson; Federalism: An Introduction, Oxford University Press, Forum of Federations, 2008, p78

Secession has strong link with the right to self-determination. Self-determination is the legitimating myth for modern nation-states. All questions of statehood are grounded in the tension between two conflicting principles of nationality: territorial integrity and self-determination. Territorial integrity is a functional means of defining existing nations; it ensures order, stability, and finality in relations between states. Self-determination on the other hand responds to social change and to developments in people's identification systems; it is a fundamental ethic of the twentieth century, affirming the right of people to choose and control their own destiny. Resolution of a secessionist claim involves a choice between these competing norms and among the most problematic demands for self-determination will be those for secession.[79]

From international law perspective, the right to self-determination has two dimensions.[80] The first is seen from the decolonization context, then, self-determination may well be regarded as a peremptory right; general principle by which a significant number of states feel bound. In this regard, a series of General Assembly resolutions, proclaiming the legitimacy of the struggle for independence, elevates the right of self-determination over norms of nonviolence. The second perspective is beyond the decolonization context. It is in this dimension that international law has responded marginally to these beliefs in self-determination and the consent of the governed. In fact, the 1966 International Covenants on Human Rights, which entered into effect in 1976, recognize self-determination as a fundamental right underlying the meaningful exercise of all other rights.[81] Article 21 of the Universal Declaration of Human Rights declares the will of the people to be the basis of government. Additionally, the United Nations in its 1970 Declaration of Friendly Relations went so far as to concede a right to exercise self-determination against any non representative government.[82] But rigid adherence to the norm of territorial integrity a historical absolute has precluded the incorporation of an evolving concept of self-determination in the definition of the international community.

[79]Thomson Reuters; The Logic of Secession, Yale Law Journal, March, 1980, p1
[80] Id, p2
[81] See International Covenant on Economic, Social and Cultural Rights, Art. 1 (1) (1966), see also International Covenant on Political and Civil Rights, Art.1(1) (1966)
[82] See Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly Resolution 2625, 1970

There are three theories that are relevant to understand the nature of secession in different contexts as enunciated by scholars in different fields.[83] The first theory is *National Self-determination theory* which provides that nations only have the right to self-determination. Advocates of this theory argue that to deny the right to self determination exists at all requires denying that there are nations. The second theory is *Choice Theory* which ultimately provides that choice by the people suffice to stake a legitimate claim to sovereign independence. The third theory is the *Just-cause or Remedial theory*. This theory advocates secession only in narrow circumstances. The theory provides that an ongoing systematic oppression by a population gives rise to the right to secession.

Proponents of secession argue that self-determination is a concept of group expression and consensual government. Secession is part of a continually changing process of self-definition that reflects the varying rates at which political and economic institutions and group self-perceptions undergo transformation. Secessionist demands encounter the same problems of citizen allegiance, boundary definition, and resource distribution faced by earlier self-determination claims; they only focus the debate between change and stability at a more explicit and heretofore unacceptable level. Just as self-determination challenged traditionally respected claims based on historic, occupative, or contiguous title, future secessionist claims will challenge present territorial boundaries and distributions of authority.[84]

Yet, proponents of secession further argue that secession is not a simple act of fragmentation. It is, rather, a complex, continuing process of regrouping personal allegiances, redefining boundaries and control over resources, and restructuring the participatory mechanisms within and among states. Knowledge that the option of separation exists can provide a group with the sense of equality and potential power needed to persevere in an existing state; for those truly oppressed, the right will provide the only means of effectuating self-determination.[85]

On top of the debates on the justifiability of secession, countries have attempted to cope up with divergent responses to the question of secession. The practical response on the question of

[83] For more on the theories, see Yared Legesse; Secession under the Federal and Sub-National Constitutions of Ethiopia: Navigating the Distance between Text and Structure, in Yonas Birmeta (ed.) 'Some Observations on Sub-National Constitutions in Ethiopia', Ethiopian Constitutional Law Series, Vol. IV, Addis Ababa University, School of Law, January 2011, p97-100
[84] Thomson, supra note 79, p3
[85] Ibid

secession by countries generally falls in either of three possibilities. [86] The first possibility is constitutional silence on the question of secession. Many countries' constitutions choose to be silent on issues of secession such as the United States and Canada. It is important to note however that textual silence of secession does not necessarily mean that secession is totally prohibited. Rather, there are instances whereby a constitution of a country is textually silent on secession while the structure of the constitution may have an implication that secession is impliedly recognized. This is true in the Canadian constitution where in relation to the secession claim of Quebec the Supreme court of Canada has ruled that the Quebec has the unilateral right to secede as supported by the structure of the constitution and other principles (federalism, democracy, constitutionalism, the rule of law, and respect for minorities) enshrined in the Canadian Constitution.

The second possibility is providing clear anti-secessionist clause in a domestic law. Countries which choose such option has taken an upfront position on the issue of secession and hence made sure that secessionist ideas are not entertained by any group. The anti-secession clause can be found either in constitutions or legislations of countries. The 1956 French constitution under Art.89, for instance, has explicitly prohibited any constitutional amendment purporting to threaten the republic nature and "territorial integrity" of France. China is another example whereby, not only its constitution but also by legislation issued subsequently, clearly prohibits the secession of Taiwan.

The last possibility is when countries provide for an explicit constitutional right to secession. Only a few countries have incorporated a constitutional right to secession. Yugoslavia's 1946 communist constitution and the USSR had constitutional arrangements that recognized the right to self-determination and secession [87] yet Ethiopia is one of the countries that have explicitly recognize constitutional right to secession.

The next important question that one may ask after reading the preceding paragraphs is that; is secession compatible with the ideal of federalism? To put it otherwise, can a country with 'secessionary federalism' qualify as a federation? This question is important for our constitutional discourse of the Ethiopian federal system. There are divergent responses to the

[86] Yared, supra note 83, pp104-109
[87] Alem, supra note 22, p6

question raised. Some argue that secession is incompatible with the ideal of federalism. Anderson for instance provides that federations are based on the notion that citizens belong both to the national and to their regional communities and the right to secession poses a dilemma for democratic federalism.[88] Furthermore, Yared argues that the right to secession as incorporated in the Ethiopian constitution goes contrary to federalism since federalism is "an optimal balance between centrifugal and centripetal forces and as such rules out secession and recentralization."[89]

However, there are those who contend that recognition of the constitutional right to secession does not negate the federal feature of a given federation. Federalism divides power between the federal government and local governments in which local units have a right to decide certain issues themselves free from interference by the center. If federal constitution divides power in this way, there is no reason to say that the mere inclusion of right to secession goes contrary to federal ideal.[90]

Despite the above arguments on the compatibility of secession with federalism, many federations have constitutional provisions asserting the eternal unity of the country or precluding the possibility of secession. The United States (the 'indestructible Union" clause), Mexico, Brazil, and Spain are examples in this regard. In other federations, such as Australia, Germany and Switzerland, the constitution is silent on the issue. The Ethiopian constitution is said to be unusual in providing a formal right to secession and remains to be controversial and untested.[91]

The issue of secession has provided one of the most defining bases for political discourse and activity of in Ethiopia and becomes the issue around which parties shape their platforms. Some contend that the secession clause is against the ideal of federalism and national unity since it invites the dismemberment of Ethiopia as a country. Proponents of the secession clause on the other hand argue that the clause is a 'peace' provision that prevented an impending ethno-nationalist conflict and civil war Ethiopia could have plunged into.[92] For the proponents of secession, the federalism and the recognition of secession was a compromise between the urge of

[88] Anderson, supra note 78, p78
[89] Yared, supra note 83, p95
[90] Samuel Assefa; Of Federalism and Secession, in 'Genesis of the Ethiopian Constitution of 1994', Reflections and Recommendations from the Symposium on the Making of the 1994 Ethiopian Constitution, InterAfrica Group, 17-21 May 1993, Addis Ababa, Ethiopia, p231-233
[91] Anderson, supra note 78, p78
[92] Tsegaye, supra note 37, p39

independence of some Ethiopian groups and the urge to remain a centralized unitary state that preserves the unity of the country at any cost. In this view, the secession provision is meant to serve as an instrument of keeping national oppression at bay while also preserving the unity of Ethiopia as a country.

Furthermore, the constitutionalization of the right to ethnic self-determination as the right to secession ("ethics of secession") may be an effective way to discourage secession. Indeed it can enhance stability of the federal order by taking the form of an instrument in constitutional politics to manage intercommunity conflicts, and a strategy to make the common state legitimate for all its community: hence the eternality of constitutional safeguards against unilateral secession.[93] More ironically, some argue that, in the absence of article 39 of the Ethiopian constitution, certain nationalities might have conceivably opted to go it alone as Eritrea did shortly after the 1991 conference adjourned.[94]

In general, the inclusion of such right, it may be contended, is justified by extra federal factors. However, secession or the emergence of an independent state does not necessarily result in the establishment of a stable and democratic state. This is evident not only from the experience of post-independence Eritrea but also from many other of the post-independence African states. Secession or independence simply replicates the nation state without resolving the controversial and normative question of how to politically integrate, share power and resources among several contending forces. It is for this reason that a genuine federal system is often preferred as it gives space for both unity and diversity, short of fragmentation.[95]

### 4.8.Federalism and Conflict Management in Ethiopia

Managing Conflicts in federal system deals with the various ways in which conflict among diverse groups has been moderated in federations. Countries challenged and enriched by diversities will never find "the end of history" of their country. As long as diversities exist, they will foster their identities and their own interests. With the flourishing of their diversities a federation will itself evolve and develop continuously in the design of its polity. One should in principle not seek final solutions. One should rather permanently seek processes, procedures,

[93]Fleiner, supra note 10, pp84-85
[94] Genenew, supra note 184, p48
[95] Assefa, Supra note 3, p240-241

institutions and tools that enable a continuing and peaceful management of any conflicts among controversial diversities.[96]

In order to promote peace among the different groups, federal political systems can provide special tools to facilitate the reduction of overpowering nationalism and emphasize multiple loyalties. Moderating nationalism is made possible by providing autonomy for the different communities on a territorial or a personal basis. The Swiss experience with direct democracy in addition reveals that decision-making through direct democracy in most cases moderates nationalism because often it is the political elites that foster nationalism. Voters are usually less induced by nationalistic feelings, tending to seek more their personal rather than ethnic interests. Party systems which avoid or prohibit parties from uniting along ethnic lines and which include different diversities within individual parties or coalitions are additional tools for reducing the intensity of the regional nationalism.[97]

The usual institutions for conflict management are the judiciary, the legislature, the constitution-making power, and the executive and administrative institutions. These conventional conflict management institutions will only be useful for conflict management, however, if they are able to recognize and respect the vital interests of the different diversities and special procedures within the legislature is incorporated for such protection.[98]

There are various good and effective conflict management devices even while there are no universally applicable best practices. In history and now, there is no constitutional model that can claim to be successful under all circumstance. The attempt by multi-ethnic states in solving ethnic conflicts in a non-violent manner is rather poor.[99] Nonetheless, some scholars suggest that cultural and political authority, decentralization, promotion of language, recognition and formalization of ethnicity in public life, and providing for legal guarantee of inter-ethnic equality, positive discrimination, equal opportunity laws, and inclusive and innovative electoral systems are helpful mechanisms for preventing, managing and resolving ethnic conflicts.[100]

---

[96] Majeed *et al*, supra note 1, p16
[97] Id, p17
[98] Id, pp17-18
[99] Andries Odendaal; Ethnic Conflict and Its Management: a Position Paper, Center for Conflict Resolution, South Africa, 1998, p1
[100] Tsegaye, supra note 39, p1

Though not easily consumable, many solutions for interethnic conflicts are offered by the FDRE constitution. The first, and may be the major solution taken by the constitution to manage conflicts is structural approach there by grants autonomy and decentralization to regional states and the right to self-determination to the various Nations, Nationalities and Peoples of Ethiopia.[7] According to the argument by the framers of the constitution, redrawing states' boundaries along ethnic line is a way to manage ethnic tension in Ethiopia.[101] Thus by granting an overwhelming powers to ethnic groups beginning from its preamble, the FDRE constitution takes respect for inter ethnic equality as a structural package for ethnic conflict management. In general, the management of conflicts under the Ethiopian federal arrangement needs to be seen in light of the following key elements.

**a. Autonomy and Decentralization**

Donald L. Horrowitz provides that the skillful division of authority between regions or states and a center has the potential to reduce conflict.[102] However, there is little more than dogma available about the utility of Federalism. In fact federalism in its initial form (the American and post 2000 Swiss models ) was not designed to regulate conflicts based on ethnicity or other identity differences; it is today conceived as one of the better device to mute conflicts among groups and between the central and sub national communities.[103.]

In Ethiopia, political powers and functions have been devolved by the Federal constitution to the states in general and the lowest levels of administration in particular. The decentralization of power between the federal and regional states involves the division of all the three powers of government, i.e. executive, legislative and judicial powers and the power to adopt their own regional constitution. Despite the grant of autonomies in such areas to states in general and local level governments in particular, the dispersion of power seems to tilt more towards the center.

This is because the federal government pursuant to Art.55 (10) of the constitution is entitled to approve general policies of social and economic development of the country seems to correspond with the directive principles of state policy where it plays a role in the socio-economic policy

[101] Assefa, supra note 3, p247
[102] Donald L. Horrowitz; Ethnic Groups in Conflict, Berkeley, University of California Press (1985), p602
[103] Lovise, Supra note 58, p14

guidance of the states. This power seems to be broad that the federal government may use and exercise it exhaustively thereby limiting states legislative power.

However, the constitution seems to be well framed in granting autonomy in governance especially at local level. The federal constitution has offered nationality groups the right to self-administration at least in zonal or 'woreda' level. Such grant of local autonomy has a paramount importance especially for minority groups to protect themselves from arrogances of majoritarian administration. By doing so, the constitution able to manage and reduce local level ethnic based conflicts. The results are clearly observed in SNNPRS whereby ensuring local level self-rule by making 15 autonomous Zones and 5 special weredas has brought about a relative peace and stability in ethnic relations in the region.[104]

The fact that Art 8 of the Federal constitution ensures that all sovereign powers resides in the nation, nationalities, and peoples of Ethiopia is another trend of realizing autonomy to ethnic groups at any level. At federal level their autonomy is, arguably, secured through equitable representation in the House of Federation which is considered as their guardian, and local level autonomy through administration structures established at district or sub district level.

Another decisive step taken by the federal constitution in decentralizing power and recognition of autonomy is that it makes the Ethiopian federalism as an open door federal political order. The constitution allows nationality groups to exercise autonomy at regional level by establishing their separate regional state. Such measure reduces conflicts between ethnic groups for power competition at federal level by diverting the same to be competition for regional power. Furthermore, the fact that states are responsible for determining local priorities for expenditure of federal grants (budget) which amounts up to 80% and state level budget is another way of exercising autonomy in fiscal financing.[105]

**b. Minority Protection**

The Federal constitution recognizes all nationality groups for proportional representation at the center through various mechanisms especially via the HoF which is the vanguard of the interests of the states and the nationalities (minority) at the federal level against any excess of the federal

[104] Assefa, supra note 3, p136
[105] Ministry of Federal Affairs, Ethiopia; a Family of National and Nationalities (MFA Occasional papers Number 1), 2003, p6

executive.[33] And the constitutional legitimacy of the right for self-rule is also another protection provided for minorities and there by reduces the existences of majority minority tension between ethnic groups. Thus, ensuring minority nationalities to administer their territory is an ultimate measure in protection of minorities. In this respect, therefore, the Ethiopian multi-national federation seems to be a good choice in making minority nationalities to be a majority of the territory they inhabit and administer the same though there are challenges that the federation is faced as discussed in subsequent section.

**c. Prioritizing Disadvantaged States in Developmental Schemes**

The adoption of preferential policies is common in ethnically divided societies though it may vary in scope, formality and explicitness. In many states the primary rationale of these policies is to reduce disparities in all aspects of the states' life; and preferential policies have a paramount significance in reducing conflicts and tensions.

In Ethiopia, because of the existence of historical differences in socio-economic and political development among nationality groups, the ethnic delimitation of the present federal system has inevitably result in large socio economic disparity which is also called '*horizontal imbalance*' between the various regional states. In principle, the federal constitution (Article 47 (4)) entrusted states with equal rights and powers in their relations with the central government. But there is factual asymmetry where certain states (Afar, Somali, Gambela, and Benshangul Gumuz), which were neglected in the previous regimes are conferred with special rights via different mechanisms. These may include funding subsidies and special federal grants through which the states are going to enhance their capacity to administer their respective regions effectively.

There is constitutional provision which provides a preferential policy for less developed regional states in Ethiopia and entrusts a mandate for the HoF to create institutions and device mechanisms for the purpose of determining the respective share of the federal and state governments from their joint tax source and subsidies that the federal government may provide for a state.[106] Further, a general provision of proclamation issued subsequent to the constitution seems to provide a flexible space for the HOF to adopt any mechanism it deems necessary with the purpose of protecting less developed regions and achieving balanced development

[106] The FDRE constitution, Supra note 9, Art.89 (4) cumulative with Art.62 (7)

throughout the country.[107] The special assistance in human resource capacity development of a region may be through preferences in admission to schools and universities could also be one mechanism by which the federal government enhances the capacity of less developed regional states.

The special assistance given by the Ministry of Federal Affairs (MFA) since 2001 to the four less developed states and the pastoralist community of Oromia and SNNPR is also another mechanism employed by the federal government in handling potential inter-ethnic cleavages.[108] Note however that the various differences in policies of the federation in relation to states has its own problem in a number of countries that have made special provisions to enable particular ethnic groups to "*catch up*." Such measures carry a heavy presumption of illegitimacy. Because the acknowledged norm and constitutional dictate remains equal treatment of all states. Provisions that depart from this norm are usually explained as distasteful concessions to the unfortunate in ability of the preferred group to compete on equal terms without preferences. The fact that some of the regions are subject to preferred policies because they are less developed may increase the claim that they are still underdeveloped even if they got out of that stage. Such was the case in India where the formulation of preferential policies in some states for those "back ward classes" increases and encourages the dictate of backwardness even by the wealthy land owning castes.[109]

### d. Party Structure and Electoral Systems

As quoted by A. Lovise, Riker points out that the way in which the party system are organized might reinforce or undermine the federal division of power and If the same party organization controls both federal and regional level of government and has centralized party structure, this might weaken the power of regional governments in a way that undermines regional autonomy. He further provides his argument saying:

> *The constitutional and institutional guarantees to prevent political leaders at the central level of the federation from breaking unilaterally the rules of the federal bargain are ineffectual when political leaders at the center are also control the party system on the*

[107] Consolidation of the House of the Federation proclamation, Supra note 46, Art.35
[108] Organization the executive proclamation , supra note 53, Art.14 (1)
[109] L. Horrowitz, supra note 102, p657

> *constituent level because, then there will be no opposition against the change. Thus, the degree of unity between the constituent and central government is closely linked to changes in federal relationship.*[110]

In Ethiopia, the constitution has come up with multi-party federal structure.[56] The constitution formally recognizes the establishment of regional or national parties so that compromises the diverse political interests of all the nationality groups. Ethiopia is today ruled by EPRDF, which is the coalition of the four regionally based ethnic parties namely: the OPDO, ANDM, SEPDF, and TPLF. This appears to be a party structure which enhances a federal division of power, because the central government is to be run by an organization with the regional, rather than central bases of power. This has to be because if federalism is to be a device for integration and accommodation, then it needs to be supported by integrative party system which includes both the existence of at least some parties able to attain cross-regional and national support as well as linkages between the party systems that exist at central and regional level.

Electoral systems are also important for federal systems in managing conflicts mainly because of the extent to which they can distort or exaggerate regional and linguistic differences or create incentives for exclusionary rather than inclusive electoral strategies. That is to say, most politician, especially those established their parties a long ethnic line have a crucial interest in the choice of electoral system and strive to institutionalize the system in favor of their respective exclusive interest because it is that system which determines their representation in the politics of a state. Besides their importance in taming ethnic conflicts, electoral systems on their own, however, are not adequate for this purpose unless they are linked to democratic values and a political system based on regularly conducted peaceful competitive politics.[111]

Which one of the various electoral systems is effective and efficient in accommodating diversity and reconciling different interests of a community has demanded an in depth academic and political debates. Neither the classical models (i.e. the majoritarian system and the proportional representation system) nor the consociationalism fulfils all of the requirements. For instance, the demand for increasing the degree of participation within an electoral system which answers fair

[110] Lovise, Supra note 58, p21
[111] Bojam Todosijevic; Macro-political means of Ethnic Conflict Management in South East Europe; A Critical Examination, p82

representation inevitably leads to a more complicated electoral system which is at odd with the principle of simplicity. Or the need to ensure adequate and fair representation system which is mainly achieved through proportional representation system will inevitably undermine the requirement to form an effective parliament based on a reduced number of parties via concentration principle which is also best achieved by majoritarian system.

Yet, Consociationalism, gives primary emphasis to minority veto (i.e. the ability of minority to veto policy), and rule by grand coalition (i.e. representation of all the relevant segments). And such system is effective for relatively small society with relatively small number of communities in cleavage, and with political elites whose political culture is accommodative rather than adversarial.Therefore, stressing in a single electoral system may not be successful in managing ethnic diversity. In this respect, the New Zealand Royal commission puts that "*the best voting system for any country will not be one which meets any of the criteria completely, but will be one which provides the most satisfactory overall balance between them, taking in to account of the country's history and current circumstances."*[112]

When one looks the case in Ethiopia, the majoritarian rule is purely adopted by the constitution.[113] However, there is no consensus between the government and opposition parties. Where the incumbent government (EPRDF) prefers the majoritarian system, other political parties choose proportional representation since the latter allows smaller parties to form parliamentary representation and the prospect that more than one party will win promotes coalition behaviour.[80] It is therefore for the reasons discussed so far that party structure and electoral systems have come to the forefront of policy proposals in connection with managing ethnic diversity and allocation of political power by political parties.

### e. Establishing Institutions and Mechanisms of Conflict Management

In countries especially with diverse society, conflict is inevitable. The conflicts may take different forms such as ethnic, religious, cultural and other identity based conflicts. The FDRE constitution has not yet come up with explicit provision empowering a particular organ to deal with issues of ethnic conflict management. Nor does it provide for procedures and mechanisms

[112] Voting in 1999; Choosing an Electoral System, Pretoria University Press, South Africa, 2000, p16
[113] The Amended Electoral Law of Ethiopia, Proclamation No. 532/2007, Federal Negarit Gazeta, 13th Year No. 54 , Addis Ababa, 25th June 2007, Art.25

of conflict management. Rather what the constitution does is entrusting the HoF to find solutions to any kind of misunderstandings between states, between state and federal government and on issues of self-determination. Apart from the HoF, one may only get the Ministry of Federal Affairs which is established by legislation. This organ is entrusted, among other things, with the responsibility to facilitate the resolution of misunderstandings arising between regional states and, up on the request of regional states, device and implement sustainable political solution for misunderstandings and conflicts that may arise within regional states.[114]

Generally, despite the federal system through the legislative act empowers the HoF to study the traditional as well as modern ways of conflict prevention and resolving mechanisms and to institutionalize them,[115] there is no such satisfactory step taken by the House so far.

### 4.9. Federalism and the Protection of Minorities in Ethiopia

Internal minorities are the common feature of multi-ethnic federations. English-speakers in Quebec (Canada), Spanish-speakers in Catalonia (Spain) and French-speakers in Flanders (Belgium) are some of the prominent examples of internal minorities in the literature of multi-ethnic federations. The impractical reality of creating an ethnically or linguistically homogenous sub-national unit has made the accommodation of internal minorities an essential part of the efforts to build a successful federation.

The treatment of internal minorities is one of the tensions that characterizes the oldest federation in Africa. This is mostly about the treatment of individuals that are not regarded as indigenous to the state in which they reside. Internal migrants in Nigeria are often subjected to discriminatory policies and laws. The federation has experienced tension and even serious communal violence over attempts by indigenes to exclude large, but ostensibly non-indigenous, resident communities from economic and political opportunities controlled by state and local governments.[116] The multi-ethnic federation of Canada has also been grappling with the problem of internal minorities. This largely pertains to the treatment of English speakers in the French-speaking province of Quebec. The Charter of the French Language in Quebec sought to promote

[114] Organization of the Executive Proclamation, supra note 53, Art.14
[115] Consolidation of the House of Federation Proclamation, Supra note 46, Art.33
[116] Yonatan Tesfaye and Christophe Van der Beken; Ethnic federalism and internal minorities: the legal protection of internal minorities in Ethiopia, frican Journal of International and Comparative Law, 2013,pp1-2

the use of French and at the same time restrict the use of English. It obliges both immigrants and Canadians moving to Quebec to send their children to a French school and mandated the display of commercial signs in French only. Although part of this legislation was eventually abrogated by the Supreme Court of Canada, it vividly illustrates the majority-minority tension that characterizes Canada and other multi-ethnic federations.[117]

Different mechanisms are recommended to accommodate and protect minorities in federal systems of which granting autonomy is one. Autonomy can take the form of "territorial" or "non-territorial" solutions, or of a combination of both. Institutions can be set up at the central, regional or local level. In other words, it is not only at the national or central level that adaptations have to be made, but also, in some cases, within constitutive units.[118] Asymmetrical solutions may also offer appropriate responses to the heterogeneity of diversities found in a particular polity.

While territorial solutions offer an effective mechanism for accommodating diversity for geographically concentrated minorities, they also raise a number of concerns. Of which the following three are important.[119] First, in highly diverse societies, a significant degree of cultural homogeneity within constitutive units will rarely be attainable, short of an ever increasing number of very small units. In many cases, and notably in major cities, the intermingling of divers groups is simply unavoidable. Nigeria has moved from 3 to 36 units, in an attempt to appease tensions between its 250 or so ethnic groups. This appeasement has only been partially successful. The Nigerian example invites us to reflect on the risk of extreme fragmentation that can come with constant restructuring.

Second, fear is sometimes expressed that territorial solutions may foster secessionist tendencies. Empirically, such occurrences are rare. An appropriate federal structure and spirit are not absolute antidotes against secession. However, they may be the most effective means of limiting the risk that it occurs, while also reducing the threat of oppression of the group which seeks this ultimate form of autonomy. Third, recent history has shown the devastating effect of some searches for autonomy based on cultural homogeneity. Ethnic cleansing or major involuntary

[117] Ibid
[118] Poirier, supra note 8, p43
[119] Id, pp44-45

displacement is a particularly perverse way of generating conditions for a diverse group to be geographically concentrated in a particular territory.

A side effect of territorial federalism is that even with a careful drawing of borders, a constitutive unit will rarely contain an entirely homogeneous population. And even if substantial homogeneity could be attained, it may not resist the test of time. People move and diversity has a tendency to erupt at every level of most societies. In other words, there are likely to be minorities within the minority-transformed-into-a-majority at the level of a federated entity.[120]

When territorial autonomy is not a viable option in a particular state, it may be adequate to provide for a form of "personal or cultural autonomy" which is "de-territorialized" also called non-territorial autonomy. This will notably, but not exclusively, occurs when a group linked on the basis of some "personal characteristic" (e.g. religion, language, ethnicity, etc.) is geographically dispersed.[121] For instance, a number of federal (India being one) and non-federal countries recognize the right of religious communities to be governed by their "personal law" particularly with regards to family matters, regardless of where they live. Such laws are not necessarily determined by democratic institutions, although, in theory, they could be. Additionally, For instance, non-territorialized "cultural councils" have been instituted in Estonia, Slovenia or Romania, in favour of certain historical minorities. With some variations, these institutions exercise a degree of control over education or certain social services. Some of these councils can levy taxes. They are either elected or nominated by their constituency.[122]

In Ethiopia the issue of minority rights has been a center of attention in the federal experience. The issue becomes more patent in relation to the treatment of minorities by regional states. From the two decades of federal experience, one major challenge the Ethiopian federal system is facing relates to the issue of local tyranny at constituent unit level. The issue of who are minorities is still confusing since the constitution or other legislations do not provide the standard (numerically or otherwise). Although the internal structure of the federation, by and large, follows an ethnic line, ethnic minorities are found in the midst of most, if not all, regionally empowered ethnic groups (especially groups after whose name the regional state is

[120] Poirier, supra note 8, p47
[121] Id, p48
[122] Id, p49

named). This has brought to the issues about the majority-minority tension at the level of the sub-national units or regions. The status and treatment of those who do not belong to the empowered regional majority may call for proper consideration by the federation.

It is true that the federal constitution has granted all ethnic groups with individual and group rights. The constitutionally recognized individual rights that are relevant for the protection of persons that belong to indigenous internal minorities include the right to equality and non-discrimination, freedom of movement and freedom to choose one's residence within the Ethiopian territory, and the right to vote and to be elected without any discrimination on any grounds including based on ethnic identity. On the other hand, Article 39 of the constitution provides for important group-specific rights, including the right to self-determination.

To be precise, four components of the right to self-determination can be identified. First, ethnic groups are granted language rights and cultural rights. Article 39(2) provides that every ethnic group 'has the right to speak, write and develop its own language; to express, to develop and to promote its own culture; and to preserve its history'. Second, every ethnic group is given the right to self-government, which includes an important component of the right to territorial self-rule. In addition, Article 47(2) of the federal constitution grants all ethnic groups – except for the six that already have a 'mother' region - the right to establish their own region. Third, every ethnic group has the right to be represented in the regional and federal governments. Finally, Article 39 grants every ethnic group the right to secede from the federation.

The recognition of the rights as mentioned above cannot however be an end by themselves when one sees the issue of minorities. With all these recognized constitutional rights, minorities may subject to local tyrannies by those who constitute a majority in the regional state or claim that the regional state belongs to them (also called indigenous groups) unless an institutional protection scheme is established. The potential for local tyranny in regional states is mainly attributable to the geographical configuration of the federal system. Article 47 of the constitution establishes nine regions that are largely delimited along linguistic lines: the state of Tigray, the state of Afar, the state of Amhara, the state of Oromia, the state of Somali, the state of Benishangul-Gumuz, the state of the Southern Nations, Nationalities and Peoples (hereafter SNNPR), the state of the Gambella peoples and the state of the Harari people.

Although none of the regional states is ethnically pure, a particular ethnic group constitutes a significant numerical majority in each of the first five regions listed above. In fact, each of these regions is also designated after the name of its numerically dominant ethnic group. Although these five regions are designated as belonging to their respective numerically dominant ethnic groups, they are not ethnically homogeneous. Internal minorities are scattered throughout the regional majorities, and this may give rise to a majority-minority tension. Neither is the remaining regions immune to the challenges of accommodating internal minorities; as is evident from their names, they, unlike the other regions, have not been designated as belonging to one specific group. With no single ethnic group accounting for the majority of the regional population, ethnic groups living in the three regional states can also be regarded as internal minorities.

The issues of minorities at regional level can be seen from two angles; those minorities who are found concentrated and having a contiguous territory and those who are found territorial dispersed. For the first category of minorities, enabling them to have their own territorial administration (thus autonomy) can be viable solution. By establishing a territorial self-rule at different levels of government (Zone, Wereda, or Kebele) in the form of local government, regional states can address their regional minorities. As Kymlicka notes, "*when national minorities form clear majority in their historic homeland, there is no any clear and realistic alternative to territorial autonomy or multinational federalism."*[123] Thus, ensuring minority nationalities to administer their territory is an ultimate measure in protection of minorities since it makes minority nationalities to be a majority of the territory they inhabit and administer the same.

Addressing and protecting regional minorities who are found dispersed however seems to be a potential challenge of the Ethiopian federation. There are millions of non-Oromo in the state of Oromia, tens of thousands of highlanders in states of Benshangul Gumuz, Gambela, Somali, and Afar. As getachew notes, those minorities may be practically exposed to local tyranny by those majorities after whose name the regional state is named.[124] The application of majoritarian rule in decision making, particularly by the HoF at federal level backed by the fact that the HoF is

[123] Getachew, Supra note 75, p3
[124] Id, p13

composed based on the majoritarian rule may also be a concern to the rights of minority ethnic groups. This may become an issue if smaller nationality groups feel disadvantaged especially where issues arise affecting their interest in their relation with the larger nationalities. Hence, establishing a tradition by which decision is adopted through consensus may help to clear such apprehension.

Generally, despite the overall constitutional reform in post 1995 creates various ethnic minorities, the fact that the notion of minority is not clearly stipulated coupled by the absence of a separate set of minority rights' protection systems, which are of course necessary, may call for minority concerns in the federation. This does not mean however that the federal constitution fails to recognize the rights, but the recognition of these rights in the constitution which is in a more general terms requires further separate legal policy to ensure minority rights in all socio-economic and political aspects of the federation.

### 4.10. Limitations and Challenges of Transition to Democracy in the Ethiopian Federation

If we subscribe to the definition that federalism self-rule plus shared rule, then democracy is necessary for the sustenance of a federal system. The sharing of powers and responsibilities between two or more orders of government requires that they relate to one another within a democratic framework and process. Democracy is an essential element of federalism, as polities composing federal systems are, directly or indirectly, based on regular or periodic expression of the popular will. History demonstrates, however, that democracy can also take radical forms and foster a disrespectful domination or a tyranny of the majority, a sense of exclusion and even hate against minorities.

Federalism is built on diversity, but if ethno-nationalism is its basis, it can degenerate into marginalization, discrimination, separation, exclusion and in its final tragic manifestation, genocide.[125] Indeed, federalism might in light of the modern experiences of states and international regimes be added to democracy as a cornerstone of lasting peace between groups, peoples and nations. Besides political culture, federalism is based on the common will of the people as well as on leadership and trust in the capacity of organs of governance. Respect for

[125]Daniel Thürer; Managing Conflicts of Diversity, in Ronald L. Watts and John Kincaid (eds.) 'Building on and Accommodating Diversities', 4th International Conference on Federalism, 'Unity in Diversity: Learning from Each Other', Volume one, New Delhi 5- 7 November 2007, P99

negotiations and equitable forms of compromise-building and the "rule of law" are integral to the federal scheme.[126]

In Ethiopia, though the federal system has brought about a relative peace and stability in the nation, the democratization process is faced with many challenges. As some argue, the challenge may be attributable to the fact that federalism preceded democratization in Ethiopia.[127] Different reasons are forwarded by scholars as challenges to the democratization process in the Ethiopian federal set up. Alem Habtu provides about six factors that challenge the democratization process.[128] First, considering previous history of the nation, ensuring the continuance of the present constitution beyond the life span of the EPRDF government (making the federal constitution a permanent feature of the Ethiopian political life is a clear challenge. This is mainly due to the lack of consensus on multicultural federalism effective in Ethiopia in the ranks of the national elites.

The second challenge is related to strengthening the existing institutions (such as the House of Federation, the Ministry of federal Affairs, Human rights commission), establishing traditional conflict resolution mechanisms and institutions, and creating additional robust institutions to identify, prevent, resolve and manage inter-communal conflicts. These steps not only help to enhance the conditions for peaceful and cooperative coexistence of the people, but also protect the various minorities found in regional states from unwarranted oppression by the majorities. The third challenge is ensuring the free mobility of labour, capital, and ordinary citizen throughout the federation. This relates to the issue of how to guarantee citizenship right such as residence, mobility, and work across the federation. This is particularly true for those rights of minorities who live outside their regional states.

The other important challenge has to do with countervailing the pressure towards centralization. Alem argues that this fact is mainly attributable to three factors; (a) the federal dominance in fiscal matters which affects regional autonomy, (b) the democratic centralist orientation of the dominant/ruling party, and (c) the major social economic transformation-oriented policy of the government (the developmental state paradigm). The fifth challenge is how to resolve self-

[126] Id, p100
[127] Alem , supra note 22, pp7-10
[128] Id, pp12-19

determination claims of groups within regional states. To this end establishing institutions that are synonymous to the House of Federation at regional level to settle issues of self-determination is not an easy task. The last but the most important challenge for the democratization process is said to be transforming the traditional authoritarian and modern totalitarian political culture to a new democratic political culture based on the rule of law.

Assefa confirm to some of the challenges discussed in the preceding paragraphs. He argues that one great obstacle in the democratic operation of the federal system and that is often reflected on both sides of the political spectrum (that is the ruling party and the opposition) partly the result of deep rooted authoritarian tendency but partly the result of what one may call the "Ethiopian factor" is the *militant political culture* within the political elite that stands in sharp contrast to the *federal political culture*.[129] While in the latter, parties and major actors are expected to work together towards the achievement of their common goals respecting their differences (that is what federalism is all about), this has not been the case for long in Ethiopia. Each of the major actors in the political process considers the other as "enemy" and do not trust one another and hence could not evolve as political partners with some common goals. Nor is there any trend to respect areas of differences. It is simply a sad situation of "you think my way or you will be eliminated."[130]

In general, withdrawal of political parties from elections, absence of clear and comprehensive programs and agendas by opposition parties, opting for violent opposition, fragmented opposition groups, and the authoritarian and exclusionist political culture within the political elite on both sides (the ruling party and opposition) are mentioned as factors that contribute to the challenge of democratization of the federal system. It is true that under the guidance of the EPRDF, it has secured the peace, introduced institutions of a democratic constitutional order, designed ruled based governance under a parliamentary system, and brought about significant social and economic development. It is also possible to say that the EPRDF will remain the dominant party for one or more election cycles. However, sustaining the relative political and socio-economic achievements will be a big challenge to the federation unless the democratic process goes side by side.

[129] Assefa, supra note 3, p262
[130] Ibid

## Conclusion

Addressing the issue of diversity has been a chronic problem for traditional nation states with diverse society. These days, ignoring diversity and promoting assimilation policies against diversity seems to have little acceptance. Especially, after the end of the cold war, recognizing and accommodating diversity becomes a priority policy choice in multicultural societies. It is in response to this desire that the application of federalism increased by nations with diverse societies. Ethiopia is one of those multinational states which choose federalism as one structural arrangement to end the long existing war, oppression of nationalities and ignorance of diversity.

Even though Ethiopia officially declared to be a federal country since 1995, many ambiguities and contending views have been forwarded in relation to the federal restructuring. The striking feature of the federal system begins from the ambiguity in the process of establishing the federal system. This ambiguity in a way runs throughout the Constitution and also seems to be a cause for confusion in the process of enforcing the federal system. The requisite balance between the forces of unity and diversity, the combination of national self-determination and federalism, the dilemma in creating constituent states that coincide with nationalities, the issue of minority protection, the choice of ethnicity as a primary basis for state restructuring, and the relation between individual and collective rights are cases in point.

The Ethiopian federal system has some peculiar features of which the explicit acknowledgement of national self-determination and its firm position to institutionalize the principle is very important. The application of unicameral legislature, the empowerment of the second chamber (HoF) as umpire of the federation, the official recognition of the right to secession, and the absence of an effective institution that represents regional interest at central decision making process are other distinct features of the Ethiopian federation.

The fact that some of the constituent units have not yet been able to evolve as viable regional governments, the problem of balancing the unity forces and diversity forces, the lack of institutionalization of modern and traditional conflict mechanisms, the absence of institutional mechanism to protect minorities found in different states and are mentioned as some drawbacks of the Ethiopian federal system. The federal system is also challenged by factors that impede the democratization process which are attributable to different factors include, problems of party

centralism, authoritarian and adversarial political culture among elites, and lack of strong democratic institutions.

**Summary Questions**

1. How are multicultural federations different from nation state federations?
2. Discuss the contending views that the Ethiopian federal system has experienced so far.
3. Explain the distinct features that the Ethiopian federal system possesses.
4. What are the possible practical responses that countries may apply regarding with the issue of secession and show which one of the possible responses you think is applied in the Ethiopian federal system?
5. Do you think that the Ethiopian federal system has an effective institutional mechanism of protecting minorities found in different regional states? Why or why not?
6. Explain the main challenges of the democratization process in the Ethiopian federal system.
7. How do you think it is possible to minimize the issue of rights of minorities in the regional states?

# 5. CHAPTER V: DIVISION OF LEGISLATIVE POWERS

## Introduction

The hallmark on the study of federalism focuses on the division of powers (legislative, executive and judicial,) the subsequent two chapters will do on the latter two aspects of division of powers between the federal and state governments. In fact, as illustrated in the preceding four chapters, federalism goes far beyond the study of technicalities and forms. Beginning by analyzing the form and scope of the division of the various public powers, this chapter focuses on the division of legislative functions in the different federal systems with special emphasis on Ethiopia.

After addressing the various techniques of dividing legislative power between the federal government and the states in different federations, the chapter continues to explain the paradox between constitutional form implying constituent states with wide powers versus the reality indicating otherwise as in the Ethiopian context. Particularly, the chapter covers the exclusive powers, shared powers (framework powers and concurrent powers), and residual powers under the Ethiopian constitution. It further explains the reasons for the relative lack of federal-state or intergovernmental conflict resolution mechanisms that one would have expected to take center stage given the existing diversity and wide constitutional powers of the constituent units in Ethiopia.

Objectives

After successful completion of this chapter, students are expected to achieve the basic knowledge and competence regarding:

- ✓The form and scope of distribution of legislative powers in federal systems;
- ✓The form and scope of division of legislative powers under the Ethiopian constitution;
- ✓The issues raised in relation to the exact borders of federal and state legislative powers in Ethiopia;
- ✓The practical application of the constitutional division of legislative powers in Ethiopia; and
- ✓The mechanisms for resolving intergovernmental conflicts in relation to division of legislative power in general and the Ethiopian case in particular.

### 5.1.Form and Scope of Distribution of Legislative Powers

It is apparent that one of the major features of federalism is the study of division of powers between the federal government and states. An important question may follow that what approaches of division of powers are available in federations. Obviously, there is no uniform model across federations regarding the assignment of legal powers between the levels of government. However, there are two broadly different approaches applicable in the division of powers in federations; the *dualist approach* and the *integrated approach* (also called cooperative, executive federalism) though many countries manifest elements of both approaches. The dualist and integrated approaches are usually applicable in countries that follow dual federalism and cooperative federalism respectively (see chapter six for more details on the two types of federalism).

The dualist model typically assigns different jurisdictional powers to each level of government and as a result each level delivers and administers its own programs within its jurisdiction. For instance in the United States, broadly speaking, the federal system is designed to enable both the federal government and the states to enact law, to execute and adjudicate it by their respective agencies. In such model, legislative, executive, judicial and financial powers are allocated based on the idea that there should be some correspondence with the scope of legislative, executive, judicial and financial powers. It is considered essential for governments to possess the executive and judicial authority and the financial resources to implement the function within their legislative competence. Thus, under the dualist model, constitutional jurisdictions over different subject matters is usually assigned exclusively to one order of government which are basically to be implemented and administered by their respective institutions.

The integrated model on the other hand provides for many shared competences and regional state's governments often administer and implement legislative programs and laws issued centrally. To be clearer, in the integrated model, some subject matters are exclusively allocated to one order of government, however most powers are assigned to be concurrent powers in which the central government sets general framework legislations so that regional states will implement and complement it. Federations under this model resort to centralized law-making, mainly entrusted to the federal government with a more decentralized executive structure reserved to the states and an integrated judicial system. This is based on the assumption that it is impossible to

avoid overlaps and there is a heavy reliance on a large measure of interdependence between the federal government and the states.

Coming back to the main issue of this section of the chapter, dealing with the scope and form of division of powers means addressing the question of 'who does what' (scope) and 'how' (form) in a federal legislative power division. When we say the *forms* of distribution of legislative power, we are referring to the ways in which these powers are constitutionally allocated between the federal government and the states. This deals with the substance of power allocated to each level of government. On the other hand, the *scope* of legislative powers refers to the areas and amount of jurisdiction assigned to each order of government. It refers to the technique and mechanism of allocation of power.[1]

Normally, the division of legislative powers between the two levels of governments is set out in the constitution. In some federations however, the legislative powers of individual state governments may be substantially determined through bilateral agreements of the federal government and each constituent states. This is the case for instance in the Spain where the competence of autonomous communities is assigned through the statutes of autonomy for each autonomous community with possible variation on the competences.[2]

Even though there are specific variations among the federations, there are significant commonalities between federations in the forms of distribution of legislative powers between the federal government and the states. Accordingly, the constitutional allocation of legislative power is usually defined on the basis of three categories, namely exclusive powers (of the federal government and/or of the states), concurrent powers and reserve powers. In the US, Swiss, German and Ethiopian federations the federal government is granted enumerated powers. While in some of these federations the federal constitution lists the federal power in a limited fashion, in others the constitution provides for broad list of enumerated powers. In all these federations the residual power belongs to the states.[3] The Indian Constitution adopts a slightly different

[1]Assefa Fiseha; Federalism, a Teaching Material Prepared under the Sponsorship of the Justice and Legal System Research Institute, 2009, p.273

[2] George Anderson; Federalism: An Introduction, Oxford University Press, Forum of Federations, 2008, p.23

[3] See The Constitution of the United States of America of 1789 (as amended until May 7 1992), Art. I section 8, the Tenth Amendment; The Basic law of the Federal Republic of Germany, 1948, Arts. 30 and 70; Federal Constitution of the Swiss Confederation, April 18, 1999 (as amended until March 3, 2002), Art.3; Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, 1st year, No.1, 21 August, 1995, Arts. 51 and 52

approach that the constitution provides for a long list of exclusive federal powers, a list of exclusive state powers and a third list of concurrent powers leaving the residue with the centre.[4]

### 5.2.Exclusive Powers

Normally, exclusive power refers to the powers for which the federal constitution provides a list of jurisdictions that are exclusively to be given to either levels of government. When a federal constitution provides for exclusive powers, it is creating a monopoly of power to either level of government in relation to the subject matters. However, the meaning of exclusive powers is not the same in all federations. For instance, the context in Germany and India is different. In Germany, pursuant to Art.71 of the Basic Law, exclusive federal power is defined as follows, 'on matters within the exclusive legislative power of the federation, the states shall have power to legislate only if and to the extent that they are expressly authorized to do so *by a federal law.'* As a result, even on exclusive federal matters the state can legislate when authorized by federal laws. German law does not assign exclusive power to *Länder* but it does recognize exclusive legislative power of the federal government. In India too, the regime of exclusive state power is used very flexibly. The centre can intervene in a number of ways to legislate even on exclusive state affairs. [5]

It is important to note that despite there are some common patters in the allocation of legislative powers in federations, there is no consensus as to the criteria for the distribution of legislative powers. To put it otherwise, there is no simple formula for determining the appropriate allocation of legislative power between orders of government; which powers to allocate as exclusive competence of the federal government and which to leave to constituent states. However, federal practice reveals that a few powers are almost always exclusively assigned to the federal government and others almost always to the regional states. For instance, legislative powers related to currency, defence, treaty ratification, international trade, interstate trade, and major physical infrastructures are often assigned as exclusive powers of federal governments. Whereas

[4] Constitution of India that came into force on the 26th of January 1950, (as amended until 2003), schedule VII, Art.246
[5] Assefa, supra note 1, p.275

powers related to intrastate trade, primary school, and health care services are usually assigned as exclusive powers of regional states. [6]

Those legislative powers which in a federation are and ought to be exclusively within the power of the federal government are functions by their very nature cover the entire territory of the federation and apply equally to all member states and citizens. Scholars argue that listing exclusive powers to either level of government is important because, in its absence, shared power can in the end be absorbed, at least potentially, into the exclusive list to the extent that the federal government chooses to regulate it.[7]

There are three general trends in federations in relation to division of exclusive powers. The first approach is assigning exclusive powers to the federal government and leaving residual powers to states. The second approach is assigning exclusive powers to states and leaving residual powers to the centre. The third approach provides for the assignment of exclusive powers to both levels of government accompanied by a list of concurrent powers to be exercised by both orders of government. In this approach, both the federal government and states have their respective exclusive powers given to them by the constitution. Federations such as the United States, Germany, Switzerland, and Ethiopia fall under the first category while Canada is a typical example that gives exclusive powers to the states. India represents the third approach of assigning exclusive powers to both levels of government.

For instance, under the U.S. constitution, the Congress has limited legislative power in the sense that its power extends only over those powers enumerated by the constitution to be its powers.[8] Thus, the Congress is vested, not with all legislative power, but only with the legislative powers enumerated in the constitution. Similarly, the German Basic Law provides that "the states shall have the right to legislate insofar as this Basic Law does not confer legislative power on the federation."[9] In line with this, the Basic Law under Art.73 provides a list of exclusive powers that are assigned to the federal government.

[6] Anderson, supra note 2, pp. 24-25
[7] K.C. Wheare; Federal Government 4th ed. (Oxford: Oxford University Press, 1963), p.79
[8] The U.S. constitution, supra note 3, Article I section 8
[9] The Basic law, supra note 3, Art.70 (1)

The Indian case represents another scenario of division of legislative power. First, the constitution lists exclusive powers of the federal government (Article 246(1). Second, it provides a list of exclusive law making powers of states (Article 246(3). The third list in the constitution constitutes a common or concurrent area in which both the Union (federal government) and the states may operate simultaneously subject to the overall supremacy of the Union (Article 246(2). A unique feature of the Indian constitution scheme of division of powers is the existence of a large concurrent field for the Union and the states.

The principle is that, when the federal government is vested with exclusive powers, the federal legislative organ can make laws only on matters that exclusively given to the federal government and cannot enact laws outside the list. However, it is important to note that the federal government may make certain laws even though they are not exclusively given to it. There are instances where the federal legislature may exercise legislative jurisdictions on matters outside its exclusive jurisdictions. For instance, in the United States, there is the jurisprudence of '*implied powers doctrine'* which justifies the exercise of legislative power by the Congress on matters which are not its exclusive powers. The doctrine is developed from Article I section 8 of the U.S. constitution which contains the '*necessary and proper'* clause. This clause empowers Congress to make all laws which shall be 'necessary and proper' to execute both the specific legislative powers granted to Congress by Article I section 8 itself and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof.

The 'implied power doctrine is developed following the U.S. supreme courts' interpretation on the meaning of the 'necessary and proper' clause in the famous case *McCulloch* v. *Maryland*. In interpreting what is necessary and proper in this famous case, the supreme court ruled that the Congress possesses, not only those named as the exclusive powers of the federal government, but also on those matters that are necessary and proper for the congress to discharge its main powers given to it by the constitution. The powers are said to be necessary and proper if they are powers that are ancillary to an enumerated source of national authority that are constitutionally given to the Congress.

Even though the U.S. Germany and Switzerland follow similar approach in the allocation of exclusive power, there is notable difference among them. For instance, while the U.S. constitution provides the 'necessary and proper' clause that vests the Congress with possible

additional powers, this is absent in the German federation. On the same token, while the Basic Law of Germany provides for a long list of shared powers between the federal and state governments, this is absent in the United States.

The Ethiopian federation generally follows the United States and Swiss forms of distribution of powers. According to Article 50(2) 'the federal government and the states shall have legislative, executive and judicial powers.' Accordingly, the federal government is assigned with exclusive powers on matters that are listed under Art.51 of the constitution while states are assigned on those matters that are assigned as neither exclusive powers of the federal government nor powers assigned to be concurrent to both levels of government (Article 52 sub 1).

However, it is important to note that the legislative powers of the federal government are not limited to those matters that are assigned as exclusive powers of the federal government under Art.51 of the constitution. This is because a reading on other provisions of the constitution gives one the inference that there are additional powers that the federal government may exercise as its exclusive powers though one cannot find them under the exclusive powers list. If one looks in to the powers of the House of Peoples Representatives (HoPR)[10] which is the federal legislative organ, it is evident that the HoPR is vested with list of law making powers including powers that are not given to the federal as its exclusive power under Art.51.

The HoPR is a federal legislative organ. From this, it appears that the house can exercise its law making power only on the matters that are exclusively given to the federal government under Art.51 of the constitution. However, a reading of Article 55 of the constitution reveals the fact that there are lists of law making powers of the HoPR outside the list of exclusive federal powers under the constitution. For instance, the power to enact labour code (Article 55 sub3), commercial code (Article 55 sub4), penal code (Article 55 sub 5), approval of federal appointments submitted by the executive (Article 55 sub13), and the establishment of federal institutions (Article 55 sub14) are powers of the federal government that are not mentioned under Article 51.

From the preceding paragraphs, one should note that Art.51 of the constitution does not incorporate all exclusive powers of the federal government. Thus, the federal government is

[10] The FDRE constitution, supra note 3, Art.55

vested with exclusive legislative powers, not only on those matters that are listed under Art.51, but also those additional powers that are mentioned as powers of the HoPR.

Another point worth mentioning regarding the division of exclusive legislative powers of federal government is that, the constitution does not incorporate the necessary and proper clause as the U.S. constitution did. As a result, one may question whether there is possible constitutional ground for the federal government to extend its legislative powers beyond what are exclusively given to it. There are authors who argue that there are some gray areas in some provisions of the constitution the interpretation of which may allow possible extension of federal law making power beyond its exclusive powers.

Assefa, for instance, argues that the fact that the Constitution empowers the federal government to '*formulate and implement the country's policies, strategies and plans in respect of overall economic, social and development matters (Art.51 sub2)...; ...establish and implement national standards and basic policy criteria for public health, education, science and technology... (Art.51sub3)*' seems to be more than the 'necessary and proper' clause.[11] This is because the constitution grants with wide powers and puts primary responsibility on the federal government to determine major policy directions and standards the federal government on economic, social, health and education aspects. Using such provisions of the constitution, there is a room for the federal legislature to go beyond its exclusive legislative powers under the constitution.

However it is important to note the same Constitution also empowers the states, among other things 'to formulate and execute economic, social and development policies, strategies and plans for the state.'[12] The big question is to draw the borderline between the two though one can certainly say that these powers fall in the concurrent policy making powers of both levels of government.

### 5.3.Shared Legislative Powers

Before discussing shared legislative powers, it is important first to address two questions. First, what is meant by shared powers? Second, what is the difference between shared powers and concurrent powers? Scholars provide different responses to the questions. For instance,

[11] Assefa, supra note 1, p.283
[12] The FDRE constitution, supra note 3, Art.55 (2) c

Anderson provides that 'shared' power means a situation in which each order of government has some different legal powers in the broad legislative area and decisions on the area is to be made independently by each orders. He further defines 'concurrent' power as a situation where both orders of government can make legislative decisions in a defined area usually with federal paramouncy.[13] Accordingly, he makes a distinction between shared powers and concurrent powers in a sense that first, decisions in shared powers are made *independently* by each orders of government while concurrent powers are usually exercised by both levels with *federal paramouncy*. Second, shared powers cover *broad* legislative areas over which both levels may exercise power independently, whereas concurrent power can only be exercise on a *defined area*.

Another author, Assefa, on the other hand defines shared power as powers representing the meeting point of the two levels of governments.[14] Accordingly, he did not make any distinction between shared powers and concurrent powers rather he considers concurrent power as one part of shared powers. What one may understand from the definitions is that there is one common thing that both authors agree; the meeting of both levels of government while exercising legislative powers. Thus, for the purpose of this section, it should be noted that concurrent power is taken as part of shared power as you will address it subsequently.

Coming back to the main point, despite federal constitutions divide legislative power between the federal government and the states, we find, however, that the dividing line between the two powers is never clear. Because of the possible unclarity of the division of powers, federations provide another set of powers commonly described as shared powers. Thus, shared powers refers to these category of powers in which both the federation and the states exercise at some point, at least, part of the power.

Many factors may be mentioned as reasons for the need to have shared power areas in a federation. These include[15]; first, the division of legislative powers between the two levels of government cannot be made perfectly. Second, federal experience has shown that there are certain matters which cannot be allocated exclusively either to the federal government or the states. As a result, it may be desirable that the states should legislate on some matters but it is

[13] Anderson, supra note 2, p.24
[14] Assefa, supra note 1, p.294
[15] Id, pp.294-295

also necessary that the federal government should also legislate to enable it in some cases to secure uniformity across the nation.

Third, the fact that the federal government may need to guide and encourage state efforts on certain subject areas induces the system to let states exercise legislative powers. More importantly some measures taken by the states may have spill-over effects to other states and for this reason the federal government may need to intervene at some point latter. Finally, the shared powers scheme may serve as a flexible channel for adjustment to new circumstances thereby avoids the necessity of enumerating complicated minute subdivisions of individual functions to be assigned exclusively to one area of government or the other.

Therefore, shared powers are introduced in recognition of the inevitability of overlaps of jurisdiction between the federal government and the states. Because shared powers assume an overlap of legislative jurisdictions of both orders, there is likely that conflict may arise between laws passed by each order. As a result, a question of which law (a law issued by the federal government or the state) should prevail in case there is inconsistency may arise. Federal experience however shows that, usually the laws of the federal government have the prevailing effect when there is conflict of laws in shared legislative powers.

Generally, it can be stated that for the most part the social and economic spheres fall into this category. These spheres include matters related to health care, post secondary education, environment, pension, insurance, and assistance for old age, unemployment, accident, and workers' compensation.[16] Economic affairs (that include regulation of trade and commerce, industries and labour and economic planning) raise issues because both levels of government have a lot of vested interest in these spheres of activities.[17] Federal experience shows that shared powers can be classified in to two sub categories; frame work powers and concurrent powers. The subsequent two sub-sections will take you to the details on each.

### 5.3.1. Framework Powers

Framework powers are those legislative powers that give the federal government to issue laws that provide general guidelines so that states will have the power to complement them. It is

[16] Anderson, supra note 2, pp.24-25
[17] Assefa, supra note 1, p.297

special type of shared power exists that in principle grants the federal government the competence to issue general legislation in a specific policy field. When framework powers are provided, federal legislation is subject to strict conditions because it has to leave substantial room for the states to issue their own legislation within the limits set by the federal laws.

If a constitution provides for framework powers, the federal government may use framework legislation to regulate federation-wide standards while leaving the states with a room to legislate the details and to deliver the services in a manner adaptable to local situations. The states under this category of powers are allowed to fill in the gaps with more detailed laws. Framework power provides an advantage for states against potential absorption of a given legislative competence by the federal government. Federal framework legislation indicates an interesting compromise that requires significant decentralization of policy-making authority without sacrificing uniformity where it is needed.[18]

The important point in relation to framework powers is that the federal government cannot exhaustively legislate on the matters. The federal government rather leaves substantial portion of the area to be covered by state legislations. An issue may however be raised in relation to the degree and extent of detail nature of federal laws on framework competences. Taking Germany where framework powers are extensive, the Basic Law provides at least two conditions to be considered before the federal government enacts law on framework powers. These conditions are 1) the existence of necessity to establish equal living conditions or 2) the maintenance of legal or economic unity.[19] Apart from this, Art.75 (2) of the Basic Law also stipulates a general precondition that only in exceptional cases could framework law be detailed or directly applicable through federal laws.

In many federations such as Austria, Germany and Brazil, there is special constitutional category of jurisdiction specifying a federal power to enact framework legislation in certain fields, leaving the states to fill out the areas with more detail laws.[20] In Ethiopia however, the stand of the constitution in relation to framework powers is beyond clarity. The unclarity begins with the fact

[18] Id, p.298
[19] The Basic Law, Supra note 3, Art.72
[20] Ronald L. Watts; Comparing Federal Systems, 3rd ed. (Montreal and Kingston: McGill-Queen's University Press, 2008), p.88

that the constitution does not provide for a clear list of framework powers as a result some would argue that there is no framework powers under the Ethiopian constitution. The other ground of unclarity is that, even as to those powers which are considered to be framework powers (e.g. Art. 51 sub2 and 3) it is not clear to what extent the federal government legislates.

One of the areas which is said to be under the Framework legislation in Ethiopia is provided under Art.51 sub2 and 3 of the constitution. The constitution provides that it [the federal government] shall establish and implement national standards and basic policy criteria for public health, education, science and technology as well as for the protection and preservation of cultural and historical legacies.[21] Similarly the constitution stipulates the power of the states and states that the states have the power 'to formulate and execute economic, social and development policies, strategies and plans of the state.'[22] The reading of the two provisions reveals, not only an obvious overlap between the powers of the federal government and the states concerning economic, social and development plans as well as health and education, but also the absence of clarity as to the extent of power of the respective governments. Consequently also not clear what is left for the states.

However, considering the nature of the items listed under the two provisions, it seems clear from the provisions that the federal government cannot exhaustively legislate on all these matters. Moreover, the wording of Article 52(2) seems to suggest that the states are endowed *not merely with administrative power* but with the power to formulate and execute economic, social and development policies. Thus, those matters listed under the two provisions are framework powers under the constitution.

Another area that triggers an issue here is the competence that each level of government may have in relation to civil matters. It is clear that civil matters are the residual powers of states since they are not mentioned as exclusive powers of the federal government. This does not mean however, that civil matters are within absolute competence of states. A reading of Art.55 (6) of the constitution suggests that the federal government may exercise legislative power on civil matters up on the recommendation of the HoF provided that it is necessary to establish and sustain one economic community.

[21]The FDRE constitution, supra note 3, Art.51 (3)
[22] Id, Art.52 (2)C

However, it should be noted that when the federal government enacted a law based of art.55 (6) of the constitution, it cannot legislate exhaustively on the matters. It should rather provide a general framework that aims at establishing one economic community throughout the country and leave the details to be complemented by states. In this regard, the Ethiopian constitution seems to reflect the approach that is followed by the German Basic Law as discussed above.

The area of land law is another area that is worth considering in framework powers under the Ethiopian constitution. The cumulative reading of Art.51 (5), 55 (2a) and Art.52 (2d) gives us the message that the federal government has the power to make laws regarding land and other natural resources while states are vested with the power to administer same in accordance with federal laws. In theory, these provisions seem to suggest that the constitution adopts functional/executive federalism that the federal government makes the law and states will administer it. Practically however, the constitution seems to be interpreted otherwise. Regarding this, the excerpt provided below provides you with the evidence [**taken from Assefa Fiseha; Federalism; teaching material prepared under the sponsorship of Justice and Legal research Institute, 2009, pp304-306]**

> In the case *Biyadglegn Meles* & *et al* v. *the Amhara Regional State [foot note omitted]* the applicants requested the CCI to declare that the state land law and regulations issued subsequently to implement the laws, contravened the federal constitution on the ground that it is the power of the federal government, not the state government, to enact comprehensive land legislation and as a result requested the CCI to declare the state law unconstitutional. However, the HoPR has enacted proclamation 89/1997 [foot note omitted] that stipulates that the regional government may proclaim laws on rural land and lays the general framework for them [foot note omitted]. Furthermore, the federal law retroactively endorses state laws that were enacted before its promulgation as the law in question was enacted prior to the federal proclamation. The CCI ruled that the law is constitutional on two grounds: it is part of the residual power of the states and also because it has been retroactively endorsed by the federal proclamation.
>
> One may raise interesting issues here. Can the federal parliament confer this kind of power on itself? Why should the federal parliament retroactively endorse the state law if it falls within the power of the states? More interestingly, if the HoPR finds out that the states lack such power, could

> such law be saved by retroactive endorsement because such an arrangement can easily be manipulated to disturb the formal division without going through the amendment process? [foot note omitted] A similar issue in India has been addressed as follows: 'When the states lack legislative competence with respect to a subject matter, parliament will have such competence. At times when a state law is declared invalid because of legislative incompetence, parliament comes to the rescue of the state law by way of validating the same. Here the principle is that parliament cannot merely pass an act saying that such a state act is hereby declared valid. This amounts to delegation of legislative power to the state legislature on a topic which the constitution has kept outside state jurisdiction and this parliament is not competent to do. It is for the constitution and not parliament to confer competence on state legislature.' [Foot note omitted]
>
> It seems that when the HoPR decided to retroactively endorse the state law, it had doubts on its constitutionality. Yet in line with the definition of concurrent power it is possible to positively construe that the state law is valid even if enacted prior to the federal law. After all it is usually the case that federal law comes at a later stage when there is a need for securing uniformity among potential diverse state practices. Federal law then steps in to cure the undesired divergence in state law.

The excerpt above tells that the decision of the CCI does not seem to be consistent. On the one hand it declared the state laws as constitutional. On the other hand, it ruled that the state laws are validated retroactively by federal proclamation. The point of inconsistency is that if the state laws as they stand are constitutional, why they needed validation by federal laws. If the state laws are constitutional, nothing is required from the federal legislature. The other important point is that can the federal legislature validate state laws which are enacted contrary to the constitutional division of powers? An affirmative response is less sound because a power that is constitutionally divided and guaranteed cannot be altered by the will of either the federal or state legislatures. According to the principle of federalism, once power is divided any change that may found to be necessary has to go through extraordinary constitutional procedure. Thus, if changing the spirit of the constitution regarding the division of powers as to land laws has to be made based on the constitution through constitutional amendment. If not, the stringent amendment procedure that is provided under Art.105 (2) of the constitution is made to be replaced by relatively easier parliamentary procedure which ultimately runs contrary the spirit of our constitution.

### 5.3.2. Concurrent Powers

Concurrent powers are category of shared powers in which both levels of government can make laws in the same subject matter. The recognition of the inevitability of overlap in many areas is the main reason for the recognition of concurrent jurisdictions. Federations such as USA, Australia, Germany, India, Malaysia, Pakistan, Brasil, Mexico, Nigeria, Russia, and Ethiopia provide for general and extensive areas of concurrent jurisdiction while Canada is the exception in providing constitutionally specified areas of concurrent jurisdiction which are agriculture, immigration, old age pensions and benefits, and export of non-renewable natural resources, forest products and electrical products.[23]

It should be noted that states can legislate on concurrent jurisdictions until the area becomes of federal importance. Once the area becomes federal importance, the federal government may enact a law which have the effect of pre-empting existing state laws. And normally where concurrent jurisdiction is specified, constitutions usually specify that in case of conflict between federal law and state laws, the federal law prevails.[24] From this one may safely conclude that concurrent jurisdictions by their nature are areas where federal legislation potentially prevails over state legislations.

In Switzerland, the constitution provides fields in which the confederation has concurrent powers shared with the cantons. Accordingly, the cantons are free to exercise a concurrent power as long as the confederation does not make use of its concurrent power. It is also possible that the confederation may not have provided federal law covering the entire policy field. In those cases, the cantons can issue their own legislation on the remainder of the policy field. However, the cantons have no individual authority if the confederation in regulating the fields has exhausted the matter.[25]

The Indian Constitution is distinguished for its long list of concurrent powers. The general idea underlying the concurrent list powers under the Indian constitution is that there may be subjects on which parliament may not feel it is necessary or expedient to initiate legislation in the first instance because these matters may not be of national importance. States may, therefore, take

[23] Watts, supra note 20, p.88
[24] Ibid
[25] Assefa, supra note 1, p.314

necessary action with respect to any matter in the list. But if at any time any of these matters comes to be of national importance or if there is a need to guarantee uniformity, the federal government may step in and legislate on any of the concurrent fields. Where the federal law is not exhaustive states can also make supplementary law and the concurrent law thus makes the scheme of distribution of powers somewhat flexible.[26]

In Ethiopia, the constitution does not seem to have expressly addressed the concurrent powers of both levels of government. Despite the constitution under Art.52 (1) provides that there is a concurrent power of both levels, it does not list those matters that fall under concurrent jurisdiction of both levels. The only provision that one may get is concurrent jurisdictions on taxation powers under Art.98 of the constitution (see chapter 9 regarding taxation powers). As a result, it becomes difficult to identify the concurrent areas of jurisdiction between the federal and state governments.

However, the power to enact criminal law may be considered as one are of concurrent jurisdiction. This is because under Art.55 (5) of the constitution, states are allowed to enact criminal law on areas that are not covered by federal legislation. However, two factors make this power defective to qualify as concurrent power proper. First, where concurrent power is provided, the principle is that states enact laws on concurrent jurisdictions until the federal government comes to legislate on the area. But in the case at hand, states can enact criminal law after the federal government makes legislation on same. Second, the federal government may exhaust the area as a result states may not have any legislative power to exercise on.

One of the advantages of concurrent powers is that it provides an element of flexibility in the distribution of power enabling the federal government to postpone the exercise of potential authority in a particular field until it becomes a matter of federal importance. They enable both governments to exercise their respective powers depending on whether the matter remains of regional or of national importance.[27] A matter under concurrent jurisdiction is said to attain a status of federal importance for many reasons such as when exercising of the power by states create spill over effects or inequalities across jurisdictions.

[26] Id, p.315
[27] Id, p.306

### 5.3.2.1.Conflict Between Federal and State Law

One of the features of concurrent powers is overlap of jurisdictions. Especially, where there is concurrent powers in which both levels can exercise simultaneous/parallel law making power, it is possible that laws enacted by both levels may contradict/conflict each other. It is true that the general principle on concurrent powers is that the laws that were previous enacted by states become ineffective once the federal government enact law on the same area. However, there are instances where federal legislation may not exhaustively cover a concurrent jurisdiction. In such case, states are entitled to exercise legislative power on the uncovered matters. This is true of the German federation which limits federal government's power to enact legislation on the concurrent field only to the extent the necessity clause permits. The issue is therefore, can the federal government pre-empt state laws without regulating the matter itself.

Different jurisdictions provide different mechanisms to address possible conflict between federal and state laws on concurrent jurisdictions. Where powers are concurrent, federal law is generally, but not always, paramount, meaning it prevails in case of conflict.[28] Apart from this general principle, some federal constitution provide for the supremacy of federal laws in case of conflict with state laws. The U.S. constitution is one example in which Art. VI, clause 2 (also called the supremacy clause) provides that federal legislations have paramount effect in case conflict between state and federal laws. The same approach is found in the Indian constitution which provides that in case of overlap of a matter between the three lists of concurrent powers, predominance has been given to the Union legislature.[29]

However, there are federal systems that do not incorporate federal or state supremacy in case conflict of laws enacted on concurrent jurisdictions. For instance, the Sudanese constitution provides for areas of concurrent jurisdiction. However, no supremacy clause or clear criteria is specified for courts to determine which law should prevail in case of conflicts.[30]

The same problem seems to be reflected under the Ethiopian constitution. The Constitution is silent, not only regarding with shared powers/concurrent powers in particular, but also regarding

[28] Anderson, supra note 2, p.22
[29] Indian Constitution, supra note 4, Arts.251, 254(1)
[30] Watts, supra note 20, p.88

the thorny issue of regulating the relationship between federal and state law in general. This, in return, results in a problem to establish which law should prevail in case of conflict. Assefa provides that there are certainly two possible views to address the issue.[31] If one adopts the federal supremacy clause by default, then most of the principles stated in this section discussing shared powers in other federations, will hold true in Ethiopia as well. But if one adheres to the 'supremacy of nations, nationalities and peoples' literally because of the principles stated on the preamble, the pretentious aggregate nature of the federation, Articles 8 and 39, then it may be difficult to state that federal law will pre-empt state law. Perhaps the best compromise is to decide the issues on a case-by-case basis rather than subscribing to either principle on the abstract level.

However, in an interesting case *Biyadglegn Meles* & *et al* v. *the Amhara National State* the CCI stated any law issued by the states regarding the administration of land shall be of no effect if it contradicts the federal rural land administration proclamation.[32] Apart from this, the federal law itself declared: 'a land administration law heretofore enacted by any Regional Council shall be applicable insofar as it is not inconsistent with this proclamation.'[33]

### 5.4. Residual Powers

Residual power represents assignment by the constitution of a federal system over those matters not otherwise listed in the constitution. Since it is impossible to provide a complete listing and allocation of powers, constitutions must provide a provision that specifies which order of government gets any power that is not mentioned as exclusive or shared powers of both orders. There is variation among federations as to the issue of which order of government should be assigned with residual powers.

In most federations, especially those created by coming together, the residual power has been retained by the states. Federations such as the USA, Switzerland, Australia, Germany, Malaysia, Argentina, Brazil, Russia, Nigeria, and Mexico assign residual powers to states.[34] There are also federations that assign residual powers to the federal government. According to Anderson, residual powers are assigned to federal government in federations that are established from

[31] Assefa, supra note 1, pp.319-320
[32] Ibid
[33] Federal Rural Land Administration Proclamation, Proclamation No.89/1997, Federal Negarit Gazeta, 3rd Year No.54, Addis Ababa , 7th July 1997, Art.8
[34] Watts, supra note 20, p.89

previously unitary regimes (holding together federations).[35] Federations that assigned residual powers to federal government include Canada, India, South Africa, and Belgium.

The significance of residual powers is directly related to the number and comprehensiveness of the enumerated powers listed in a constitution. That is to say, the greater and comprehensive the enumerated powers, the less the scope of residual powers would be. Thus, when a constitution provides for detailed, exhaustive, and comprehensive lists of exclusive federal, exclusive state and concurrent/shared legislative powers, the residual powers is relatively less significant. In contrast, when the constitution provides that state powers are not enumerated but simply covered by unspecified residual power, the scope of residual authority is usually highly significant. From this, one may say that while assignment of residual powers in federations like Malaysia, South Africa, and Canada is less significant, residual powers in federations such as the USA, Australia, Germany, Nigeria, Russia, Brazil, and Mexico is highly significant.

Residual powers arrangement in constitutions may be important for different reasons. One of the main reasons is that leaving residual powers to states will have the potential of preserving legislative autonomy of states from being swamped by expansive federal legislative jurisdiction. This is particularly true for federations that are established by coming together. In the United States, the assignment of residual powers to states was intended to underline the autonomy of states and the limited nature of powers assigned to the federal government. In practice however, there is a tendency in federations such as the USA where the 'implied powers' is interpreted very broadly at the expense of the unspecified residual state powers which has in fact the effect of progressive centralization of powers by the federal government.[36]

In Ethiopia, the Constitution expressly confers residual powers on the states. Under Art.52 (1) the constitution states: 'All powers not given expressly to the federal government alone or concurrently to the federal government and the states are reserved to the states.' Thus, if a given power is not either expressly or impliedly given as exclusive or shared powers of both the federal and regional governments, the power goes to residual power of states.

[35] Anderson, supra note 2, p.26
[36] Watts, supra note 20, p.90

An issue related to the residual powers in Ethiopia had been presented before the CCI. The following excerpt is in relation to the opinion of the CCI on the issue [taken from **Assefa Fiseha, Federalism; teaching material prepared under the sponsorship of the Justice and Legal Research Institute, 2009, pp331-332]**

> The CCI ruled on the issue of the extent of residual powers of the states. A petition was submitted from the Prime Minister's office to the HoF seeking its advice as to whether the HoPR has the competence to enact a federal family code applicable nationwide [foot note omitted]. If it has a competence, to what extent would this affect autonomy of the states to make laws on the same subject? The CCI investigated briefly Articles 52(1), 55(6) and 62(8) and ruled that enacting a family code is a state power on two counts. First, the enactment of a family code is intertwined with the culture, tradition, and religion of society. It is an aspect of diversity that needs regional protection. Second, reserve power belongs to the states and such power is not expressly granted to the federal government. This normally belongs to the states. But it briefly noted the importance of Article 55(6) although it stressed that it is not relevant to the issue at hand as the federal Constitution outlines the minimum standards under chapter three, the supremacy clause of Article 9 sub 2, 62 sub 1 and 84 sub 2 as enough safeguards in case the states enact family laws that contradict those minimum guarantees.
>
> The Constitution enumerates a list of seven jurisdictions given to the states in addition to the reserve clause [foot note omitted]. One may doubt the relevance of the enumeration of state powers as the states are granted reserve powers. According to Ulrich Preuss it is 'not only redundant but even dangerous to enumerate powers of the states because this will in time of conflict and crisis raise the question of what about those issues which are not mentioned in Article 52 sub 2?'[Foot note omitted]. The enumeration of state powers is important when the federal government retains the residual powers or when what is conferred on the states constitutes an exceptional grant of power on the states that would normally constitute a federal power, for instance participation of states in foreign affairs [foot note omitted]. A closer look at Article 52 sub 2, however, indicates that the lists of powers mentioned are routine functions of the states rather than exceptional ones. The title of Article 52 sub 2 is also indicative of the fact that the list is an illustration giving only a portion of some of the authorities of the states.

At this juncture, it is important to note that in addition to the reserve powers discussed above, the constitutions vests other powers to states. For instance, under Article 50 (5) states are empowered to draft, adopt and amend state constitutions provided that they did not contradict with the stipulations under the federal constitution. In case states make their own constitution that have a clause contradicting the federal constitution, their constitution is null and void as provided in art.9 (2) of the federal constitution. This is may be one important feature of state power under the Ethiopian federation that unlike other federations like India and Nigeria where the major features of the state constitutions are embodied within the federal constitution, in Ethiopia, though the federal constitution provides for fundamental requirements for member states, the states are normally left free to articulate their own constitutions.[37]

**Conclusion**

Constitutional division of legislative powers between federal and state governments is the basic essence of federalism which is applicable in all federations. However, there are many variations and similarities among the federations both in terms of form and scope of legislative power. Yet there are common trends that federations follow while dividing legislative powers. In terms of the form, most federations divide legislative powers as exclusive, shared and residual powers. Some federations assigned exclusive power lists to the federal government leaving states with residual powers. Federations such as USA, Germany, Switzerland, and Ethiopia fall under this category. Others provide exclusive lists of legislative powers to states to which Canada is a typical example. Yet, a federal system may provide for a respective list of exclusive legislative powers to both the federal and state governments leaving residual power to the centre. India represents the third approach of assigning exclusive powers to both levels of government and assign residual powers to the center.

In terms of scope, there is difference across federations that some provide for relatively broad legislative powers to states while others provides only very limited powers to states. Taking the case where exclusive power is given to the center and residual powers to states, the scope of the power of states is mainly dependent on the degree and extent of detail of the exclusive lists of legislative power. Thus, when the exclusive federal powers are more detail and comprehensive, residual powers of states becomes narrow and less significant. The reverse is true that states will

[37] Assefa, supra note 1, p.334

have relatively significant legislative power when exclusive federal powers are less detail and comprehensive.

Another important area of legislative power is hared powers arrangement in which both levels have some kind of power to make law on the same subject area. Such arrangement is important mainly for the following reasons; the impossibility making perfect allocation of powers, encouraging states' effort, and providing better flexibility in legislative tasks. However, shared powers provide for possible conflict of laws issued by both levels in the same matter. Most federal constitutions provide for the prevalence of federal laws in case of conflict. Framework powers are powers in which the federal government assumes the power to provide legislative guide line in a given framework competence so that states will come up with detail laws complementing the federal law in a way fitting their local demands.

In Ethiopia, the constitution provide for a list of exclusive federal legislative power, and residual powers to states. Despite the constitution's stipulation as to the existence of concurrent powers, it does not provide the lists of such matters. Furthermore, though the constitution grants wide powers to the states, it fails to have a kind of 'necessary and proper' clause or comprehensive regime of shared powers. Nor does it provide for federal supremacy in case laws issued by the federal government and states in shared powers are in contradiction.

**Summary questions**

1. It is said that the Ethiopian constitution grants wide range of legislative powers to states. Do you agree? If yes, discuss the facts that prove the assertion.
2. Explain the difference and similarity in the division of legislative powers in USA, Germany, India, and Ethiopia.
3. It is argued that significant residual powers are left to states in federations which are established through 'coming together'. How do you see this statement in light of the division of legislative power in Ethiopia?
4. Discuss those matters that may be considered as shared legislative powers under the Ethiopian constitution.

5. Can you mention a constitutional provision/s that shows the fact that the federal legislature in Ethiopia may extend its legislative power beyond what is exclusively given to it? If yes. Explain.

# 6. CHAPTER VI: DIVISION OF EXECUTIVE POWER

## Introduction

It is to be recalled that the division of legislative, executive, judicial and fiscal powers between different orders of government is the hallmark of federal system of governance. Like division of legislative power, the way division of executive power is made in a federation has an implication on the operation a federation and degree of autonomy of both levels of government. Yet, how executive power is allocated between orders of government is not the same across federations. Thus, under this chapter the division of executive power in federations in general and the Ethiopia constitution in particular is addressed. To this end, this chapter is organized under three main sections. Section one highlights the two main approaches that federations adopt in allocating executive powers; dual federalism and executive federalism. Section two tries to address the division of executive power under the Ethiopian constitution after making comparative overview other federations' experience on same issue.

The third section canvasses intergovernmental relations and the implementation of federal laws in regional states in Ethiopia. This section tries to highlight some issues pertained to the mechanisms employed to implement federal laws in regions as reflected in the constitution and practice. It also addresses how intergovernmental relations are carried out in the federation with a view of smooth implementation of federal laws in the federal system. After looking at the mentioned discussions, the chapter tries to analyze whether the Ethiopian federal system resembles to dual federalism or executive federalism.

## Objectives

After completing this chapter, students will be able to;

- ✓ Explain the division of executive power between federal and state governments;
- ✓ Appreciate the two common approaches of division of executive power in federations: Dual versus executive federalism approach;
- ✓ Elaborate the repective merits and demerits of dual and executive/cooperative models of division of executive powers;

- ✓ Analyze the concept of intergovernmental relations (IGR) in relation to executive powers in a federation;
- ✓ Discuss the division of executive powers in the Ethiopian constitution: whether it adopts the duality model or cooperative model;
- ✓ Identify the issues that may be raised in relation to the division of executive powers in Ethiopia; and
- ✓ Explore the concept of intergovernmental relations (IGR) and the implementation of federal laws in regions under the Ethiopian federation.

### 6.1. Dual versus Executive Federalism

The principle in federalism is the existence of dual authority in relation to legislative, executive and judicial powers in a federation. Accordingly, the presumption is that each order of government will have their constitutional legislative power to which they will have their respective agencies to implement the laws enacted within their jurisdiction. However, modern federal practice shows otherwise. While the two variants of constitutional federalism (dual federalism and cooperative federalism) are both based on the idea of existence of dual regimes, they differ in their conception of how the two levels of government relate to each other especially in the implementation of federal laws. Thus, in terms of allocation of executive powers, most federations adopt either the duality approach or executive/cooperative approach though many federations reflect the combination of both elements.[1] A discussion on each types of federalism is thus in order, yet back reference to chapter one is important to appreciate the two approaches on federalism.

#### 6.1.1. Dual Federalism

The basic philosophical foundation of dual federalism is based on the idea of dual sovereignty. The federal and the state governments are regarded as co-equals, which operate independently within their respective spheres. In this way, dual federalism rejects the idea of a hierarchical relationship between constitutional levels, the federal and regional.[2] In line with that federal

[1] George Anderson; Federalism: An Introduction, Oxford University Press, Forum of Federations, 2008, p.21
[2] Robert Schutze; Dual Federalism Constitutionalized: the Emergence of Exclusive Competences in the EC Legal Order, European Law Review, 2007, pp.1&2

philosophy, the constitutional architecture of dual federalism is based on mutually exclusive powers. The federal and the state governments operate independently in their respective spheres. The dualist federal principle thus needs to devise a method of dividing powers so that the federal and regional governments are each, within a sphere, coordinate and independent. The hallmark of dual federalism is the existence of exclusive competence of two jurisdictions. Within their scope, only one authority exists and such exclusive powers are constitutionally guaranteed monopolies, for only one governmental level is entitled to act autonomously.[3]

Dual federalism is an approach where the allocation of executive authority is in principle considered co-extensive with the distribution of legislative responsibilities. This stems from the fact that, if the federal and state governments are to remain autonomous, then each must act directly towards the people in the process of enforcing its laws. As a result, it follows that not only legislative but also executive, financial and judicial powers should be divided between the federal government and the states so that each will act autonomously.[4]

R. Watts provides that in federations that follow duality approach, the distribution of administrative responsibilities in most cases corresponds with the distribution of legislative responsibility.[5] That is to say, the fact that a legislative power is assigned to one order of government in principle requires the implementation of the law by the government which made the law. It is important to note that the temporary delegation of legislative and executive powers from one level to another order of government does not change the dual nature of a federal system. To put it otherwise, in dual federations, legislative and/or executive powers may be delegated from one order of government to another. But this does not render the federal system as cooperative because delegation is temporary while duality in the assignment of powers refers to the permanent and constitutional assignment of legislative and executive powers.[6] Thus, when we deal with the division of power in light of dual federalism and executive federalism, we are dealing with the allocation of executive power as assigned by the constitution, not as developed by delegation.

---

[3] Ibid
[4] Assefa Fiseha; Federalism, A Teaching Material Prepared under the Sponsorship of the Justice and Legal System Research Institute, 2009, p.359
[5] Ronald L. Watts; Comparing Federal Systems, 3rd ed. (Montreal and Kingston: McGill-Queen's University Press, 2008), p.92
[6] Id, p.93

Federations such as the USA, Canada and Australia represent dual federal system in relation to the allocation of executive powers. In such systems, the constitution assigns different jurisdictions to each order of government regarding which each order of government are expected to have their own institutions and agencies to implement and administer federal laws and programs.[7] Accordingly, states, in principle, cannot be obliged to implement federal laws even on the condition that the federal government covers the cost of administration of federal laws.

Taking the United States federal system as an example of dual federalism, the federal government has one set of enumerated and limited functions and the states another set of non-enumerated reserve powers and within their respective spheres the two governments are *co-ordinate* and *sovereign*. Such arrangement presumes there is less overlap of power between the two governments and hence less sharing. This in turn brings a competition between the two levels of government as each legislates, executes and adjudicates its own respective laws.[8] Such approach under the U.S. system has something to do with the formation of the federation. At least in its formative stage, owing to the concept of states' rights, the dominant operative concept was that of competitive federalism which denoted a spirit of competition and rivalry between the federal government and the states. The states were conscious of their powers and rights and thus resented the growth of the federal power and its encroachment on the states domain.[9]

It should be noted however that in dual federalism everything is not within the exclusive power of either levels of government. As federal practice shows, the dualist approach does not create a neat separation of executive powers because so many issues have regional, national, and even international dimensions and many different responsibilities of governments are themselves intertwined.[10] It is therefore for such reason that constitutional arrangement in dualist federations provide for shared competences of both levels.

Whether dual approach is better than cooperative approach is beyond consensus among scholars. Literature shows as to the existence of considerable debate over the benefits and costs associated with each approach. Despite the debates, dual/competitive federalism is said to be advantageous

[7] Anderson, supra note 1
[8] Assefa, supra note 4, pp.360-361
[9] Ibid
[10] Anderson, supra note 1

for many reasons. One of the advantages according to advocates of the duality approach is that competition between governments in a federation may actually produce beneficial results for citizens.[11] This view is forwarded from the view point of economic competition that just as economic competition has superior benefits compared to monopolies or oligopolies, competition between governments serving the same citizens is likely to provide citizens with better service. Similarly, Assefa provides that the duality of executive authority has the following advantages:

> firstly, this is believed to reinforce the autonomy of the legislative body; secondly, it assures to the government the authority to implement and enforce its own legislation, which might otherwise run into difficulty when it relies on the state machinery; thirdly, in parliamentary systems, it is only when the legislative and executive responsibilities coincide that the legislature can exercise control over the body, executing its laws.[12]

However, it should be noted that dual federalism is not a perfect choice devoid of any drawbacks. For instance, some argue that dual/competitive federalism if applied excessively can lead to intergovernmental conflict and acrimony and may have a divisive impact within a federation.[13]

### 6.1.2. Executive Federalism

Before we rush in to detail discussion on the sub-section, it is worthy first to make some conceptual clarifications on the terms of executive federalism and cooperative federalism. It is common that both terms are used interchangeably as if they refer to the same approach of a federal arrangement. Are they meant always the same thing? Assefa claims that executive and co-operative federalism may at times mean the same thing as aspects of intergovernmental relations but there is also some slight difference.[14]

He provides that the notion of executive federalism often applies in parliamentary federation (though rarely, if ever, used in presidential federations) in which intergovernmental co-ordinating policies and shared programs between the federal government and the states is often dominated by the executive of both governments. On the other hand, the notion of co-operative

[11] Watts, supra note 5, p.122
[12] Assefa, supra note 1, p.361
[13] Watts, supra note 5, p.123
[14] Assefa, supra note 4, p.353

federalism may be used in both presidential and parliamentary federations. However, for the purpose of this section and the whole module in general, executive federalism is used as synonymous with cooperative federalism and may also mean to administrative or functional federalism.

As its naming indicate, executive/ cooperative federalism refers to a federal system which assigns, apart from exclusive powers of each orders of government, many shared competences and the constituent under the premise that the national government units often administer centrally legislated laws or programs. This model of federalism applies on the premises that the federal government and the states are mutually complementary parts of a single governmental mechanism all of whose powers are intended to realize the current purposes of government according to their applicability to the problem at hand.[15] Unlike dual federal system which focuses on the existence of exclusive competence, co-operative federalism works on the principle of mutually complementary jurisdiction in a federation. Under such system, some subject matters are assigned as exclusive power of either level of government and the bulk of powers are concurrent in which the central government sets framework legislations that the constituent states can complement (but not contravene) with their own legislation.[16]

In these federations administrative responsibility has not coincided with legislative authority, thus it is not mandatory for the federal government to establish its own federal agencies in regional states to execute federal laws. Administration for many areas of federal legislative authority is constitutionally assigned to the governments of the units/states. In Switzerland, for instance, national laws are invariably executed by cantonal civil servants and virtually no federal administrators outside the capital with the exception of post, railway, customs officials, some army personnel, and peoples staffing in certain federal institutions such as two federal polytechnics, the national museum and meteorological institute.[17] It should be noted however

[15] Robert Schutze; Cooperative Federalism Constitutionalised: the Emergence of Complementary Competences in the EC Legal Order, European Law Review, 2006,
[16] Anderson, supra note 1, p.22
[17] Peter A. Shweizer; Federalism in Switzerland, in 'Genesis of the Ethiopian Constitution of 1994 (ed.)', Reflections and Recommendations from the Symposium on the Making of the 1994 Ethiopian Constitution, InterAfrica group, Addis Ababa, Ethiopia, 17-21 May 1993, p.156

that in cooperative federalism the federal government may and make federal expertise available to states without imposing the will of the federal government.[18]

Germany is a typical example that represents executive federalism. As discussed under chapter five, the states under the German federation are empowered, as a matter of their right, to administer all federally issued laws other than those the Basic Law expressly provides for federal administration.[19] The federal government may only establish federal authorities to administer federal legislations on those matters that are addressed under Art.87 (3) of the Basic Law. As a result, almost all administration function of federal laws is undertaken by state governments, thus federal agencies to implement federal laws are rare in the German federation. Particularly if such administration power is exercised by states as a matter of their rights, the federal government cannot establish its agencies to implement federal laws. It should be noted that the administration of federal laws by states is not to be exercised at the discretion of the federal government. It is rather as a matter of right that states assume such competence. Therefore, the federal government cannot dictate and regulate states as to the establishment of implementing agencies and issuance of administrative procedures for the administration of federal laws except when the *Bundesrat* consented to such effect.[20]

The possible intervention that the federal government may exercise in relation to administration of federal laws when states exercise as a matter of their right is conducting an oversight. Accordingly, the federal government may carry out an oversight on states to ensure that the states exercise federal laws in accordance with the law. To this end, the *Bundesrat* is vested with the power to decide as to whether a state has violated the federal law or not and an appeal can be lodged against such decisions by the *Budesrat* before the Federal Constitutional Court.[21]

In the preceding paragraph, the administration of federal laws by states as a matter of their right is discussed. However, it is important to note that there are other categories of administration of federal laws by states in the German federation. The Basic Law under Art.85 provides for situations where the states enforce federal laws as agents of the federation and subject to binding

[18] Stephen Breyer; Active Liberty: Interpreting our Democratic Constitution, Alfred A. Knopf, New York, 2006, pp.58-59
[19] The Basic law of the Federal Republic of Germany, 1948, Art.83
[20] Id, Art.84 (1)
[21] Id, Art.84 (3&4)

federal instruction. In such cases, the federal government can take measures that are necessary to ensure that the states execute federal laws faithfully and as a result, state governments may be subjected to strict instructions and supervision by the federal government.

In general, administration of federal laws in the German federation is mainly vested to states. As Assefa said, federal administration of laws is an exception while state administration of same is the rule.[22] Thus, the exceptional federal administrative powers may be manifested in two general ways. First, when the federal government exercise administrative power in the matters that the Basic Law provides for federal administration. Second, when federal government exercises oversight on states either on the consent of the *Bundesrat* or in its own concern in matters where states serve as agents of the federal government. From this it is important to note that state administrative power is of two types; those powers that states exercise as of rights, and those that states exercise as agents of the federal government.

Different justifications may be forwarded as to why countries opt for executive federalism. The inevitability of interdependence and the need for intergovernmental institutions and process to deal with the interdependence is considered as one of the reasons that have led to a choice for executive/cooperative federalism within many federations.[23] The need to avoid unnecessary duplication of efforts in the administration of federal laws and the need to grant states with further discretion to adapt federal laws to local circumstances during implementation are also mentioned as additional benefits that executive federalism offers.[24]

However, there are some drawbacks that are related to executive federalism. One of the drawbacks is that as mainly witnessed in Germany, executive federalism may lead to a situation called *'joint decision trap'* which reduces the autonomy and freedom of action of governments at both levels.[25] This is because, decision making in such federalism model often requires coordination and joint decision making. The other problem with executive federalism is that the fact that substantial federal laws are administered by state agencies results in the dependency of federal government on the capacity and willingness of state executive organs to get its laws

[22] Assefa, supra note 4, p.363
[23] Watts, supra note 5, p.122
[24] Assefa, supra note 4, p.371
[25] Watts, supra note 5, p.122

properly implemented. As a result, the federal government may found itself defective in implementing its own laws.[26]

### 6.2.Division of Executive Power in Ethiopia

It is to be recalled from chapter five that the Ethiopian constitution provides for the division of legislative, executive and judicial powers between the two levels of governments. The constitution under Art.50 (2) provides that 'The federal government and the states shall have legislative, *executive* and judicial powers.' Furthermore, the constitution under Art.77 (1) provides that Federal Council of Ministers is empowered to ensure the implementation of laws and decisions adopted by the HoPR (the federal legislature). A reading of these provisions may give us the inference that there is a dual structure in the federation in which each order of government is vested with their respective legislative and executive functions. Of importance for this section, the constitution seems to convey the message that there is a parallel federal and state executive organ in charge of enforcing federal and state laws respectively.

Moreover, the absence of explicit recognition of the supremacy of federal laws in the constitution in cases of conflict between federal and state laws is also considered as one factor to say the Ethiopian federal system seems to sanction a dual federalism.[27] If this way of understanding the constitution is tenable, one may therefore safely say that executive power in Ethiopia is co-extensive with the legislative power, thus the constitution adopts a dual model of federalism.

An issue that follows from the preceding paragraph is therefore, does federal practice in Ethiopia reveal the duality of the federal arrangement? Even though readings of relevant provisions of the constitution seem to reflect the dual nature of the federal arrangement, there is however some arguments that shows the otherwise federal nature of the federation. To have good appreciation of the issue in this regard, read the following excerpt [**taken from Assefa Fiseha, Federalism; teaching material prepared under the sponsorship of the Justice and Legal Research Institute, 2009, pp354-357]**

[26] Assefa, supra note 4, pp.371-372
[27] Tsegaye Regassa; Issues of Federalism in Ethiopia: Towards an Inventory of Legal Issues, in Tsegaye Regassa (ed.) 'Issues of Federalism in Ethiopia: Towards an Inventory', Ethiopian Constitutional Law Series, Vol.2, Addis Ababa University, Faculty of Law, May 2009, p.57

... Constitutional practice indicates that there is a gap in enforcing federal laws. It is true that there are some federal executive organs organized throughout the country to enforce federal laws. Chief among them are Customs Authority, Federal Inland Revenue, Telecommunications, Postal Services, Insurance and Banking and Federal Public Prosecution. These are federal agents normally enforcing exclusive federal powers. With respect to the latter for instance, the law states, 'the office of the central attorney General shall have...duty to (1) ensure that laws, regulations, orders and directives of the central transitional government are correctly and uniformly applied in all places,'[28] which remains effective today. It is true though that the office depends on the state police as far as the investigation of the crime is concerned. The states have also organized a parallel state prosecution office for the prosecution of the bulk of other non-exclusive federal crimes [foot note omitted]. The Federal Police was until very recently organized only in Addis Ababa but a recent proclamation authorizes the federal government for the setting up of such institutions in other regions.[29] Equally, the federal civil service proclamation deals exclusively with federal civil servants[30] and Article 89 expressly repeals all previous laws that were in force and applicable throughout the territory leaving the states to enact their own laws. In all these circumstances, which by and large are exclusive federal matters, one observes the federal government enforcing its policies and laws directly through its agents.

However, these are not the only federal institutions. Many of the federal Ministries mentioned above do not have branch offices outside Addis Ababa nor is there any express delegation of power to the state executive. It is important to point out that even in Germany and Switzerland, states that rely heavily on state executive organs for the enforcement of federal legislation, the federal government in each of them has these minimum federal institutions to enforce exclusive federal powers. The duality implied under Article 50(2) should, therefore, imply something beyond these few institutions to cover

[28] Article 5(1), 'A Proclamation to Provide for the Establishment of the Office of the Central Attorney General of the Transitional Government of Ethiopia,' Proclamation No. 39/1993, *Negarit Gazeta*, 52nd Year No. 24, Addis Ababa, 11 January 1993

[29] See Article 5 sub 3 of Proclamation No. 313/2003, 'Federal Police Commission Proclamation,' *Federal Negarit Gazeta*, 9th Year No. 30 Addis Ababa, 4 January 2003; this proclamation replaced Proclamation No. 207/2000, 'A Proclamation to Provide for the Organization and Administration of the Federal Police,' *Federal Negarit Gazeta*, 6th Year No. 37, Addis Ababa, 27 June 2000. The new proclamation also allows for the *delegation,* when this is deemed necessary, of the powers given to the federal police commission to regional police commission. Art. 7 sub 15.

[30] Federal Civil Servants Proclamation,' Proclamation No. 515/2007, Federal Negarit Gazeta, 13th Year No.15 Addis Ababa, 19th February, 2007.

the whole field of other federal powers enumerated under Articles 51 and 55 of the federal Constitution.

[...], despite the apparent lack of express concurrent powers, the bulk of social, education, economic and health affairs are shared between the federal government and the states. Certainly there are no institutionalized meetings, for instance, between respective heads of health, education and agriculture, of the federal government and the states. We have noted how police power is shared in the area of crime investigation even when both governments have legislated on their respective police forces. It is in these areas that the regime of co-operative federalism has been very influential in other federations. As far as the bulk of other fields are concerned the federal government has not yet organized institutions to enforce its laws.

Apart from the enforcement of federal laws through direct federal agents, there appears another pattern in the process of evolution: delegation. The federal income tax proclamation as well as the federal police commission proclamation, for instance, expressly permits the federal government to delegate some of its functions to the respective state bodies.[31] In these instances, it appears that what is delegated is the execution of laws. A related development is when the regional state machinery directly executes federal laws. Sometimes, the state governments take over the responsibility of enforcing federal laws despite the absence of direct authorization [foot note omitted]. What this shows is the lack of a well-organized institutional set-up for the enforcement of federal laws as well as the fact that the system of intergovernmental relations in Ethiopia is in its infant stage. [...], enforcement of the bulk of federal laws in the states is undertaken either by informal contacts between the respective offices or following party channels. It is true that in a federal system, federal laws and policies should take into account the autonomy of the states. However, so long as this limit is respected, it must be emphasized that the enforcement and co-ordination of such laws throughout the territory is an essential aspect of 'building one political as well as economic community' as proclaimed under the Preamble of the Constitution.

The above excerpt tells us about constitutional duality of the federal system and the practical cooperative/executive nature of the federation. It claims that, constitutionally speaking

[31] Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, 1st year, No.1, 21 August, 1995, Art. 50(9); as well as Proc. No. 313/2003, supra note 29, Art.7 (15) for example.

(Art.50sub 2), the Ethiopian federations resembles to the duality model in which both levels of government are expected to have their own agencies administering their respective laws. However, it contends that the practice seems to reflect more of executive federalism. The argument invokes different practices which include; first, the federal government is not administering federal laws by establishing its own agencies in regional states.

Despite some federal agencies are established at regions, still many federal laws are implemented by regional agencies. As a result, many federal laws are implemented by regional governments either after express federal delegation or direct implementation by regions without formal authorization by the federal government. Second, many federal laws are administered by regions by informal contacts between relevant offices at both levels or through party channels which are often practicable in cooperative federation.

However, the excerpt also shows that the federations cannot still qualify to be executive federalism. Two reasons may confirm the assertion. First, despite the bulk of social, education, economic and health affairs are shared between the federal government and the states, there are not institutionalized meetings and cooperation between relevant government offices at both levels. Second, the fact that the federal government heavily relies on party lines rather than on formal institutions of intergovernmental cooperation makes to say the federation as cooperative federal system less plausible.

From the overall discussion in the preceding paragraphs it can be stated that there is discrepancy between constitutional distribution of executive power and execution of federal laws in practice. This results a problem in determining which federal model is implemented in Ethiopia. Even though a federation may use both elements of both dual approach and cooperative approach in the assignment of executive powers, the Ethiopian experience cannot be regarded as such since the constitution does not show the possibility of both dual and executive federalism.

### 6.3. Intergovernmental Relations and the Implementation of Federal Laws in Ethiopia

It is easily discernable from the reading of the preceding sections that whether a federation follows a dual federalism or executive federalism has different implication on the type and nature of intergovernmental relations and the implementation of federal laws in a federation. The same holds true for Ethiopia. The fact that which model (dual federalism or executive federalism) is

adopted in Ethiopia is not clear as revealed from federal practice has also an implication on intergovernmental relations and implementation of federal laws. Thus under this section, the situation of intergovernmental relations and the implementation of federal laws is addressed hereunder.

### i. Intergovernmental Relations in Ethiopia

It is to be recalled from chapter three that intergovernmental relations refers to the interdependence between two levels of governments and addresses issues such as how politicians, civil servants, citizens and other stakeholders try to influence outcomes in jurisdictions other than their own. Intergovernmental relations arise between the federation and component units on matters cross-cutting federal and regional spheres, among which health care and environmental protection are important examples. It is important to note here that intergovernmental relations are not unique to federal systems rather it may also exist in unitary systems.

Interdependence between governments is inevitable and significant, particularly in federations where the constituent unit governments deliver many federally legislated programs or laws, where there is extensive concurrency or joint responsibility in many areas and where the constituent units depend heavily on conditional financing from the federal government.[32] However carefully powers are allocated between the spheres of government, substantial interaction and co-operation is inevitable because of the complexity of social organization, increased economic integration, and the exigencies of politics. These factors indicate the need to co-operate between levels of government through the mechanism of intergovernmental relations.

When we come to the system of intergovernmental relations in federal systems, federations use various institutions and process. These can be formal or even constitutional, but often they are informal. Most federations manage intergovernmental relations through many kinds of political and legal instruments. The divergent practice in intergovernmental relations is attributable, if not the only, to the approach of federal system adopted by a federation; dualist federalism or executive federalism.

[32] Anderson, supra note 1, p.64

In dualist federations such as the USA, intergovernmental relations remain not only informal but also fluid.[33] In contrast, the executive/ co-operative model of federalism provides a mechanism through which various intergovernmental structures can be established in line with the essentially cooperative spirit of the constitutional design. The German constitution which typically represents co-operative federalism, for instance, provides for cooperative institutions beyond the federal chamber *(Budesratt).* In Germany, the so-called *joint tasks* framework, which include post-secondary education, regional planning, and agriculture, are subject to joint public financing determined in joint planning committees in which the federation and the *Länder/states,* taken together, have an equal share of votes.[34]

In Ethiopia, the system of intergovernmental relations is not well defined both in the constitution and practice. The constitution does not provide for significant guidance as to federal-state relationships especially as to their roles in the implementation of laws. As you may infer from the preceding sections, the constitution provides for neither a clear and comprehensive dual structure nor executive/cooperative federalism at work.

In fact, there are some informal forums between institutions of federal (vertical intergovernmental relations) and state governments or between and among state governments (horizontal intergovernmental relations). These forums and councils by which regional states and the federal government meet include a Joint House Speakers Forum (for speakers of the federal houses and regional councils), Education Professionals Forum, the Forums of Dialogue between the House of Federation and each Regional State, Prosecutors' Joint Forum, the Council of Judges, the Five Eastern Adjoining Regional States Joint Forum, the Oromia and Somali Regional States Joint Cooperation Forum, Afar and Tigray, and Afar and Amhara Cooperation Forums, Amhara and Benishangul Gumuz Joint Cooperation Forum, and the SNNPRS and Gambella Joint Forum.[35]

[33] Stefan Hammer; Techniques, Structures, and Processes, in Ronald L. Watts and John Kincaid (eds.) 'Interaction in Federal Systems', Unity in Diversity: Learning from Each Other", 4th International Conference on Federalism , New Delhi, 5-7 November 2007, p.62

[34]Id, p56

[35] Alemayehu Fentaw; Conflict Management in the Ethiopian Multi-National Federation: A Critical Examination, a thesis Submitted to the European University Center for Peace Studies in Partial Fulfillment of the Requirements for the Master of Arts in Peace and Conflict Studies, Stadtschlaining, Austria, February 2009, p.60

However, these forums are far from establishing the existence of comprehensive intergovernmental relations, not only because they are informal, but their purpose is limited to mainly resolution of border, resource and ethnic based conflicts.[36] Thus, they are not proper to qualify as forums of executive cooperation for the purpose of governing federal-state relations in the implementation of laws. Therefore, establishing formal and comprehensive institutional mechanism of intergovernmental relationship through the cooperation of all concerned is yet to be seen in the federation.

### ii. Implementation of Federal Laws in the Ethiopian Federation

As it is discussed in section 6.2 above, the implementation of federal laws by regional agencies involves different mechanisms some of which may raise constitutional issues. As it is said earlier, the constitution seems to follow a dualist approach of federalism in which federal laws are expected to be administered by federal agencies established at regional states. However, the practice reveals otherwise. Many federal laws are being administered by regional agencies. The absence of comprehensive and formal system of intergovernmental relations has an impact on the issue of how federal laws are administered in regions.

Aseefa claims that there are four important mechanisms through which federal laws are implemented in regional states. These are delegation, Co-operation through Executive Institutions, Co-operation through Party Channels, and Co-operation through the Process of Policy-Making.[37] A brief discussion on each is in order.

#### a. Delegation

It is true that the federal government implements its laws by regions since Art.50 (9) provides that the federal government may, when necessary, delegate to the states powers and functions granted to it by Article 51 of this constitution. However, this provision cannot be taken for granted as it includes the implementation of any federal laws by regions through delegation because the provision calls for many issues to be settled.[38] The first issue is that which powers from the list of exclusive federal powers under Article 51 can be delegated to the states since the

[36] Ibid
[37] Assefa, supra note 4, pp.374-391, Substantial portion of the contents on the discussion of the four mechanisms is taken from the cited author.
[38] Id, p.374

powers under Art.51 are broad powers that are not limited to legislative power? Does the provision cover delegation of legislative and executive powers or only one of them? Would not an open clause authorizing delegation contradict the federal principle enshrined in the Constitution? And more seriously, would not this go against the rigid procedure of amendment prescribed in Articles 104 and 105? The constitutional guaranteed division of power is likely to be endangered if both the federal government and the states have the right to change this distribution at will.

Thus, though the scope of delegation is contestable, it may serve as one formal mechanism through which the federal government can get its laws implemented by regional agencies. The problem is however, in the absence of delegation, what other legitimate grounds are available for the federal government to implement its laws by regional governments. Assefa claims the following mechanisms are practically used by the federal government.

**b. Co-operation Through Executive Institutions**

This is an informal mechanism of executive cooperation that enables the federal government to implement its laws and programs by regional governments. The key federal institution established outside the formal constitutional framework is the Ministry of Federal Affairs, previously known as *Killil Guday Zerf*. The Ministry serves as an informal mechanism through which the federal government influences regional governments.

It is important to note that the Ministry's scope of power does not cover all regional states. It is rather limited to the four states, Gambela, Benshangul-Gumuz, Afar and Somali, otherwise known as 'emerging states,' or 'less developed states'. The main purpose, if not the only, for the establishment of the Ministry under the Office of the Prime Minister is in order to enable the federal government to provide emerging states with additional support. It is aimed at enhancing the lowland state capacity to utilize their constitutional rights to administer their own affairs.

However, the establishment of the Ministry is criticized for at least two important reasons.[39] First, it is alleged that the office is serving as a key instrument in controlling these states' activities and further their dependence on the centre. There are allegations that the federal

[39] Id, pp.378-379

government is sending its personnel and party officials who inevitably intervene in policy matters of the states. Second, the establishment of the Ministry has created a *de facto* asymmetry between states which is contrary to the constitutional stipulation of symmetrical federalism. This is because; the Ministry is providing special support to the four regional states in exclusion of the other states.

### c. Cooperation Through Party Channels

Assefa claims that this is perhaps the most pervasive scheme used by the federal government to influence state governments as well as to guarantee uniformity of policies. It is true that federal-state coordination through party channels is familiar in federations. The issue is however, the type of coordination and the degree of influence over one another. Given the fact that the same party organization (EPRDF) and its affiliates controls both federal and most state level governments and the existence of centralized party structure in the federation makes easier for the federal government to easily influence regional government. This in turn, weakens the power of the regional governments in a way that undermines regional autonomy, and may ultimately become subservient of the federal government.

### d. Cooperation Through the Process of Policy Making

As you may recall from earlier discussion on framework powers, the federal constitution provides shared powers for both levels on social and economic affairs in which the federal government enacts framework legislation and states will complement them by enacting detail laws. In theory therefore, it can be said that states can adopt the general laws of federal government in a way to suit their local demands and circumstances. However, these policy areas are said to be used by the federal government to influence competence of regional states on same. Three main factors are attached to the assertion.[40] First, the federal government is issuing the policy areas in a very detail extent to cover those that would have been covered by regional policies. The federal government for instance issued many policy documents that have covered very detailed matters such as primary education which are constitutionally considered to be

[40] Id, p.391

within jurisdiction of states.[41] Second, the existence of party congruence between the federal government and states helps the former to easily implement federal policies. Finally, the lack of expertise in most regions to design their own policy makes them to be dependent on the policies issued by the federal government.

In general, despite the lack of adequate and formal intergovernmental system in the federation, the federal government uses the above mechanisms to influence regional governments' competence and implement federal laws.

**Conclusion**

Though division of executive power between the two levels is common in all federal systems, how such power is allocated between orders of government is not the same across federations. As has been pointed out in this chapter, broadly speaking there are two options: the dual structure as practice in the USA or the executive federalism practiced in Germany and Switzerland. Dual federalism is based on mutually exclusive powers that the federal and the state governments operate independently in their respective spheres. The dualist federal principle thus needs to devise a method of dividing powers so that the federal and regional governments are each, within a sphere, coordinate and independent.

Executive/cooperative model of federalism on the other hand applies on the premises that the federal government and the states are mutually complementary parts of a single governmental mechanism all of whose powers are intended to realize the current purposes of government according to their applicability to the problem at hand.

There is no consensus s to which model is better. While dual federalism is admired for encouraging competition and ensuring autonomy of federal legislature, cooperative federalism is favored for it avoids duplication of efforts in implementing federal laws, provide room for flexibility, and allowing states to implement federal laws in accordance with local realities. As a result, executive federalism is said to be a good option in ameliorating the problem. It might

[41] See for instance *Ye Ethiopia Democrasiyawi Republic Mengist Ye Masfesem Akim Ginbata Strategy ena Programoch* (Ministry of Information, Addis Ababa Yekatit 94 E.C); also *Be Ethiopia Ye Dimocraci Sirat Ginbata Gudayoch* (Ministry of Information, Addis Ababa, Ginbot 94 E.C.)

minimize the unnecessary duplication of agencies and resources by sharing certain institutions such as administrative services and courts.

In Ethiopia, there is a difference between the constitutional hint for dual federalism and practical resemblance towards cooperative federalism. This unclarity and difference has an implication on the practice of intergovernmental relations and the implementation of federal laws. In this regard, the constitution and the practice seem to lack formal mechanisms of intergovernmental relations. Similar problem appears in relation to the implementation of federal laws. Practically, federal laws are implemented through delegation, cooperation through party channel, executive cooperation, and through policy making process.

**Summary Questions**

1. To which model of federalism does the Ethiopian division of executive power belongs; dual model, or executive/cooperative model? Which model do you think is appropriate to the Ethiopian reality?
2. What does Intergovernmental Relations mean? How is it under the Ethiopian federal set up?
3. What is the basic distinction between dual federalism and executive/cooperative federalism?
4. How do you see the special support given to the four regional states (Afar, Gambella, Benshangul-Gumuz, and Somiali) by the Ministry of affairs in light of Art.47 (4) of the FDRE constitution? Do you think such special treatment practically desirable? Can you imagine of problems in relation to such treatment?
5. Explain the respective advantage and disadvantages of dual federalism and executive federalism.

# 7. CHAPTER VII: DIVISION OF JUDICIAL POWER

## Introduction

It is to be recalled from the preceding chapters that a constitution in a federal system is a compact between the central and state governments. Accordingly, the constitution divides powers between the two levels of government; federal and state. Judicial power is among the powers that a federal constitution divides between the two levels of government. However, there is a question as to whether the division of power inherent in federalism applies for judicial power to the extent of requiring each order of government to have its own court system. In this regard, federal experience shows different practices.

Thus, under this chapter discussion is made regarding the division of judicial powers in federal systems. The chapter have two main sections. The first section deals with the organization of the judiciary in different federal systems. To this end, two mainly used approaches by federations in the organization of the judiciary are addressed; the dualist approach and the unitary approach. The second section mainly deals with the division of the judiciary under the Ethiopian federal arrangement. Under the same section, the exclusive federal judicial powers, exclusive state judicial powers and the concurrent judicial powers in Ethiopia are canvassed.

## Objectives

Up on successful completion of this chapter, students are expected to have the knowledge relevant to;

- ✓ Appreciate how federal systems organize their judicial structure;
- ✓ Explore the dualist and unitary approaches of organizing the judicial branch in federal systems;
- ✓ Explain how the judiciary is organized in the Ethiopian federal set up: unitary approach or dualist approach;
- ✓ Discuss the division of judicial competences between federal and state governments;
- ✓ Identify the respective jurisdictional competence of federal and state courts in Ethiopia; and

- ✓ Elaborate the issues as to the application of federal and state division of judicial powers in Ethiopia at sub-constitutional level (in other laws and the practice).

### 7.1. Organization of the Judiciary in Federal Systems

It is obvious that there has been no uniformity among federations in organizing their judiciary. Even though judicial power is among the powers that are to be divided between the two levels in a federal constitution, there is however a question as to whether the division of power inherent in federalism applies for judicial power to the extent of requiring each order of government to have its own court system. On the one hand there is the view that state courts subject to review by a higher court at federal level are sufficient to protect the interest of the federal government. This is called the unitary approach. On the other hand, there is a view that federal courts like federal executive agents are desired to effectively implement the power of the federal government. To this end, it is important that federal courts are established at different hierarchical level to implement federal laws. This is called the dualist approach. A discussion on the two approaches of organization of the judiciary is in order.

#### 7.1.1. The Dualist Approach

This approach has its basis on the strict application of the federal principle of division of power. Accordingly, it requires that, not only are legislative and executive functions divided between the federal government and the states, but judicial authority too is divided. In federations that follow the dualist approach, the powers of one organ of the central or regional government is defined in terms of the power of the other organ. That is to say, the federal judiciary interprets the laws issued by the federal law making organ and the executive of the centre implements the laws issued by the federal law making organ. The same logic should therefore be applied with regard to the powers of the three organs of regional governments. In the dualist approach therefore, the laws issued by the law making organ of regional governments are to be executed by the regional executive organ and interpreted by the regional judiciary.

The hallmark of the dualist approach is that the existence of a dual set of courts; federal courts applying and interpreting federal laws and another set of state courts applying and interpreting the laws of each state. The United States is a typical example representing the dualist approach. As some argue, there are certain reasons to opt for the dualist approach in the organization of the

judiciary. First, there is a fear that state courts might not fully enforce and implement federal policies. This view remains sceptical about the competence of state courts. There is some distrust in state courts in adjudicating federal laws. Thus, federal government need to have its own federal courts that apply and interpret federal laws throughout the country. Second, establishing federal courts along side with regional courts is needed for maintaining uniformity in the interpretation of federal laws.[1]

In the United States, there are dual court structures, federal courts applying federal laws and state courts applying state laws. In fact, the federal constitution only provides for the establishment of federal courts. These courts are of two types; constitutional courts as established under Art.III of the constitution (refers to the Supreme Court) which is directly established by the constitution and legislative courts which the congress may establish at federal level based on Art.I of the constitution. Accordingly, there is one Supreme Court established by the constitution and other lower courts established by the Congress. Accordingly, there are three levels of federal courts divided into numerous geographic units and various levels of hierarchy: at the bottom are district courts also called trial courts, mainly with original jurisdiction. Next exits the circuit courts of appeals also called US Circuit Courts, intermediate levels of federal courts. Finally, the Supreme Court in the apex of the federal court system consisting of nine justices who hear and decide cases is established.[2]

At state level, the U.S. federal constitution does not say anything and as a result the establishment of state courts is considered as residual power of states over which they can exercise power. Accordingly, states have established state courts at different level that interprets state laws. The highest court in each state is the ultimate authority on what the law is with regard to state law from the state's point of view. Following this, each state has its own independent judicial system.

The Federal Supreme Court is the court at the apex in the federation. The Court has the power to review cases on appeal from federal courts or state courts whose decisions are based on an issue involving a federal law, for instance, when a federal appeals court invalidates a state statute or

[1]Assefa Fiseha; Federalism, Teaching Material, Prepared under the Sponsorship of the Justice and Legal System Research Institute, 2009, p.436
[2] Id, pp.437-438

when a state court strikes down a federal statute. Or two lower courts have reached conflicting conclusions over the same issue and therefore a higher authority's opinion is sought or the court may want to issue a new opinion. The Supreme Court has also a power of review when a lower court has ruled on a matter that the Supreme Court has not yet settled in an earlier case.[3] However, it is important to note that the Supreme Court is not the highest court of appeals over the state judiciary with regard to state laws.

### 7.1.2. The Unitary Approach

There are federations in which the federal government assumes the power only to establish a highest federal appellate tribunal that reviews cases decided by states courts involving federal laws. Such federations believe that establishing state courts subject to review by a highest federal court is sufficient to protect the interest of the federal government. In such federations, judicial power over substantial federal laws is left to state courts. Federations under this category thus adopt a unitary approach on the organization of the judiciary and federations such as Germany, Switzerland and India are examples in this regard. Two important reasons may be forwarded justifying the unitary approach. First, establishing lower courts at federal level are unnecessary, expensive and likely to be an intrusion on the autonomy of the state governments. Second, state courts are believed to be competent for the work required so long as appeal is guaranteed to a higher federal tribunal.[4]

Taking the German federation as an example in the unitary approach, the Basic Law provides that all judicial power not given to federal courts is reserved to the states.[5] The Basic Law further stipulates that the establishment of lower federal courts is possible only for military, civil service controversies and intellectual property.[6] The reading of the provisions of the Basic Law thus suggests that most matters involving federal law are litigated initially in state courts subject only to ultimate and limited federal appellate review. Except on matters of military, civil service controversies and intellectual property, all lower and intermediate courts of appeals are therefore state courts.

[3] Ibid
[4] Ibid
[5] The Basic law of the Federal Republic of Germany, 1948, Arts.30 and 92
[6] Id, Art.96

However, it is important to note that all courts of final appeals in Germany are federal tribunals. The federal tribunals will have the final say over all state decisions including those cases involving state laws.[7] This clearly shows the fact that state judicial power does not correspond to state legislative power and vice versa. Yet, one needs to note that the federal appellate court in Germany does not refer to the Federal Constitutional Court which sees only cases involving constitutional disputes. The federal appellate courts we are referring to are other courts other than the Constitutional Court that review cases that came from state decisions not involving constitutional disputes.

The Indian system is a typical unitary approach in which there is only one Supreme Court at federal level and other courts are established at state level. States courts are established and empowered to enforce and interpret both the Union and state laws in which the Supreme Court of India is put at the apex to review any type of cases decided by state courts.[8] Such organization of the judiciary is meant to assure a uniform judicial standard and is thus a powerful force in the political integration of the various parts of the republic.[9]

Switzerland is another federal state that follows unitary approach of judicial system. There is just one set of courts in which the cantonal courts exercise jurisdiction to apply both the law of the cantons and the laws of the federal government. In Switzerland, there are state courts of different level that interprets and enforces laws of both federal and Cantonal governments after which the Federal Supreme Court serves as the highest court of appeal over decisions of Cantonal courts involving federal laws. One needs to be careful that the Federal Supreme Court has two types of powers over decision of Cantonal courts. First, it serves as an appellate court only on Cantonal decisions involving federal laws. In this case, the court entertains cases decided by cantonal courts only if they involve federal laws. Second, it serves as a constitutional court over cantonal decisions involving both federal and Cantonal laws. [10] In the latter case, it assumes power to adjudicate constitutional disputes arising both from state laws and federal laws.

### 7.2. The Division of Judicial Power in Ethiopia

[7] Id, Art.95 and 99
[8] Constitution of India that came into force on the 26th of January 1950 (as amended until 2003), Art.233
[9] Assefa, supra note 1, p.442
[10] Federal Constitution of the Swiss Confederation of April 18, 1999 (as amended until March 3, 2002), Art.188

Even though the federal constitution divides all the three powers between the two levels of governments, it is not clear whether the organization of the judiciary in Ethiopia follows the dualist approach or the unitary approach. The constitution under Art.50 (2) provides that "the federal government and the states shall have legislative executive and judicial powers". By establishing the three organs of government at both the state and federal level with their respective powers, the constitution apparently claims the adoption of a dual judicial structure.

Moreover, the constitution establishes the Federal Supreme Court to have a final say over federal matters (Art.80 (1)). It also stipulates that the HoPR to decide by a two-third-majority vote to establish inferior federal courts as it deems necessary, nationwide or in some parts of the country (Art.78 (2)). In Parallel to this, the constitution provides for the establishment of state Supreme Court, High Court and First Instance Court (Art.78 (3) in which the State Supreme Court will have a final say over state matters (Art.80 (2)). The reading of such provisions of the constitution may give us the inference that dual judicial system is organized in Ethiopia.

However, there are claims which say the judicial system is not practically a dualist one though theoretically it seems. The main reason for such claim is the application of the 'delegation clauses' in the federal constitution. As practice reveals, federal courts had not been established, until recently, in regions to enforce federal laws. It is rather through the principle of delegation that most judicial powers of the federal government have been carried out by regional courts where the state courts serve, not only as an institution for interpreting state laws, but also assumed the function of the two other federal courts; the Federal First Instance Court and the Federal High Court.

Following the delegation clauses in the constitution,[11] the State Supreme Court and State High Court are exercising, in addition to their state jurisdictions, the jurisdictions of the federal High Court the Federal First Instance Court respectively. This in fact seems to undermine the theoretical claim that there is a dual system of court structure in Ethiopia.

### 7.2.1. Judicial Power of the Federal Government

[11] Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, 1st year, No.1, 21 August, 1995, Arts.78 (2) and 80 (2&4)

The constitution does not clearly put which matters are within the exclusive jurisdiction of the federal judiciary. It is true that the constitution provides that the Federal Supreme Court to have a final say over federal matters and the State Supreme Court to have a final say over state matters.[12] A logical question that follows is therefore, how can we distinguish a matter as federal or state? Which matters are federal and which are state?

If we stick to the claim that the constitution follows the duality approach as discussed above, it can be said that federal courts have the power to adjudicate cases arising from federal laws; i.e. laws issued by the federal law making body. From this, what one may argue is that the federal law making organ can issue laws on matters which are within the exclusive jurisdiction of the federal government. These are matters which are listed under Art.51 and 55 of the constitution. Accordingly, federal courts have the power to adjudicate those matters which are listed as federal matters under Art.51 and 55.

However, the practice seems to show otherwise. At this juncture, making reference to the Federal Courts Proclamation (as amended)[13] is very important. The proclamation is a comprehensive law that deals with the jurisdiction of federal courts. Consistent with Art.78 (1) and 80 (1) of the constitution, Art.3 of the proclamation provides that federal courts shall have jurisdiction over cases arising under federal laws. Furthermore, Art.2 (3) of the proclamation defines federal laws as laws relating to matters that fall within the competence of the Federal Government as specified in the Constitution.

However, a reading of other provisions of the proclamation governing the scope of criminal (Art.4) and civil (art.5) jurisdiction of federal courts seems to signify another message. Although all the matters listed as criminal and civil jurisdiction of federal courts are federal matters, not all criminal and civil cases relating to federal matters are included. For instance, despite the Criminal Code (which is a federal law) incorporates many crimes, Art.4 of the proclamation covers only limited list of crimes as jurisdictions of federal courts. Furthermore, a cumulative reading of Arts.4&5 with Arts.12 (2) and 15 (2) of the proclamation reveals that all criminal and civil matters not listed under Arts.4 and 5 of the proclamation are within the jurisdiction of state

[12] Id, Arts.80 (1) and 80 (2) respectively
[13] Federal Courts Proclamation, Proclamation No.25/1996, Federal Negarit Gazeta, 2nd Year, No. 13 Addis Ababa - 15th February, 1996.

courts. This is also what is applicable in practice. Thus, one easily observes a contradiction between the Constitution and the proclamation (also the practice) regarding with the division of judicial power between the federal government and states.

### 7.2.2. Judicial Power of States

As discussed above, a reading of the provisions of the Constitution implies that the judicial structure at state level consists of the state first instance courts at the lowest level, also called *wereda* courts, above which we have the intermediate zone/high court and at the highest level we have the state supreme court. Such structure seems to reaffirm the dualist organization of the judiciary in Ethiopia.

Regarding the judicial power of states, it is to be recalled that the state Supreme Court has a final say in state matters. The state matters in this case are those matters which fall within the competence of states under the federal constitution. They are matters which are not exclusively given to the federal government under Art.51 and 55 of the constitution. From this, state courts have a jurisdiction to enforce laws issued by the regional law making organ.

However, it is important to note that judicial power of state courts is not limited to those matters which are within the exclusive competence of states as provided in the constitution. At least three reasons may be forwarded to support the assertion. First, state High Court and Supreme Court are exercising, in addition to their powers, the powers of federal High Court and Supreme Court respectively through delegation. Second, state courts are exercising judicial power over matters arising from federal laws if the matters are not assigned as jurisdictions of federal courts by the Federal Courts Proclamation (see discussion in section 7.2.1 above).

Finally, we know also for certain that the state courts do adjudicate criminal cases in the regular discharge of judicial duties, not in their delegated powers. For instance, state First instance Courts (Wereda courts) are practically exercising criminal jurisdiction over criminal matters arising from federal laws. Constitutionally speaking however, state first instance courts are with no possibility to be delegate with powers of federal courts since only state high courts and supreme courts are empowered to exercise powers of the federal first instance court and high court respectively through delegation. So, a question may arise as to the legal basis of first instance/wereda courts' power to assume criminal jurisdictions arising from federal laws.

### 7.2.3. Concurrent Judicial Powers

Even though the Ethiopian constitution seems to adopt the duality approach in organizing the judiciary, this does not necessarily imply that each set of courts exercises jurisdiction that is completely exclusive of the other. There is rather an argument which suggests the existence of shared judicial power of both levels of government. In this regard, there are two views. On the one hand there are those who hold that the dual court structure is strictly taken both under the constitution and the Federal Courts Proclamations and as a result contend that civil or criminal cases fall either before an exclusively federal court or an exclusively state court; hence there is no case of shared/concurrent judicial power.[14] One indication of this is the fact that the Federal Courts Proclamation has not openly provided for the existence of shared judicial powers.

The other view holds that despite the Federal Courts Proclamation's silence as to the existence of shared judicial powers, there still remains a concurrent judicial power. For instance, labour cases are mentioned nowhere in the proclamation as federal cases but we know for certain from Article 55(3) of the Constitution that it is a federal law matter. The commercial code too is a federal law by virtue of Article 55(4) of the Constitution and the same holds true for the penal code (Article 55(5)).[15] As discussed above, those matters which are not listed under the proclamation are within the jurisdiction of state courts. The point, however, is that it is difficult to think that federal courts are prohibited from adjudicating what is inherently their subject matter for the mere fact that the proclamation does not list them as jurisdiction of federal courts. For this reason, one may soundly argue that there is shared jurisdiction between the two levels regarding with those federal matters but not listed as jurisdiction of federal courts by the proclamation.

Besides, the federal and state constitutions incorporate a huge number of rights and freedoms. It is declared under Art.13 (2) of the constitution that 'All federal and state legislature, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this chapter [chapter three].' This clause, if taken seriously, has far-reaching consequences as far as the role of the judiciary in enforcing and protecting human rights is

[14] Assefa supra note 1, p.446
[15] Id, pp.446-447

concerned. Thus, state courts have shared power with federal government with regard to enforcing rights enshrined under chapter three of the constitution.[16]

**Conclusion**

Judicial power is one of the powers that are to be divided between the two levels of governments. The issue however is that whether the division of judicial power is to be made in a similar manner with the division of legislative and executive powers. Regarding this, there is no uniform application across federation. However, one can witness two common approaches that federal systems follow in assigning judicial powers to both levels of government; the dualist approach and the unitary approach.

In the dualist approach, judicial power is divided between the federal and state governments in a similar fashion with the division of legislative and executive powers. Accordingly, federal courts are established to interpret and enforce federal laws throughout a nation. Likewise, state courts are to be established within states to apply and enforce state laws. The USA federation belongs to this approach in organizing its judiciary.

In the unitary approach on the other hand, establishment of lower federal courts to apply and enforce federal laws is considered as unnecessary. It rather requires establishing a highest appellate federal tribunal that reviews decision of state courts involving both federal and state laws. Accordingly, substantial portion of federal laws and all state laws are applied and enforced by state courts after which a federal appellate court will review decisions of the former. Germany, Switzerland, and India belong, with slight difference among them, to this approach of organization of the judicial system.

In Ethiopia, it seems that there are two important problems. First, the constitution does not clearly put which matters are within the jurisdiction federal courts and which are within the jurisdiction of state courts. Though, it says that the federal Supreme Court has a final say over federal matters and state Supreme Court will have a final say over state matters, it does not clearly indicate which matters are of federal and which are that of states. Second, there is a difference between the constitution and the Federal Courts Proclamation as well as the practice in relation to the division of judicial power between the federal government and states.

[16] Assefa, supra note 1, p.447

Even though the textual reading of the constitution seems to suggest that there is a dual court structure, the reading of the federal courts proclamation and observance of the practise implies otherwise. Pursuant to the Proclamation, federal courts cannot exercise all civil and criminal matters that the constitution assigned as federal matters. Following this, state courts are exercising jurisdictions which according to the constitution are federal matters, at least, as a matter of shared jurisdiction with the federal courts.

**Summary Questions**

1. Elaborate the main difference between the dual approach and the unitary approach in the organization of the judiciary.
2. Explain whether the Ethiopian federal set up establishes the dualist approach or the unitary approach in the allocation of judicial power between the two levels of government.
3. Regional first instance courts in Ethiopia are practically exercising criminal jurisdictions. Do you think that they have a constitutional basis to do so?
4. How do you see the Federal Courts Proclamation No.25/1996 (as amended) in relation to the constitutional division of judicial power between the two levels of government in Ethiopia?
5. Some writers contend that there is no shared judicial power arrangement under the Ethiopian constitution. Others argue that, though not explicitly, there are grounds to say that shared judicial power is incorporated in the constitution. Which side of the arguments you agree with? Why?

# 8. CHAPTER VIII: THE ALLOCATION OF PUBLIC EXPENDITURE RESPONSIBILITIES IN FEDERATIONS

## Introduction

Fiscal arrangements are considered to be of particular importance because the financial arrangements within a federation have significant impact on its operation. These arrangements can be especially salient and volatile in federations characterized by high levels of diversity wherein various groups are highly sensitive to who pays what and who gets what out of any given system of fiscal federalism. To put it more briefly, arrangements about the raising, sharing, and spending of money are critically important both politically and economically for the functioning of a federal systems. Thus, this and the subsequent two chapters take you to the details on the issue (fiscal federalism).

This chapter begins by providing a general conceptual overview on fiscal federalism and fiscal decentralizations and continues to address the meaning of public expenditure, the principles applicable in the allocation of public expenditure responsibilities, the role of each orders of government, the main types of expenditure responsibilities, and constitutional practice on the allocation of expenditure responsibilities in some federations. After discussing on such concepts, the chapter canvases the allocation of expenditure responsibilities under the Ethiopian constitution.

## Objectives

After completing this chapter, students are expected to grasp the basic knowledge regarding:

- ✓ The concepts of fiscal federalism and fiscal decentralization;
- ✓ The notion, principles, objectives, and types of public expenditure;
- ✓ The division of expenditure responsibilities between different level of governments;
- ✓ The constitutional methods on the division of expenditure responsibilities in federal countries; and
- ✓ The constitutional methods on the division of expenditure responsibilities under the Ethiopian constitution

## 8.1.Fiscal Federalism and Fiscal Decentralization: An Overview

The devolution of taxing and spending powers to lower levels of government has become an important theme of governance in many countries in recent years. Accordingly, restructuring of government functions and finance powers between the national and lower level governments have become the core of development debate. A general conclusion emerging from review of theoretical and empirical literature in intergovernmental fiscal relations is that sub-national governments need to be given access to adequate resources to do the job with which they are entrusted.[1] At the same time, they must also be accountable for what they do with these resources. Moreover, like all policies, intergovernmental fiscal policies must take in to account both the political constraints facing policy makers, such as the strength of different states and groups in political decision, and economic constraints such as the stage of development of financial markets. [2]

Different definitions may be given to the concept of fiscal federalism. Some define fiscal federalism as a theory which lays down how the three budgetary functions of allocation, redistribution and stabilization should be performed by different government levels within a country for optimal, efficient economic performance and growth.[3] Others define fiscal federalism as a concept that encompasses principles of fiscal relations between federal and state governments, which are the command over resources by various level of governments and the direction and size of intergovernmental fiscal flows.[4] This includes the division of tax power and the means through which resources are adjusted to match expenditure responsibilities for the federal and state governments.

It is important to know the difference between fiscal federalism and fiscal decentralization. Decentralizing financial powers is not inherent to federal systems; rather unitary states may also decentralize fiscal powers to sub-national governments in the same way, even better than some federations. Thus, fiscal decentralization is a general concept that encompasses decentralization

[1]Odd-Helge Fjeldstad; Intergovernmental Fiscal Relations in Developing Countries: a Review of Issues, Chr. Michelsen Institute Development Studies and Human Rights, 2001, p.1
[2] Ibid
[3] Renuka Viswanathan; Fiscal Federalism and Regional Equity, in Ronald L. Watts and John Kincaid (eds.) 'Emerging Issues in Fiscal Federalism.', Unity in Diversity: Learning from Each Other", 4th International Conference on Federalism , New Delhi, 5-7 November 2007, p.78
[4] Endawke Tsegaw; Fiscal Federalism, Teaching Material prepared under the sponsorship of the Justice and Legal System Research Institute, 2009, p.25

of financial resources and power of spending in both unitary and federal form of states.[5] From this, one can easily understand that fiscal decentralization is a broader concept than fiscal federalism since it is applicable both in federal systems and non-federal (unitary) arrangements whereas fiscal federalism refers to the principles of fiscal decentralization as applied in federal systems.

Generally, Fiscal federalism is concerned with the design of fiscal constitutions when decision-making is among various orders of governments. The design of fiscal constitutions entails the division of powers for taxing, spending and regulatory functions as well as fiscal arrangements that accompany such arrangements. To be specific, the study of fiscal federalism focuses on the following interrelated issues. First, it deals with the issue of "who does what" (the distribution of expenditure responsibilities which in a federal system depends on the constitutional division of powers and responsibilities). Second, it deals with the division of revenue raising powers between the federal government and the regions. Third, it deals with the study of the causes and impact of fiscal imbalances between the tiers of government in executing their respective responsibilities. Finally, it deals with the design and objectives of intergovernmental transfers towards establishing a meaningful relationship between the tiers of government.

### 8.2.Meaning of Public Expenditure

The concept of public expenditure has a wider meaning that is highly associated with the function of government than any subject of public finance. In broader sense, public expenditure signifies the functions of government whereas, narrowly, it implies government's identifying and prioritizing areas of spending and implementing those identified projects in particular fiscal year.

Public expenditure is not only the most important but also the central part of the study of public finance. Public expenditure is incurred by the government for the attainment of public good. Every government has to maintain law and order, armed forces for providing protection, public parks, schools, health etc. of the people. Government has to perform certain other welfare measures like maternity protection, arranging for cheap food, cloth and low-cost housing for the poor and so on. All these multifarious activities which are increasing every year require huge

[5] Ibid

fund. Public expenditure, thus occupies the same important place in the study of public finance that consumption occupies in the study of economics.

Public Expenditure is incurred by public authorities – Central, State and Local Governments – either for the satisfaction of collective needs of the citizens or for promoting their economic and social welfare. They can finance expenditures through taxes, public debt, money emission, and international aid. In general, public expenditure is that expenditure incurred by the public authorities i.e. Central, State and Local governments, to satisfy those common wants which the people in their individual capacity are unable to satisfy.

### 8.3.Principles and Objectives of Public Expenditure

#### a. Objectives of Public Expenditure

Dalton divided the aims of public expenditure in broader two parts *i.e.* the functions of government.[6]

(i) Security of life against the external aggression and internal disorder and injustice.

(ii) Development or up gradation of social life in the community.

These functions can be broken down in to more detailed functions as:

1. The public authority works in many ways for the benefit of the people. These include the generalized services like public health and education. The whole society is benefited by these functions of the State.
2. Secondly, through public expenditure, the government influences directly or indirectly, the industrial and commercial system of the nation thereby helps towards the economic and social development of the society.
3. Thirdly, in modern times, the responsibilities of the government are increasing every year. For the economic development of the country, the government has started, on its own accord, industries and commercial businesses. This sector of the economy which is under the direct control of State has come to be known as public sector. Expenditure on this sector is increasing rapidly every year. In an underdeveloped economy, this aim of public expenditure has attained great significance.

[6] Id, p.44

4. Fourthly, Dalton points out that the public expenditure should be carried on up to that limit where the marginal benefit arising from different branches of expenditure are equal. These marginal benefits must be equal to the marginal sacrifice incurred by the public.
5. Public spending should be designed to optimize the level of investment in such a way as to maintain full employment – with growth.
6. Public Spending may be incurred at an increasing rate in the backward region to uplift their economy.

**b. Principles of Public Expenditure**

In economic literature, the expression "Canons of public expenditure" is used for the fundamental rules or principles governing the spending policy of the government. The following canons of public expenditure have been laid down by many scholars on the subject:

(1) ***Canon of Benefit:*** this canon suggests that every public spending must ultimately be used for the cause of social benefit i.e. for the general well-being of the common people. In other words, the State spending should confer benefits on the entire community at large than on an individual group or section. It means public funds should be spent in such directions which pursue common interest and promote general welfare.

(2) ***Canon of Economy:*** It implies that public expenditure should be incurred carefully and economically. Economy here means that wasteful and extravagant expenditure should be avoided at all levels. Public expenditure must be productive and efficient. Hence, it must be incurred only on very essential items of common benefit – without duplication in a way that involves minimum cost. An efficient system of financial administration is therefore, very essential in any country.

(3) ***Canon of Sanction:*** this canon suggests that no public spending should be made without the approval of proper authority. Only obtaining prior sanction is not sufficient. It must be properly inspected and examined whether the sanctioned amount of money spent on the purpose for which it is sanctioned by the highest authority and accounts properly audited.

(4) ***Canon of Surplus:*** this canon suggest that saving is a virtue even for the government, so an ideal budget is one which contains an element of surplus by keeping public expenditure below public revenue. In other words, public authorities should aim at

surplus of income over expenditure and they should avoid deficits. Frequent and huge deficits lead to uncontrollable financial situation with dire consequences of inflation. Therefore every government should attempt to balance its income and expenditure.

(5) ***Canon of Elasticity:*** this canon requires that the expenditure policy of the State should be such that changes must be possible in the expenses according to the changes in requirements and circumstances. In other words, there should be scope for changes in public expenditure according to the requirements of the country.

(6) ***Canon of Productivity***: this canon or principle implies that the expenditure policy of the government should be such that would encourage production in a country. That means a large part of public expenditure must be allocated for development purposes.

(7) ***Canon of Equality:*** one of the foremost aims of public expenditure is also to ensure the just and equitable distribution of income by conferring benefits on the poorer section of the community. This canon of equitable distribution is more significant for the countries where the gap between the highest income and the lowest income groups is very wide. Developing countries like Ethiopia, have given this aim a significant and particular importance in the economic activities of the State and in their fiscal policies.

### 8.4.Roles of Layers of Governments

Federations have several tiers of government. In addition to the federal government, federations have at least two other levels of governments; i.e. regional governments and local governments (such as wereda and Kebelle). In many federations, the lower level governments undertake important fiscal functions, both on the expenditure side and with respect to revenues. In such federal systems, various forms of fiscal arrangements between the national and lower level governments determine the way in which taxes are collected and shared between the levels, spend, and how funds are transferred from one level to another. [7]

Theories of fiscal federalism ordinarily treat local government as a subordinate tier in a multi-tiered system and outlines principles for defining the roles and responsibilities of the various tiers

[7] Odd-Helge, supra note 1, p.1

of government.[8] In some federations, the role of local level governments and Municipalities in fiscal relations may be significant while in others it may be very little. For instance, though Canada is one of the most decentralized federations in relations between the center and provinces, it is highly centralized regarding with the relationship between the center and local level governments. As a result, Municipalities have a limited capacity to raise their own revenues.

The way intergovernmental fiscal relations are organized and the role of lower level governments vary from federation to federation. These differences partly reflect the historical and geographical characteristics of each country, the degree of heterogeneity of the population and the extent of government intervention in the economy. [9] Public expenditure is determined by political will of the leading forces in the state: their priorities, their desired state model, and their interpretation of current economic and political phase. Past choices have relevant impact on public expenditure because of inertia and instrumentalism. Bureaucracy may play an important decision role for the actual expenditure. Sometimes considered as a completely exogenous variable, the public expenditure would thus be fully in the hand of political decision-makers without dependency from the economic context.

For more on this, read the following excerpt [**taken from Endawke Tsegaw; Fiscal Federalism, Teaching Material prepared under the sponsorship of the Justice and Legal System Research Institute, 2009, p48-49]**

> In particular,[…] one may distinguish at least three general models of state to which public expenditure corresponds: There are:
>
> 1. the **minimal state**, where only justice, public order, foreign policy and some other basic functions should be carried out by the state, relying on private initiative for the others;
> 2. the **welfare state**, where the State cares about the people's well-being directly, also through expenditure in schooling, health, support for the poor, the old, the disadvantaged,

[8]George Mathew; The Functioning of Local Governments and their Relationship with Upper Levels of Government, in Ronald L. Watts and John Kincaid (eds.) 'Local Governments and Metropolitan Regions in Federal Systems.', Unity in Diversity: Learning from Each Other", 4th International Conference on Federalism , New Delhi, 5-7 November 2007, Volume IV, p.48

[9] Odd-Helge, supra note 1 p.1

3. The **developmental state**, where the State takes the responsibility of fostering economic development, also through expenditure in infrastructure, support for firms, export and production in general.

Both the welfare and developmental state include the items of the minimal state. Military expenditure and special policies are common traits of the three models, maybe in different proportions. Comparing function shares in public expenditure, one can get insights in the kind of state under analysis. Needless to say, the State does not exert its influence on economy and society through public expenditure only, but also for example through laws.

In Ethiopia, the fiscal years from 2002-2006, six functional areas, *i.e*. Agriculture, Rural Water Supply, Rural Road, Education, Health, Administration and General Services are identified as the major sectors of regional expenditures. This is evidenced by the largest share (over 90 per cent) that these sector account from the total regional expenditures.

On the contrast, the federal government expenditures are summarized by the 2007 and 2008 federal fiscal budget proclamation under the heading of recurrent budget, capital budget and subsidy. Accordingly, administration and general service, economic service, social service and other expenditures are the major branches of federal capital and recurrent expenditures. Administration and general service comprises the expenses organ of the state, justice and public order, national defence and general service. Economic service consists of agriculture and rural development, water resources, industry and trade, mining and energy, transport and communication and construction. Social service comprises education and training, information and communication, culture and sport, health, labour and social affairs and prevention and rehabilitation. Lastly, under other expenditure heading transfer, regional subsidy, public debts, provisions and others are arranged.

### 8.5.Main Areas of Expenditure Responsibility: Capital and Recurrent

Technically, in the structure of a budget, most governments classify expenditure into two.

(i) Recurrent expenditure, and

(ii) Capital expenditure.

Recurrent expenditures refer to the expenditures that a public sector incurred for delivery of public goods and services. Expenditures under this category include expenditure on defense, education affairs and services, health affairs and services, social security and welfare, housing, water supply, sanitation, culture and recreational affairs. All sorts of administrative costs such as salary, wages, and defense expenditure and debt services are called recurrent expenditure. They are also referred to as non-developmental expenditure. They are intended for continuing the existing flow of goods and services and maintaining the capital of the country intact.

On the other hand, capital expenditures are expenditures that contribute to increased productive capacity of the nation and therefore, are known as development expenditure. They are expenditures intended to produce positively returns from projects from an economic perspective. Expenditures on fuel and energy affairs, agriculture, forestry, fishing and hunting, mining-manufacturing-construction, transportation and communication, and other economic affairs and services such as on construction of dams, public works, state enterprises, agricultural and industrial development etc., are instances of capital expenditure.

Though public expenditure is a means of maintaining the capital of the country intact, it is not merely a financial mechanism, it is rather a means of securing social objectives. Socialism can be realized only through progressive taxation and their distribution afterwards. Therefore, public expenditure is that expenditure incurred by the public authorities i.e. Central, State and Local governments, to satisfy those common wants which the people in their individual capacity are unable to satisfy efficiency wants.

The federal Government of Ethiopia, for instance in 2006 Fiscal Year, a total expenditure of 45.2 per cent was spent to capital expenditure and 26.8 per cent for recurrent expenditure while 28 per cent had gone to budget grant to regions. In subsequent fiscal years, relative increment has been experienced with a minor variation of the percentage share.

### 8.6. Constitutional Methods for Division of Expenditure Responsibility:

An important aspect of the exercise of fiscal federalism is the assignment of fiscal functions to the federal and the sub-national governments and the appropriate means of financing these responsibilities. This can also be described as the allocation of the authority and responsibility for the public sector decisions among different power centers. In the design of a decentralized

system of intergovernmental finances, there is an obvious need for a policy decision on concrete assignment of expenditure responsibilities between the central government and the regions and between the regions and the local governments.

The explicit and systematized assignment of functions and expenditures to the different levels of governments still needs to be a priority in transition countries' strategy for decentralization.[10] A specific assignment protects sub-national government budgets by making the *ad hoc* transfer of responsibilities from the central government harder and by helping to guarantee the continued provision of services. A specific and concrete assignment of expenditure responsibilities, of course, should not detract from the flexibility needed to adapt government budgets to major changes in policy.[11]

The theory of fiscal federalism does not provide a clear-cut separation of fiscal responsibilities that would promote economic efficiency and resource distribution.[12] There is no uniform method for the allocation of expenditure responsibilities across federations. The issue of which expenditure functions of public sector should be assigned to which level of government takes different factors in to consideration. The traditional economic theory of fiscal federalism, identifies three major functions for the public sector; macroeconomic stabilization, income distribution and resource allocation.[13] According to the theory, those functions which have macroeconomic stabilization role should be assigned to the central government. This is because such functions are considered to be national in nature.

The theory also advocates the assignment of income distribution function as primarily the responsibility of a national government. Accordingly, functions, such as taxation policies, aimed at bringing about desirable income distribution from the wealthy to the poor are better taken care of by the central/federal government. Regarding the allocation function, there is no agreement as to which level of government is better deal with it though in principle, it is the responsibility of

[10]Charles E. McLure & Jorge Martinez-Vazquez, The Assignment of Revenues and Expenditures in Intergovernmental Fiscal Relations, in "The Tax Assignment Problem: Conceptual and Administrative Considerations in Achieving Subnational Fiscal Autonomy" by Charles E. McLure and "The Assignment of Expenditure Responsibilities" by Jorge Martinez-Vazquez, papers prepared for the World Bank Institute's Decentralization, Homepage (www.worldbank.org/decentralization), p.7

[11] Ibid

[12]Abu Girma Moges; An Economic Analysis of Fiscal Federalism in Ethiopia, EL Classification: E62, H11, H71, p.3

[13] Musgrave, R and P. Musgrave, Public Finance in Theory and Practice, 5th ed., McGRAW-HILL Editions (1989)

all tiers of government. The classic argument is that providing some of the goods and services (such as defense) by the national government bring about efficient level of output since it confers significant benefit to everyone in the country. On the other hand local public goods can better be provided by local authorities who can easily identify local priorities. Thus, public goods and services can be provided nationally, regionally or locally despite some serious arguments against the benefits of decentralizing function to local levels in developing countries.[14]

There are other principles that need to be considered in the allocation of expenditure responsibilities. These include, efficiency in delivery of public service, ensuring regional (horizontal) equity, and preservation of internal common market.[15] According to the principle of efficiency, public services are provided most efficiently by the jurisdiction having control over the minimum geographic area that would internalize benefits and costs of such provision. Thus expenditure responsibilities that demand efficient provision of public service should be assigned to the states. Nevertheless, some degree of central control or compensatory grants may be warranted in the provision of services when there are spatial externalities or economies of scale.

Ensuring regional (horizontal) equity is important principle that needs to be considered in the allocation of expenditure responsibilities. Accordingly to this principle, decentralizing expenditure responsibilities for the sake of efficiency may bring differential fiscal benefits across various jurisdictions. This may lead to unequal treatment of citizens with identical private incomes depending on their place of residence. As a result, this principle calls for the assignment of expenditure responsibilities that have the role of dealing with these fiscal inequities to the national government.[16]

Consideration of preservation of internal market is also important principle in the allocation of expenditure responsibilities. It is evident that federations often provide constitutional guarantees for free domestic flow of goods and services. Thus, regulatory responsibilities that are important

[14]Solomon Nigussie; Ethiopia's Fiscal federalism: A Constitutional Overview, in Assefa Fiseha and Getachew Assefa (eds.) 'Institutionalizing Constitutionalism and the Rule of Law: Towards a Constitutional Practice in Ethiopia, Ethiopian Constitutional Law Series Vol. III, Law Faculty Addis Ababa University, 2010, pp.84 -85

[15]Anwar Shah *et al;* Emerging Issues in Fiscal Federalism, in Ronald L. Watts and John Kincaid (eds.) 'Emerging Issues in Fiscal Federalism.', Unity in Diversity: Learning from Each Other, 4th International Conference on Federalism , New Delhi, 5-7 November 2007, Volume II, pp.5-7

[16] Id, p.5

to ensure the constitutional guarantees of free flow of goods and services are better to be assigned to the central government.[17]

The principle of subsidiarity is also another important criterion that need to be considered in the division of expenditure responsibility. The principle implies that functions are only transferred to a higher level of government if they cannot be exercised by the lower level.[18] the philosophical underpinning of the principle of subsidiarity is that powers may be assigned to the center following the failure of the local governments in effectively discharging such responsibilities. Thus, provided that they do not contradict with the required level of uniformity in a nation, expenditure responsibilities need to be assigned to localized if they can be efficiently carried out by local governments.

Coming back to the constitutional allocation of expenditure responsibilities in federal systems, there is greatly varied experiences. In federations, the division of expenditure responsibilities is primarily determined by a federal constitution. Accordingly, allocation of expenditure responsibilities corresponds with the constitutional division of power between the levels of government. Particularly, the division of legislative and executive functions between the two levels is very important. Moreover, considering that it is the executive functions that demands largest share of public expenditure, it is worthy to note that how executive power is divided between the levels of government.

The difference among federations as to the allocation of expenditure responsibility may be attributable to different factors. However, the most important factor is the type of federal system in a country; whether it is dual federalism or cooperative/functional federalism. As you may recall from the discussion under chapter six, if a country adopts dual federal system, the expenditure responsibilities of each level of government is related to its legislative power. In such model, both the legislative and executive powers concerning a given subject-matter lie with the same government, and so does expenditure responsibilities for both powers.

[17] Id, p.6
[18] Bertus de Villiers; Involving Traditional Leaders in Local Government: International Perspectives, Forum of Federations, October 2010, p.13

In cooperative federal systems however, the bulk of legislative powers is usually for the federal government and the administration of the laws will be reserved to states. Thus, expenditure responsibility of states is likely to be high since the states bore the expenditure for the implementation of substantial portion of federal laws and the entire regional laws.

In general, literatures on fiscal federalism provide that the allocation of expenditure responsibility should be made taking the following points in to consideration.

1. **Efficiency consideration** -- Public services are provided most efficiently by the jurisdiction having control over the minimum geographic area that would internalize benefits and costs of such provision.
2. **Fiscal efficiency** -- decentralized decision making in a federation results in differential net fiscal benefits across jurisdictions also lead to unequal treatment of citizens with identical private incomes depending on their place of residence. Thus, the federal government should have the responsibility to rectify such differences.
3. **The Redistributive Role of the Public Sector** – expenditure responsibilities that aim at effective redistributive policies like progressive income tax could better be handled by national governments.
4. **Preservation of an internal common market**-- regulation of economic activity such as trade and finance should be left to the federal government.
5. **Economic stabilization** -- usually national governments control monetary and fiscal policies to provide macro-economic stability.

## 8.7. Constitutional Methods for Division of Expenditure Responsibility: The USA and German Models

The selection of the U.S. and German federations has some ramifications. The US federation, for its pioneer and complex of federalism and the constitutional base of individualism and liberalism totally far from the spirit of FDRE constitution albeit, the mechanism of allocation is to some extent similar. The German experience is best known for its moderate lubrication of the tension of highly ethicized federalism, which is common in other federations like Switzerland, Canada, Belgium, etc. Thus, the two selected federations teach the Ethiopian system lessons to harmonize the individual rights and group rights which are enshrined in the FDRE Constitution. In addition,

the allocation of power and function which seek expenditure has also the same benefit.

**i. The USA experience**

The U.S federation is constituted of three tiers of government; the federal government, state governments, and local governments. As mentioned elsewhere above, the U.S. federation represents dual federal system in which each level of government retains the executive responsibility in those matters in which it exercises the legislative power. To put it clearly, the federation reflects a system in which legislative power coincides with executive power. Thus, the division of expenditure responsibility in such system reflects the duality of the federal system.

There are at least three unique features of fiscal system of the USA. First, it is one of the countries where fiscal federalism has had a long history and the fiscal framework is deeply embodied in the federalist spirit of the constitution. Second, it is the most diversified and complex system, not only at federal level, but also state and local governments in the United States are highly devolved and complex, both organizationally and fiscally.[19] For one thing, the state fiscal system is very diverse, and so is the degree of fiscal decentralization. For another, the structure of local government in various parts of the country, and hence, there is a great deal of variety in the pattern of the local government among different states. These combined with the lack of a clear constitutional assignment of fiscal responsibilities among the various levels of governments, has led to the introduction of very complex and diversified system of change from time to time, the efficiency costs of which are large and can only be afforded by an advanced nation like the USA.[20]

The third and the most striking features of the US fiscal federalism, in spite of its high complexity and diversity, is that there has been much stability. On the one hand, the fiscal structure has been the most flexible by any standards. This can be evidenced by the expanding role of inter-governmental transfers and the reassignments of fiscal responsibilities over times. As such, the Constitution provided neither assignment of particular expenditure functions to the various levels of governments nor did it prescribe what taxes should be used by them. [21]

[19] George Mathew; supra note 8, p.40
[20] Endaweke, supra note 4, p.52
[21] Ibid

As is the case in virtually all federations, state and local levels of government in the US deliver various important public goods and services. These include public goods of a local or regional nature, such as local transportation and infrastructure, sanitation and water, sewage and garbage, libraries, parks and recreation facilities, and so on.[22] Despite the states assume comparable expenditure responsibilities, they have considerably less discretion over their own expenditures. This may be attributable to three important factors.[23] First, their important public services have been partly financed by conditional grants of the federal government that specify program design features, which state spending must abide. In some cases, state spending has been subject to federal mandates, without associated funding.

Second, though the U.S. constitution does not explicitly identify a general spending power of each levels of government, their courts in varying degrees have recognized that the taxing and spending powers of the federal government can be used to affect a field of activity beyond the strict confines of their normal legislative power. [24] This is the case where the federal government has been using the Trade and Commerce Clause of the Constitution to strike down state legislation that is alleged to interfere with interstate trade. The 'implied power doctrine' as interpreted by the Supreme Court allows Congress to extend its expenditure responsibility beyond what is exclusively given to it under the constitution. Accordingly, the Congress may exercise expenditure functions on any areas if it finds that it is necessary to promote the general welfare of society.

Another point to be noted is that unlike in other federations, equalizing grants from the federal to state governments have never been common in the United States. Intergovernmental grants in the U.S. typically address specific functions or programs, but usually do not accomplish much in the way of fiscal equalization. At the levels of the states, however, there are many such programs under which states provide equalizing grants to local jurisdictions—notably school districts.[25]

However, social insurance, defense and interest rate are among the big items of US federal expenditure. The big items of state expenditures are education, welfare, social security, and

[22] Robin Boadway and Ronald L. Watts; Fiscal Federalism in Canada, The USA, and Germany, Working Paper, Queen's University, 2004, p.6

[23] Ibid

[24] Ronald L. Watts; Comparing Federal Systems, 3rd ed. (Montreal and Kingston: McGill-Queen's University Press, 2008), p.101

[25] Wallace E. Oates; An Essay on Fiscal Federalism, Journal of Economic Literature Vol. XXXVII, September 1999, p.1127

transportation education being the dominant function at local level. Defense is entirely and social security is largely federal. Expenditures on welfare and transportation are made at state level, while education and policy are largely local functions.[26] A brief summary of the forgoing discussion is in order here.

The central instrument of expenditure policy is the budget. Budgeting could be conceived as a process for systematically relating expenditure of funds to accomplish planned objectives.[27] In the US federation, there are four steps involved in the budget cycle; (1) formulation of the president's budget by the executive branch, (2) appraisal of the president's budget by the congress and budget legislation, (3) the execution of this legislation by the executive branch and (4) auditing by the General Accounting Office (GAO).[28]

**ii. The German Experience**

It is to be recalled that the Germany is a typical example of cooperative federal system in which the bulk of legislative power is given to the federal government while the implementation of same is reserved to states. The federal government is primarily concerned with policy initiation, formulation and legislation, while the states are mainly responsible for implementation and administration. As a result, German federalism is described as *functional federalism* since it involves a strong relationship between the federal government and the states.[29]

The Functional/cooperative nature of the German federation may be inferred from three main aspects.[30] First, each level has its specific task and duties as well as some taxable source – but not the general right to tax – for fulfilling its duties. Second, some tasks as well as some revenue sources are not exclusively assigned to one level, but instead are shared by two or even three administrative levels (local governments included). Thirdly, there is a legally fixed mechanism which allows for an inter-Lander and inter-*local governments* equalization of fiscal and economic power.

---

[26] Endaweke, supra note 4, pp.52-53

[27] Getachew Negera; Analysis Of Medium Term Expenditure Planning And Budget Allocation In Ethiopia, A Thesis Submitted to the Graduate Studies of Addis Ababa University in Partial Fulfillment of the Requirement for the Degree of Master of Arts in Regional and Local Development Studies(RLDS)-(unpublished), Addis Ababa University, July 2005, p.24

[28] Endaweke, supra note 4, pp.54-55

[29] Solomon, supra note 14, p.91

[30] Endaweke, supra note 4, pp.56-57

The most important feature is that, the German federation has been unique in providing constitutionally for interstate fiscal transfer to cover a substantial portion of expenditure responsibilities of poorer states with a view of adjusting horizontal imbalances.[31] In almost all federations, equalization of regional imbalances is effected by federal transfers to poorer states. In Germany however, there are substantial transfers of income from wealthy provinces or states to poorer ones.

The federal-state fiscal transfer is also common in German federation than others. This is because of the fact that the Basic Law assigns state governments with substantial portion of administration and implementation responsibility of federal laws which apparently requires huge spending power. Thus, the system provides for sub-national federal transfers, either as portion of federal tax proceeds or in the form of unconditional and conditional grants so that state governments can effectively discharge their bulk of administrative responsibilities.[32]

Another peculiar feature of the German Federation is the concept of federal 'preemption'. The Basic Law not only provides exclusive powers for the central and the regional governments but also extensively provides the concurrent powers of both levels of government, in general leaving their execution to the *Lander*. What makes the German federation peculiar is the application of concurrent responsibilities of both levels. Accordingly, states can legislate on the subjects listed under the concurrent legislation so long as and to the extent that the federation has not exercised its legislative power by enacting a law. This is called preemption of states' jurisdiction by federal legislation. The concurrent power, on the other hand, can only be exercised by the federation if it is essential for the establishment of equal living conditions or for maintaining legal and economic union throughout the federation.[33] Thus the Basic Law has made it clear that the federal government cannot preempt states own their concurrent jurisdiction any time it wishes.

In general, the role of states in decisions of expenditure responsibilities by the federal government is relatively strong in the German federation. In Germany federal decisions that affect spending power of the states (*Land)* require an absolute veto power of the Land through

[31] Watts, supra note 24, p.109
[32] Id, p.101
[33] The Basic law of the Federal Republic of Germany, 1948, Arts.72, 74

the *Budesratt*. This is because matters related to spending/expenditure powers are connected to the financial interest of *Lander*, thus require their consent. Not only this, the expenditure responsibility of local governments in the German federation is not to be ignored. Compared to other federations, local governments in the German federation has significant role in fiscal relations.

### 8.8.The Division of Expenditure Responsibility Under the FDRE Constitution

The Ethiopian constitution seems to follow a dualist approach of dividing powers between the two orders of government. The Constitution lists the exclusive powers and functions of the federal government (Art.51) leaving residual powers to states (Art.52 (1)). It also provides a limited list of exclusive powers for the states (Article 52(2)). In principle therefore, the Ethiopian Constitution follows the USA model by enumerating the powers of the centre and allocating the residual powers to the states, but it also incorporates some features from India and Canada by listing some powers for the states.

It is to be recalled from the discussion on chapter five that the powers and responsibilities of the federal government are found under Art.51 and 55 of the constitution. For the purpose of convenience however, the powers and functions of the central government as assigned the by federal constitution can be generally divide into four groups. The first group comprises those powers which by their very nature are considered to be the common concern of all the constituent units of the federation. In all federations, such categories of powers are assigned to the central government. In this category of power, we may find national defense, international or foreign relations, citizenship, immigration and naturalization, and other powers that are supplementary to the main powers in this category. The Ethiopian Constitution (Article 55(7)) explicitly empowers the center to organize national defense, public security and the federal police force.

The second group of powers assigned to the federal government constitutes several commercial powers that are essential for facilitating as well as international trade can be mentioned (taxation is independently dealt with in the next chapter). In this group (see Art.55 of the constitution), we find the largest category of powers, including interstate commerce, postal and telecommunication services, weights and measures, domestic

currency coinage and foreign currency usage and banking, insurance, patents copyright. These powers are assigned to the federal government primarily for economic reasons and for practical convenience.

In all federal countries, the central government has the power over currency and legal tender, but they may differ on regulating banking by giving a concurrent power to the states. In Ethiopia, however the central government has the power over monetary and fiscal policy, local currency, the administration of the national bank and foreign exchange (Art.55 (10). Even though the Ethiopian Constitution does not specifically mentioned it, the regulation of insurance is practically made to be a federal power may be for the reason that it has an implication on the exclusive mentioned federal power; i.e. interstate trade. Furthermore, rail, air and water transports and major roads linking two or more states are assigned to be within the competence of the federal government (Art.55 (2)). The legislative power of the federal legislature also extends to the labor and commercial codes (Art.55 (3) and 55 (4) respectively).

The third group comprises matters related with various aspects of social and political issues. In Ethiopia, the federal legislature (HOPR) may legislate on matters concerning electoral laws and procedures (laws governing elections and political parties), as well as the enforcement of political rights established by the constitution (Art.51 (15). Some of the issues that may fall under the latter are press law, demonstrations and the registration of political parties.

The final group comprises civil and criminal laws. The powers of the federal government in these two areas need to be taken in a qualified manner. In relation to criminal law, the federal government has a primary power to make criminal laws. The states, however, may enact legislation on matters that are not covered by the penal code (art.55 (5)). Thus states power in such case is conditioned by the extent of power exercised by the federal government. Regarding the power over civil laws (e.g. the law of family and succession) it is the principal power of states. The federal government may however enact civil law when the House of Federation considers that it is essential for employing uniform law in order to establish and sustain one economic community (Art.55 (6)). Thus, the federal government cannot automatically exercise a power over civil matters.

States on the other hand are assigned with the powers which are residual and those which are listed under Art.55 (2). The division of power between the two levels of government as discussed in the preceding paragraphs therefore tells us the expenditure responsibilities of both levels of government. This does not mean however that the expenditure responsibilities of each levels of government are clearly set by the constitution. There are some gray areas in the division of power as a result of which determining the expenditure responsibility of each levels becomes difficult. For instance, the Constitution in its Article 51(3) provides that '[the federal government] shall establish and implement national standards and basic policy criteria for public health, education, science, and technology as well as the protection and preservation of cultural and historical legacies'.

Similarly, the constitution provides that '[state governments] have the power to formulate and execute economic, social and development policies, strategies and plans of the State' (Art.52 (2 c)). This clearly shows a problem in demarcating the border of the two powers. As a result it becomes difficult to determine up to which the expenditure responsibility of each levels extends in relation to these matters.

It is to be remembered from chapter five that the division of powers under our constitution seems to resemble to the dualist approach. This is because the Constitution provides the states with legislature, executive, and judiciary which are constitutionally independent from the central government in matters assigned to them. If one concurs with this view, each level of (especially the federal government) is expected to have its own agency to implement its own laws. However, it is important to note that this is not practical true in Ethiopia. Practically, (see chapter six) the powers assigned to each level of government are not mutually exclusive. For instance, many of federal legislations are being implemented by regional governments even without delegation to this end. It is not common for instance, to see as many federal agencies in regional states to administer federal laws. Nor does federal practice show that the federal government is covering the cost of administering federal laws through delegation as provided under Art.94 (1) of the constitution.

In general, one may wonder to see the nature of powers given to the federal government. At this point, it is important to note that the aspiration of the constitution to build one

economic and political community in the preamble seems to have an implication in the division of power. This is because many of the responsibilities that are assigned to the federal government are matters that have nationwide implication. Yet, the division of power as mentioned above has one important implication. That is to say, each level of government will bore the required cost of financing its respective expenditure responsibility. This is clearly provided under Art.94 (1) of the constitution which provides that both the federal government and the states have to cover the financial expenditures necessary to carry out all the responsibilities assigned to them by law. However, there are some practical issues in this regard which are in fact addressed in chapter nine.

**Conclusion**

The principle in federal constitutions is not limited to the division of legislative, executive, and judicial powers. Fiscal powers are also at the heart of any federal functioning. Fiscal federalism is therefore a principle that provides for the allocation of expenditure responsibilities and revenue raising powers of both levels of government. It also addresses the causes and mechanisms of solving intergovernmental fiscal imbalances in federal system. Fiscal federalism is different from fiscal decentralization in the sense that the latter is more broad and applicable in any type of government, federal or non-federal, while the former applies to officially declare federal systems.

Though division of expenditure responsibilities is common to all federations, there is no conventional standard applicable in all federations as to how the responsibilities are to be divided between different orders of governments. The traditional theory on fiscal federalism however provides three important criteria in the allocation of expenditure responsibilities to both levels. The first principle is macroeconomic stabilization which provides that expenditure responsibilities that have an impact on macroeconomic stabilization of the nation need to be centralized.

The second principle is income redistribution tasks. According to this principle, expenditure functions that are relevant in serving as redistributing income from the rich to the poor need to be centralized. The third principle provides that expenditure responsibilities that are related to the allocation of resources are better to be allocated to regional governments. The main reason for

this is that resource allocation has something to do with identifying the preference and demands of a given locality in relation to the provision of public goods and services. Local governments are therefore considered to be in a better position to appreciate local preferences or priorities, thus responsibilities of this type have to be localized.

In Ethiopia, the expenditure responsibilities of each level of government are determined by the constitution. This is because of the fact that the constitution divides legislative, executive and judicial powers to both levels. This execution of these powers necessarily requires spending. Thus, expenditure responsibilities of the federal and regional governments correspond to the legislative, executive and judicial responsibilities of each level. Particularly, since the constitution seems to claim a dual federal structure, the expenditure functions of each level relates to the spending needs of both levels that are necessary to discharge the legislative, executive and judicial powers.

However, it is important to note that the constitution lacks clarity in the allocation of expenditure responsibilities to both levels. There are some expenditure functions that are not clearly provided as federal responsibilities or state responsibilities. Furthermore, there is practical issue that states are implementing federal laws through delegation allegedly without federal government's responsibility to finance the cost of administering such laws.

**Summary Questions**

1. Do you think that the implementation of federal laws by regional states tells us that the Ethiopian federal system does not follow the dualist approach of division of powers?
2. Explain the main differences of the USA federation and the German federation regarding with the allocation of expenditure responsibilities between the federal government and regional states.
3. Discuss the difference and similarities between fiscal federalism and fiscal decentralization.
4. Explain the points that need to be considered I the allocation of expenditure responsibilities between the federal government and regional states.

5. Elaborate the allocation of expenditure responsibilities between the federal government and regional states under the Ethiopian constitution.

# 9. CHAPTER IX: THE ALLOCATION OF PUBLIC REVENUE

## Introduction

As discussed in the preceding chapter, money is at the heart of a given federal arrangement. When a federal constitution divides expenditure responsibilities between the federal and regional governments, it must, in parallel, design a mechanism whereby each level of government is empowered with a financial power necessary to accomplish the expenditure needs. To this end, revenue sources, tax and non-tax, of government need to be constitutionally assigned to different orders of government within a federal entity. However, federal practice discloses the fact that government orders below the federal government are often devoid of the necessary revenue raising powers that are comparable with the expenditure needs they have. As a result, fiscal imbalance between the federal government and states is a common reality in many federations.

This chapter therefore takes you to the overall concept of allocation of revenue sources in federal systems. It starts providing a preliminary discussion on the meaning, source and types of public revenue sources then continues with a thorough elaboration on the basic methods/principles that are applicable in the allocation of revenue sources to different levels of government in general and in federal countries in particular. The chapter finally addresses the constitutional method of allocation of revenue raising powers under the FDRE constitution. Under this part, the material discusses the exclusive federal and state powers of taxation, concurrent powers of taxation, and residual powers of taxation in the Ethiopian constitution.

## Objectives

Up on successful completion of this chapter, students will be able to:

- ✓ Explain the meaning public revenue and its sources;
- ✓ Elaborate different principles of fiscal federalism that are relevant in the allocation of revenue raising powers to different levels of government;
- ✓ Discuss the constitutional methods in the allocation of revenue raising powers in different federal constitutions;
- ✓ Explore the division of taxation powers between federal and state governments under the Ethiopian constitution;

- ✓ Identify the basic points that distinguish the general division of powers and the division of taxation powers under the Ethiopian constitution; and
- ✓ Analyze some constitutional and practical issues that may be raised in relation to the division of taxation powers under the Ethiopian constitution.

### 9.1.Meaning of Public Revenue

Public revenue is the income that a given order of government collect from different sources to finance the various expenditure responsibilities assigned to it by the constitution. However, Dalton defines public revenue as one aspect of public income. Accordingly, he defined 'public income' in broad and narrow sense, i.e. in terms of 'public receipts' and 'public revenue'. Public revenue includes income from taxes, prices of goods and services supplied by public enterprises, revenue from the administrative activities, such as fees, fines etc., and gifts and grants; while public receipts include all the incomes of the government which it may be having during a given period of time, i.e. public revenue plus income from all other sources such as public borrowing from individuals and banks and income from public enterprises.[1]

In a federal system, different levels of government are assigned with different responsibilities that require huge spending. To discharge their spending power in the delivery of public goods and services, governments need to have their own source of revenue. When we discuss of federalism, we are not only concerned about the division of expenditure responsibilities and autonomy of each orders of government in exercising such responsibilities. We are rather, in parallel to this, concerned about the means through which the discharging of the responsibilities by the governments is financed. Thus arrangements related to raising and sharing of money is critically important both politically and economically for the functioning of a federal system.[2]

Thus, the need for raising revenue is necessitated by the existence of expenditure responsibilities of different government orders. From federalism perspective, sub-national governments, not only be assigned with some spending responsibilities, but they need to be given access to adequate resources to do the job with which they are entrusted. In the absence of such access, it

[1] Endaweke Tsegaw; Fiscal Federalism, Teaching Material Prepared Under the Sponsorship of the Justice and Legal System Research Institute, 2009, p.77-78
[2] George Anderson; Federalism: An Introduction, Oxford University Press, Forum of Federations, 2008, p.30

is very difficult and irrational to make sub-national governments accountable for failing to discharge their spending responsibilities.

### 1.1.Revenue Sources of a Government

Governments in federal systems rely on a wide variety of revenue raising instruments for their revenue needs in financing their expenditure responsibilities. Depending on the economic capacity of a country, the type and amount of public revenue that the economy generates greatly varies from federation to federation. This difference is mainly attributable to the stage of economic development of a nation, the extent of natural resources available, the taxation system and the underlying philosophy of public administration in a given nation.[3] Even though some major revenue sources are known for covering the substantial amount of public revenue, the importance of each source of revenue varies from federation to federation.

Generally speaking, the sources of public revenue fall in two main categories; tax revenue sources and non-tax revenue sources. A discussion on each is in order.

1. **Tax revenue sources:**

It is important first to know the meaning of tax before dealing with tax revenue sources of government. Tax may be defined as a compulsory contribution payable by an economic unit to a government without expectation of direct and equivalent return (*quid pro quo*) from the government for the contribution made.[4] It is a burden that is imposed only by the legislative organ on persons or properties in order to raise money for public purposes. From this definition the following points are important. First, tax is a compulsory imposition by public authority. That is to say, the payment of tax does not require the consent of a tax payer. It is payable once it is decided by law irrespective of the will of tax payers. Second, the duty to pay tax cannot be imposed except by law. There must be an express legislative authorization for the government to exact tax from persons. Third, tax is exacted without direct *quid pro quo*. That is to say, a person is required to pay tax without expecting a direct return for the payment.

[3] ጆርጅ አንደርሰን፤ ፊስካል ፌዴራሊዝም፡ የፌዴራል አገራት ተሞክሮ በንፅፅር፣ ፎረም አፍ ፌዴሬሽንስ፣ ሚያዝያ 2002 ዓ.ም.፣ አዲስ አበባ፣ ገፅ40
[4] Misrak Tesfaye; ethiopian Tax Accounting: theory and practice, 1st ed. 2008, p.1

Tax is one of the basic sources of revenue for governments. Public revenue is often supplied by the instrumentalities of government. Many governments in any system rely on a wide variety of tax instruments for their revenue needs, including direct and indirect taxes, general and specific taxes, business and individual taxes. Thus, any type of taxes properly imposed by law, be it direct or indirect taxes, general or specific taxes, is categorized as tax revenue source.

## 2. Non-Tax Revenue Sources

There are some sources of revenue for governments which are not strictly speaking taxes, but usually considered as tax revenue sources. These include fees and charges also known as administrative revenues. Fees are payments to be imposed for licenses while charges are cost recovery mechanisms for the government up on delivery of services such as charges on trading services such as electricity, water, sanitation and solid waste, are the major sources of urban and metropolitan revenues.[5] Non-tax revenue sources include those sources that are not mentioned as tax revenue sources. They constitute small portion of government revenue. Different incomes fall under such category. These following are non-tax revenue sources for governments [**taken from Endaweke Tsegaw; Fiscal Federalism, Teaching Material Prepared under the Sponsorship of the Justice and Legal System Research Institute, 2009, pp80-81]**

a. **Commercial revenues**; the revenues, we call "commercial" are received in the form of price paid to government for produced commodities and services. These are revenues which are derived by government from public enterprises by selling their goods and services. They are also termed as price, for they are collected in the form of price of goods and services provided by government. They include payment of postage, tolls, interest on funds borrowed from the government credit corporations; dividends and profits from public sector enterprises; currency, coinage and mint by the central/national bank and profit from their circulation; price paid for liquor in the government stores; water, telecommunication, electric distributed by the government, rail, air, road and water transport services and the like. In addition, governments earn revenue from the production of commodities like steel, oil, minerals, etc. However, the surpluses from commercial undertakings are not considered as an important source of income in most of the countries of the world. Moreover, in a country which implements free-market economy accompanied by privatization,

[5] Odd-Helge Fjeldstad; Intergovernmental Fiscal Relations in Developing Countries: a Review of Issues, Chr. Michelsen Institute Development Studies and Human Rights, 2001, p.7

these sources of revenues are minimal, for the substantial volume of goods and services are provided by the private sector.

b. **Gifts and Grants;** gifts and grants are another category of public revenue. Gifts are voluntary contribution from private individuals or non-government donor to the government fund for specific purpose, such as, relief fund or defense fund during a war or an emergency. Such contributions are made by patriotic, charitably minded, public spirited or conscientious person during war, floods and droughts or an emergency. Gifts have no significant place in modern revenue system except during such above mentioned natural or manmade catastrophes.

Grants are government financial aid in the performance of governmental function at another level. In federal countries, for instance, central government traditionally gives grants-in-aid to the state governments and the state government to local governments in order to enable them to do their functions successfully or for undertaking specific activities such as construction of highways, dams, etc. and their maintenance in the interest of uniformity and efficiency in the working. Hence, these grants may be either conditional or unconditional or either for specific or general purpose.

Sometimes, the government of one country receives a grant from another country, which is commonly called "foreign-aid". It may be military aid, economic aid, technical aid, and so on. Many advanced and well developed countries such as United States, Soviet Union, United Kingdom, Canada, Germany, etc. give grants to the poor countries for their economic development. Such grants are very useful revenue resource for the under-developed countries. But foreign grants are always uncertain and not always unconditional, and this often leads to international difficulties and entanglements. Moreover, it always follows political game of give-and-take. Hence, it is not advisable to depend on foreign aids. Compared to each other, the total gifts as distinguished from grants do not form a significant amount in the revenue system. Both grants and gifts are characterized by their voluntary and by the absence of any expectation of direct benefit to the donor.

c. **Capital Receipts;** capital receipts constitute revenue from market borrowings, i.e. loans which have a maturity of fixed time. Receipts of this account would be considered as market borrowings even when some of these loans are taken by the central bank or reserve bank of the country. The borrowings also include special bonds, for example, the central government usually issues borrowing through special bonds and treasury notes under voluntary disclosure scheme that mature in different fixed time. The

second means of capital receipts is external loan. In federal arrangement, only the central government is authorized to raise loans from abroad; from friendly countries. The third means of capital receipts consists of loans and advances made by the central government to state governments and non-government parties. Small savings are also made in terms of savings which comprises of Post Office savings, bank deposits, etc. There are also another group consisting a variety of funds and the net effect of transactions occurring under the funds, accounts and deposits. Examples of such funds include deposit under various compulsory deposit schemes such as, provident funds, pension fund, reserve fund, etc.

### 1.2.Methods of Division of Revenue Sources between Federal and State Governments

The allocation of revenue raising powers between different orders of government is at the heart of federalism. Anderson, for instance, provides that the maxim that 'money matters' applies as much in federal systems as it does in life generally.[6] He forwarded two important reasons to illustrate his statement. First, financial arrangements regarding who determines and collects taxes and other revenues have a real impact in the real division of powers in a federal system. They can significantly alter the apparent legislative powers of the two levels of government. This is true, in particular, when one reminds the fact that central governments use their strong fiscal power to influence and control state governments in many ways. Second, the way how money is raised and spent can significantly affect the economic health of a federation.

Similarly and more plausibly, Watts provides two strong reasons justifying the need for allocation of financial resources to each orders of government within a federation.[7] First, it is the financial resources that enable or constrain governments in achieving their policy objectives within their constitutionally assigned legislative and executive responsibilities. Powers related to taxation and expenditure is by itself important instruments for affecting and regulating the economy.

It is evident that most important with regard to autonomy is the allocation of financial resources. In fact real autonomy is only possible when the autonomous units can also levy their own taxes and have the ability to finance their tasks with their own income. With regard to the finances, it

[6] Anderson, supra note 2, p.30
[7] Ronald L. Watts; Comparing Federal Systems, 3rd ed. (Montreal and Kingston: McGill-Queen's University Press, 2008), p.95

is of utmost importance, nevertheless, that financial inequalities among the different autonomous units are equalized by special tools for fiscal equalization since financial disparities can be corrosive. Such equalization is politically feasible, however, only if there is a minimum solidarity among the different autonomous units.

However, the division of revenue sources among federal and sub-national governments especially the tax assignment task is found to be problematic for many federations. Once expenditure assignment has been agreed on, tax assignment and design of transfers become critical elements in matching expenditure needs with revenue means at various levels of government. Even though expenditure assignment can provide a powerful argument for assigning a parallel tax responsibility to the government, its application is however not easy.

Literatures on fiscal federalism reveal that there is no ideal on assignment of taxes between central and lower levels of government. There are rather conflicting principles involved in the effective assignment of revenue raising powers especially tax assignment (*who levies what taxes*?) among governments in federations. While some of the principles provide for federal assignment of revenue sources, others provide for state assignment of same. For instance, administrative advantage of centralizing certain kinds of revenue sources and the need to avoid tax competition among states that would influence mobile companies and individuals to locate to a particular region are mentioned as justifications to assign such taxes to federal government.[8]

Others still suggest for additional points to be considered in the assignment of taxation powers. For instance, Anwar Shah *et al* provide that four general principles require consideration in assigning taxing powers to various governments.[9] The first point is the *economic efficiency* criterion. This criterion dictates that taxes on mobile factors and tradable goods that have a bearing on the efficiency of the internal common market should be assigned to the central government. Sub-national assignment of taxes on mobile factors may facilitate the use of socially wasteful policies to attract resources to their own areas by regional and local governments.

[8] Ibid

[9] Anwar Shah *et al;* Emerging Issues in Fiscal Federalism, in Ronald L. Watts and John Kincaid (eds.) 'Emerging Issues in Fiscal Federalism.', Unity in Diversity: Learning from Each Other, 4th International Conference on Federalism , New Delhi, 5-7 November 2007, Volume II, p.14-15

The second point is *national equity* criterion. This consideration provides that progressive redistributive taxes should be assigned to the central government, which limits the possibility of regional and local governments following perverse redistribution policies using both taxes and transfers to attract high-income people and repel low income ones. The third point that needs to be considered is the *administrative feasibility* criterion (lowering compliance and administration costs). This criterion suggests that taxes should be assigned to the jurisdiction with the best ability to monitor relevant assessments. This criterion minimizes administrative costs as well as the potential for tax evasion. Accordingly, property, land and betterment taxes (taxes that are relevant in changing the living standard of the people at grassroots level) are considered as better to be assigned for local governments because local governments are in a better position to assess the market values of such assets. The administrative capacity criterion is particularly considered as an important guide in developing countries where lower level governments are usually found to be incapable of having their own effective tax design.[10]

The forth point is the *fiscal need or revenue adequacy* criterion which suggests that to ensure accountability, revenue means (the ability to raise revenues from own sources) should be matched as closely as possible with expenditure needs. The literature also argues that long-lived assets should primarily be financed by raising debt, so as to ensure equitable burden sharing across generations. Furthermore, such large and lumpy investments typically cannot be financed by current revenues and reserves alone. This criterion also suggests that user charges and fees are suitable for use by all orders of government.

Similar to what is discussed above, the traditional theory on fiscal federalism provides for a set of tax assignment rules that relate to the respective responsibilities of central and lower level governments in macroeconomic stabilization, income redistribution, and resource allocation.[11] Accordingly, a tax type that may substantially influence central budget and inflation has to be assigned to the center. Under this category, taxes such as customs duties and considerable share of income and sales taxes (such as VAT) are mentioned.

Furthermore, the theory provides that in countries where there are wide disparities in income and wealth across regional states, taxes that have redistributive function, such as corporate income

[10] Odd-Helge, supra note 5, p.5
[11] Ibid

tax and wealth taxes, has to be centralized. However, if the taxes are important for resource allocation purpose, such taxes are better to be assigned for local governments since local governments are in a better position to appreciate local demands and preferences.

The preceding paragraphs deal mostly on the principles that need to be considered in allocation of revenue raising power between the central government and sub-national governments. The principles are intended to be applicable in all types of government. An important question that follows is therefore, does the practice of allocation of revenue raising power in federations correspond to the basic normative standards discussed above. It is less plausible to expect that the assignment of each and every tax conforms to the theoretical principles discussed above. Deviation from the normative principles is inevitable. This is because of the fact that there is no ideal of assignment of taxation powers that can be uniformly applicable across all federations and the fact that the constitutional allocation of taxation powers is country specific.[12]

As it is discussed above, the allocation of revenue raising power in a federation is very critical in federal system since it is the key reason that enables or constrains different orders of governments to discharge their constitutionally assigned expenditure responsibilities. Thus, each level must have enough financial power to finance the services they deliver to citizens. Each level of government should be assigned taxes that are related to the benefits of its spending. Thus, the proper assignment of taxes that are related to benefits depends on the assignment of expenditure functions. The central government should be responsible for expenditures having benefits that extend across sub-national boundaries or that are characterized by economies of scale not realized at the sub-national level. Sub-national government comes into its own in the provision of goods and services characterized by limited economies of scale and limited spillovers of benefits to other jurisdictions.[13]

The question is not therefore whether or not allocating revenue raising powers to sub-national governments is necessary. It is rather how the allocation is to be made. Though there is no universal ideal on allocation of tax powers in federations, there are some considerations that

[12] Solomon Nigussie; Fiscal Federalism in The Ethiopian Ethnic Based Federal System, 2006, p.119-120

[13] Charles E. McLure & Jorge Martinez-Vazquez, The Assignment of Revenues and Expenditures in Intergovernmental Fiscal Relations, in "The Tax Assignment Problem: Conceptual and Administrative Considerations in Achieving Subnational Fiscal Autonomy" by Charles E. McLure and "The Assignment of Expenditure Responsibilities" by Jorge Martinez-Vazquez, papers prepared for the World Bank Institute's Decentralization, Homepage (www.worldbank.org/decentralization), p.12

federations need to consider. These include the criteria of economic efficiency criteria, equity, need and administrative feasibility, and accountability criteria.[14]

Most federations in their constitutions divide the revenue raising powers of the two orders of government. These powers may be exclusive, concurrent or shared. When constitution provides for exclusive assignment of tax powers, several taxes are assigned to the federal government and states separately. When the powers are concurrent, both governments may assume jurisdiction (the power to legislate, collect, and appropriate) in relation to the revenue.[15] The exercise of concurrent jurisdiction may lead to competition between the two levels. Such competition is usually addressed by the paramouncy rule (usually federal supremacy).[16] Where a given revenue raising power is shared between the two jurisdictions, the constitution in principle assigns the power of levying taxes to the federal government but guarantees states a right to some or all proceeds of the revenue collected.[17]

While on the expenditure side the proportion of government spending that is decentralized is reasonably similar across federations, the extent of revenue decentralization varies widely. Financial power may be well decentralized in some federations and centralized in others. The main distinction between centralized and decentralized fiscal federal systems is the extent to which state governments have discretionary access to broad-based taxes (taxes that have high revenue return for the government). Canada, India, Switzerland, and the United States are some of the decentralized federations in terms of financial power in which state-level governments have full access to broad-based taxes such as income, sales, and payroll taxes. On the other hand, Australia and Germany are more centralized federations, in which much less own-source tax revenue is raised by states, although in both cases, revenue-sharing applies to federal taxes.[18]

Furthermore, federations such as USA, Canada, and Switzerland represent decentralized fiscal power since they provide for concurrent taxing power as their dominant feature. This is because,

[14]Solomon Nigussie; Ethiopia's Fiscal federalism: A Constitutional Overview, in Assefa Fiseha and Getachew Assefa (eds.) 'Instituionalizing Constituionalism and the Rule of Law: Towards a Constitutional Practice in Ethiopia, Ethiopian Constitutional Law Series Vol. III, Law Faculty Addis Ababa University, 2010, p.93. See also Anderson, supra note 2, p.32

[15] Sollomon, supra note 12, p.121

[16] Watts, supra note 7, p.96

[17] Solomon, supra note 12, p.121

[18] Robin Boadway and Anwar Shah (eds.); Intergvernamntal Fiscal Transfers: Principles and Practice, Public Sector Governance and Accountability Series, The World Bank, 2007, p.xxix

in principle, concurrence taxation power is a characteristic of the federal principle that gives utmost regional autonomy over tax legislation, administration, and execution of revenues that are accrued from several tax sources.[19]

However, a common characteristic of the allocation of revenue raising powers in almost all federations is that the majority of major revenue sources have been assigned to the federal government. This is true even where some tax fields are shared or placed under concurrent jurisdiction, the federal governments tend to predominate because of the federal power to pre-empt a field of concurrent jurisdiction.[20]

In general, the normative theories of fiscal federalism suggest the following criteria in the assignment of revenue powers:[21]

(i) progressive redistributive taxes should be central;
(ii) taxes suitable for economic stabilization should be central; lower level taxes should be cyclically stable;
(iii) tax bases distributed highly unequally between jurisdictions (e.g., resource taxes) should be centralized; taxes on mobile factors of production are best administered at the center;
(iv) taxes based on residence (e.g., sales of consumption goods to consumers or excises) are suited for states;
(v) taxes on immobile factors (e.g., property taxes) are better left for local levels;
(vi) benefit taxes and user charges might be used at all levels

The following table shows the broad distribution of taxes if the theory of fiscal federalism were to hold control;[22]

**Table 8.1: Tax Assignment according to the theory of Fiscal Federalism**

[19] Solomon, supra note 13, p.121
[20] Watts, supra note 7, p.96
[21] Odd-Helge, supra note 5, p.6
[22] Tadesse Lencho; Income Tax Assignment Under The Ethiopian Constitution: Issues To Worry About, Mizan Law Review, Vol. 4 No.1, March 2010, p.37

| Tax Category | Determination of | | Tax Collection and Administration |
|---|---|---|---|
| | Base | Rate | |
| Customs duties | F | F | F |
| Income Tax | F | F,S | F |
| Estate & Gifts | F | F,S | F |
| Corporate Income Taxes | F | F,S | F |
| Resource Taxes | F | F,S | F |
| Retail Sales | S | F | S |
| VAT | F | F,S | F |
| Excises | S | S | S |
| Property tax | S | L | L |
| User charges | F, S, L | F,S, L | F,S,L |

**Notes: F = Federal, S = State L = Local**

### 1.3.The Structure of Taxation Power in Ethiopia

It is true that the federal constitution provides for a federal system of government in which legislative, executive, judicial and fiscal powers are divided between the federal and state governments. While dividing fiscal power, the constitution assigns taxation powers in to three categories, namely the "federal power of taxation", " state power of taxation" and "concurrent power of taxation".[23] It also prescribes the conditions under which the regional governments could acquire revenue through loans and grant subsidies.

One question that may be raised is; does the constitution consider the theories and normative principles of allocation of revenue raising powers while assigning taxation powers between the federal and state governments. In this regard Tadesse argues that the revenue provisions do not support conformity with what the theories of fiscal federalism generally prescribe in the area of

[23]Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, 1st year, No.1, 21 August, 1995, Arts.96, 97, 98 respectively.

assignment of revenue powers.[24] In fact, addressing the issue requires a close look at the actual division of tax powers as discussed in the subsequent sub-sections.

Before we proceed to the detail discussion of the division of taxation power, it is important at this juncture to highlight some of the basic features of the Ethiopian constitution governing the division of tax powers. The first feature is that the constitution does not address division of powers between the center and local governments (sub-state governments). It rather addresses the division of taxation powers between the federal government and states. Second, the provisions governing revenue/tax raising powers of the Ethiopian Constitution are more detailed than their counterparts elsewhere.[25] Third, the Ethiopian Constitution departs from the assignment formula set for expenditure powers (general division of powers) and prescribes a special procedure for assignment of 'undesignated taxes'.[26]

Once again, it is worth mentioning some key principles and concepts with regard to the division of tax power under the Ethiopian constitution. One of them is that the division of tax powers is different from the general division of powers in relation to legislative, executive, and judicial powers. That is to say, while the general division of powers provides that residual power is assigned to states, residual powers under the division of taxation powers is governed in a different way in the title 'undesignated powers' (Art.99). Furthermore, the general division of powers does not provide for a separate list of concurrent powers but the tax regime of the constitution regulates concurrent powers under a separate provision (Art.98).

Furthermore, the tax regime of the constitution provides for detail principles governing allocation of tax powers and the exercise of same. The constitution for instance provides a general principle of revenue sharing between the two levels of government saying "The Federal Government and the States shall share revenue taking the federal arrangement into account".[27] Other principles are provided under Art.100 of the constitution and include;

[24] Tadesse Lencho, Supra note22, p.31
[25] Ibid
[26] Ibid
[27] The FDRE constitution, supra note 23, Art.95

I. **The prohibition of discriminatory tax laws:** this prohibition provides a limitation for federal government and states from dealing with tax between states and between states and the federal government in a discriminatory manner (Art.100 (2).

II. **The prohibition of extraterritoriality of state taxes**: in fact the principle in the division of tax powers requires that those taxes which by their nature (e.g. customs duties) have extraterritorial effect has to be assigned to the federal government. However, some taxes that are assigned to states may in due course bring an unwarranted impacted outside the geographical boundaries of a state by imposing burdens up on the economic and trade activities of other states.[28] To prevent such spill over, the constitution under Art.100 (1) provides for proper consideration of exercising tax powers by states.

III. **The principle of intergovernmental tax immunity**: given the fact that there will be an inevitable intervention between the federal government and states or among the states themselves while exercising their powers, the constitution under Art.100 (3) provides that the federal government may not tax the states, and the states likewise may not tax the federal government unless the property is related to a profit seeking public enterprise. However, an issue may be raised here that the constitution governs only intergovernmental tax immunity between the federal government and the states (see especially the Amharic version of Art.100 sub-3). 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 (e.g. establishing branch regional office) in another state?

Finally, the constitutional provisions that are considered as governing the division of revenue raising powers do not address only tax sources. Rather there are other non-tax sources that are considered by the constitution within the division of taxation powers. These include, for instance, tax, chargers, fees, rents, etc and accordingly Art.96 (7) provides that "it [the federal government] shall determine and collect fees and charges relating to licenses issued and services rendered by organs of the Federal Government." Similar provisions are available under exclusive sate taxation powers such as royalties and land rentals (Art.97 sub8) and fees and charges (Art.97 sub 9).

[28] Solomon, supra note 14, p.101

### 1.3.1. Federal Power of Taxation

The first category under the division of tax power in the constitution is those tax areas that are exclusively reserved to the federal government. The constitution under Art.96 provides a list of tax powers exclusively assigned to the federal government. Accordingly, the constitution declares that the federal government shall levy taxes and collect duties on sources reserved to it. This clearly shows that the federal government exercises legislative (levying power) and administration powers within its exclusive tax competences. The federal government is therefore entitled to collect revenue for itself from such sources.

The exclusive tax powers of the federal government include (Art.96); custom duties, taxes and other charges on imports and exports; personal income tax on employees of the federal government and international organizations; personal income tax, profit tax, sales and excise taxes on enterprises owned by the federal government; taxes on income from national lotteries and other chance winning games; taxes on the income of air, rail and sea transport services; tax on rental of houses and properties owned by the federal government; federal stamp duties and tax on monopolies; and collecting fees and charges related to licenses issued and services rendered by the federal government.

From the reading of the above paragraph, the exclusive tax power assigned to the federal government involves the following important categories. These are; Customs duty (tax on international trade), income tax, indirect taxes (especially sales and excise taxes), and property taxes. A brief discussion on each follows.

#### i) Customs Duties

Customs duty is usually identified as the major taxation power of the federal government.[29] This tax represents collection of tax, duties and other charges on imports and exports. Similarly, the Ethiopian constitution assigns customs duty as exclusive power of the federal government (Art.96 sub1). Many reasons may be forwarded to justify the allocation of customs duty as exclusive power of federal government. First, such tax is collected from international trade thus has an international implication for which the national government is better fit to such position. Second, the trend on international trade has an implication for domestic manufacturers and

[29] Watts, supra note 7, p.96

economy. At times, international trade may create unfair trade practices (e.g. dumping) that have negative impact on domestic producers. Not only this, it may have security, health and environmental implications to the country. Thus, to protect domestic producers from unfair competition thereby strengthening domestic economy, the national governments may employ different mechanisms such as antidumping measures, high tariffs, trade quotas, and restrictions.

Another reason is that tax from international trade is the major source of revenue especially for developing countries such as Ethiopia. Furthermore, international trade has the nature of extra territoriality. Its transaction usually affects more than one regional state. So to assign such power to states will have a trade distortion effect within the country. In general, in the interest of domestic economy, security, health, environment, controlling trade distortions within the nations, and high revenue return for the federal government, it is plausible that customs duties are reserved for the federal government.

**ii) Income Tax**

Federal experience shows divergent practices in relation to the allocation of taxation powers over income taxes. Some federations have allocated income tax to the federal government others assigned it to states (e.g. USA). Yet, in some federations (e.g. Germany) income tax is levied and collected jointly by the federal government, states and local governments (Municipalities).[30]

In Ethiopia, the reading of Art.96 reveals that income tax is the most important source of revenue for the federal government. Most of the provisions under the article deal with income taxes accrued from different tax sources. However, it is important to say that income tax under the Ethiopian constitution is neither exclusive power of the federal government nor exclusive power of states. The power to levy and collect income tax is assigned by the constitution to both levels of government. The difference is therefore, the grounds based on which the respective power of both levels is determined. Thus, the ground is not by tax type (income tax), but by sources of the income therefore, the criteria is the source.

Taking personal income tax as an example, the constitution makes a distinction of sources of such income. Accordingly, exclusive federal jurisdiction over personal income tax relates to those incomes the source of which are employees of the federal government (Art.96 sub3),

[30] Solomon, supra note 12, p.127

employees of public enterprises owned by the federal government (Art.96 sub2), and employees of international organizations (Art.96 sub2). Personal income taxes from other category of employees are therefore exclusive powers of the states.

In addition to personal income tax, the federal government also exercises exclusive power over income arising from rail, air and sea transport and income from chance winning from national lotteries and other games of chance (Art.96 (4) and (5)). Income obtained from leasing its own property and houses are subject to federal taxation (Art.96 (6)).

**iii) Indirect Taxes (sale and excise taxes)**

This is another major tax area of the federal government. In fact, the federal government does not have an exclusive competence over all areas of sales and excise taxes. The federal government has an exclusive competence to levy and collect sales and excise taxes only in relation to the sale, production or services of public enterprises owned by the federal government (Art.96 sub3). Sales and excise taxes related to other transactions and sources are exclusive tax jurisdictions of states. In addition to these indirect taxes, the federal government has an exclusive power over Valued Added Tax (VAT) following the introduction of VAT after the promulgation of the constitution (issues related to VAT are addressed in subsequent section under 'undesignated powers').

**iv) Property Taxes**

Property taxes are one of the tax sources of public revenue in many jurisdictions. There may exist different types of property taxes the determination of which is to be define by special tax legislations in a country. Tax on property may include several types such as real property taxes on land and buildings, annual tax on the value of land, and land transfer or conveyance taxes payable when real property is transferred/ sold.[31]

The Ethiopian constitution gives the federal government the power to levy and collect taxes on income of houses and properties owned by the Federal Government. This power further includes the power to fix rents (Art.96 sub 6). Property taxes related to other properties are therefore left for states.

[31] Id, p.132

In addition to the above mentioned taxes, the federal government is assigned with other exclusive tax jurisdictions. The Constitution provides the federal government the power to determine and collect fees and charges relating to licenses issued by organs of the federal government (Art.96 (7)). It also empowers the federal government to levy and collect stamp duties provided that the organs of the federal government render the service (Art.96 (9)).

### 1.3.2. State Power of Taxation

In the preceding section, we discussed the exclusive taxation power of the federal government. Now, let's see the exclusive taxation powers of the states. The revenue sources allocated to the states are provided under Art.97 of the constitution and include: personal income tax collected from employees of the state and private enterprises; rural land use fee and tax on income of private farmers and cooperative associations; profit and sales tax on individual traders; tax on income from inland water transportation; taxes on income derived from rent of houses and other properties in the state individual owned or owned by state; personal income tax, profit, sales and excise taxes on enterprises owned by the states; income tax, royalties and rent of land levied on small and medium scale mining activities; royalties for use forest resources; and charges and fees on licenses and services issued by state government.

When one compares the exclusive taxation powers of states with the exclusive federal taxation powers, almost all, except customs duties, tax types are assigned as exclusive taxation powers of the federal government. The states have an exclusive tax jurisdiction on personal income tax on income from employees of the states and from employees of private enterprises are subject to the exclusive authority of the states (Art.97 (1)). They also other exclusive income tax jurisdictions such as the income or profits of the public enterprises owned by the states are taxed by the states (Art.97 (7)), profit or income from small business activities and sole proprietorships (the nature of the business activities determined by the Commercial Code and other relevant laws) is left to the states (Art.97 (4)). Income from individual farmers or cooperative association, income from water transport service provided within the boundary of the state and rental income from properties owned by the state are exclusively taxed by the state (Art.97 (3), (5) and (6)).

Similar to the federal government, the states have also an exclusive taxation jurisdiction on sales and excise taxes. This power includes the power to levy and collect excise and sale taxes on

transactions pertaining to public enterprises owned by them (Art.97 (7)). In addition, the states can levy and collect these taxes from individual traders within their jurisdiction (Art.97 (4)). However, the exclusive power of the states is abolished since the introduction of the VAT.

This in fact triggers a constitutional issue. One of the reasons mentioned for the cancellation of sales tax from state power of taxation is that VAT, which is indirect tax and similar with sales tax, is introduced and given to the federal government by the joint decision of the House of People Representatives and the House of Federation.[32] The issue is therefore; if replacing sales tax by VAT is found to be necessary for any reason, is it not necessary to be made through constitutional amendment? Can any of the powers that are exclusively assigned to either level of governments be altered or changed by the joint decision of the two houses? If yes, what is the constitutional guarantee of the exclusive taxation powers of states? One of the very essence of federalism is that the power of each level of government (be it taxation power or any) is constitutionally guaranteed and any change on such power need to be made by extra ordinary constitutional amendment mechanisms. Thus, in light of this federalism value cancellation of one of the exclusive taxation power of states may become untenable. What if for instance, a state continues to exercise collection of sales tax in its jurisdiction? Is there any constitutional ground that prohibits the state from doing so?

The Constitution also assigns the states with exclusive power to levy property taxes upon houses which are privately owned, land which is used by usufractuaries and royalties from the use of forests (Art.97 (2), (6) and (10)). The states are also empowered to levy and collect taxes and royalties on small-scale mining activities (Art.97 (8)). One of the most important property tax of the states could be revenue from land lease payment from investors, for the constitution provides that land is publicly owned. Similar to the federal list, the taxation powers listed for the state also have provisions authorizing the collection of fees and charges on license issued and services rendered by different organs of the state. Hence, the states are empowered to determine and collect fees and other charges for the service rendered by the state organs (Art.97 (9)).

[32] የኢፌዴሪ ሁለተኛው የህዝብ ተወካዮችና የፌዴሬሽን ምክርቤቶች 2ኛ የስራ ዘመን 2ኛ የጋራ ስብሰባ፣ሚያዝያ 3 ቀን 1994 ዓ.ም. በ ተጨማሪ እሴት ታክስ ዙርያ የተሰጠ ውሳኔ.

The most important question in relation to the exclusive powers of taxation is whether each level of government entitled to determine its own tax bases and tax rates. The power to exercise in relation to tax contains two important powers; the power to make tax law (the power to levy) and the power to administer (collect). Thus, when a constitution provides for exclusive taxation powers to the federal government and states, does it mean that both levels have an exclusive autonomy to make law and administer a tax area exclusively given to them? Of important is, can the states determine their own tax base and rates in relation to the tax areas exclusively given to them by the constitution?

When powers are assigned as exclusive powers of either level of government, the presumption in federalism is that both levels have the power to make laws and administer the same in their respective jurisdiction. This seems to be included in the Constitution where it declares that the federal government shall levy taxes and collect duties on sources reserved to it, and the states likewise exercise the same power with respect to sources that fall under their jurisdiction (Art. 51/10 and 52/ 2/e). The legislative power to levy a tax area involves the determination of tax bases and tax rates. Thus, can the states in Ethiopia determine their tax bases and tax rates within their exclusive tax jurisdiction so that there may exist different tax bases and tax rates across states?

One may argue that subject to the general guidelines provided under Art.100 and Art.95 of the constitution, the states have the power to determine tax bases and tax rates on taxes which are under their exclusive taxation power. However, a look at the financial administration proclamation may warrant an otherwise interpretation. The proclamation provides that "tax systems at the Federal and Regional levels shall have harmonized and standardized *tax bases*".[33] The Amharic version is clearer in this regard and provides "በፌዴራልና በክልል ደረጃ ያሉ የታክስ ስርዓቶች የተጣጣሙና ተመሳሳይ የታክስ መሰረት ያላቸው ሊሆኑ ይገባል". To this end, the Ministry of Finance and Economic Development is entrusted to facilitate such harmonization and standardization.[34]

[33] The Federal Government of Ethiopia Financial Administration Proclamation, Proclamation No.648/2009, Federal Negarit Gazeta, 15th, Year No. 56, Addis Ababa 6th, August , 2009, Art.64 (1)
[34] Id, Art.64 (2)

The reading of the provision seems to suggest that the proclamation is imposing a duty on states to make their tax laws and tax bases harmonized and similar with each other. However, an issue may be raised here if the legislature can force states not to determine their own tax base and tax rates which are constitutionally given to them. Thus, though harmonization is required by the constitution in a way of the above principles, it seems questionable that the proclamation prohibits states from having a different tax base from other states so long as this does not go contrary to the principles mentioned above. The principles discussed above seems to suggest that diversity of tax rates and bases is tolerable to the extent it does not affect federal-state and state – to-state relation in taxation powers. In practice, however, the issue does not seem to be a reality since tax legislation is uniform throughout the country.[35]

From the preceding two sections, the following deductions can be made. First, the major tax sources such as customs duty and also VAT are assigned to the center. Even though it is proper to assign some taxes that are unevenly distributed to the center, the constitutions assigns some taxes that would conveniently administered by states to the federal government. For instance, income taxes from employees of public enterprises and NGOs could be to states particularly taking the mobility principle in to consideration.[36] Second, the constitution seems to be designed well in avoiding tax overlapping and multiple taxations. This is because, the constitution follows a rigid separation taxation power of the center and states, where particular type of tax (on particular source) levied by the center cannot be subjected to the taxation power of the states.[37] This has an impact on the fiscal power and the overall autonomy of states as will be discussed latter. Finally, the constitution does not allocate taxation powers to both levels merely based on tax types. It rather assigns taxes (except customs duty) based on the categories of taxpayers or particular things as a source of revenue.

### 1.3.3. Concurrent Power of Taxation

As discussed elsewhere above concurrent power of taxation refer to the practice where both the federal government and each state have the power to enact laws concerning a subject matter of tax within their jurisdiction. The arrangement of concurrency in relation to assignment of

[35] Solomon supra note 14, p. 96
[36] Solomon, supra note 12, p. 151
[37] Id, p.152

taxation powers varies from jurisdiction to jurisdiction. For instance, as mentioned above the USA is known for providing a long and broad list of concurrent taxation powers.

The Ethiopian constitution similarly provides a concurrent taxation powers between the federal government and states (Art.98). These areas include; profit, sales, excise and personal income taxes levied on enterprises jointly established by the federal and state governments, profit, sales and excise taxes on companies, and tax on dividend due to shareholders, profit tax and royalties on large-scale mining and all petroleum and gas operations.

Even though the lists under concurrent power of taxation seem to be short and brief, many questions are raised in relation to this provision. Read the following excerpt for more on the issues [taken **From Solomon Nigussie; Ethiopia's Fiscal Federalism: A Constitutional Overview, In Assefa Fiseha and Getachew Assefa (eds,) 'Institutionalizing Constitutionalism and the Rule of Law: Towards a Constitutional Practice in Ethiopia', Ethiopian Constitutional Law Series, Addis Ababa University, Faculty of Law, 2010, Pp83-120]**

> There are several questions that can be raised with regard to the application of „the concurrent power" as provided under Article 98 of the Constitution. The main issue raised is whether it can be applied in the same manner like that of the practice in the USA. Would it enable each state to enact its own tax law on sources listed under concurrent taxation? Is it similar to the concept of concurrent power of legislation? The power of taxation comprises of two specific powers: the power to set a tax rate and the power to collect the tax paid. The federal government and the states exercise an independent power to determine the rate and to collect the tax paid in areas exclusively assigned to each of them. If we pursue this principle, a concurrent power of taxation likewise presupposes the determination of the rate and collection of taxes to be decided independently by the federal government and the state concerned.
>
> Moreover, the title – concurrent power – implies that the two levels of government enact laws on the same matter separately. But there is a concern whether these arguments can be supported by the text of Art 98 which reads „The federal government and the states shall jointly levy and collect…" How can both the centre and states jointly (not separately) levy and collect taxes at the same time? Does it mean that tax legislation would be enacted by a joint meeting of the federal and state

> legislatures? Is it intended to benefit all states irrespective of the place where the source of a tax is located?
>
> Besides all the ambiguities, the provisions have been put into effect in the form of shared taxes where the federal government levies and collects the taxes, while the states are entitled to the proceeds arising from the taxes. A number of countries demonstrate shared taxes where the taxing powers of the centre and the states have been elaborated on the basis of the division of powers and functions inherent in the taxation power. However, the problem in our case is that the constitutional provision lacks clarity and the basis for centralizing the power to the federal government has not been appropriately designed. For instance, the proposed amendment of the provisions has not been proclaimed yet although the joint session of the two federal houses unanimously voted for it [foot note omitted].

The above excerpt reveals the issues that revolve around the area of concurrent taxation power in the Ethiopian federation. The ambiguity of the provision on concurrent tax powers may create conflict and competition between the federal government and the states. As it is said before, federal practice on concurrent power of taxation signifies the exercise of taxation powers by both levels of government in relation to the same tax source. This may result in conflict between the two orders. Concurrent power of taxation in general would lead to inter-jurisdictional competition (federal-state, or state-state) or conflict concerning a better control of taxes. In many federations, when such conflict occurs between the two levels, the laws of the federal government will prevail.[38] This is particularly true in federations where supremacy of federal law is constitutionally established.

In Ethiopia, there is no clear constitutional provision that settles this issue since there is no supremacy of federal laws in the constitution. In addition to the potential for inter-jurisdictional competition, the concurrent tax regime may create inconvenience for tax payers, a greater possibility of tax evasion and inefficient administration which may have a direct consequence up on the law and limited revenue source of the country. In most cases, countries that do not have a developed tax administration system avoid this complicated approach by allocating the power to the central government only.[39]

[38] Watts, supra note 7, p.96
[39] Endaweke, supra note 1, p.97

In practice however, it is said that the Constitution has been "amended" whereby the power is delegated to the federal government. Accordingly, the provision has been interpreted in such a way that those tax sources listed under the concurrent power have to be levied and collected by the federal government and the proceeds are compulsorily shared with the states.[40] As the result of this interpretation, the federal government has become fully empowered to levy and collect taxes on the mentioned sources and to retain the proceeds and dispose of them based on the decision of the HOF. Thus, the allocation of the proceeds is to be made based on the formula that the HoF prepares.

The above interpretation has been taken from the proclamation, Definition of the Sharing of Revenue between the Central Government and the National/Regional Self-Governments Proclamation No.33/92 of the Transitional Government of Ethiopia. However, such interpretation would not be free from creating further problem. First, since the federal government is given the power to determine the tax bases and rates, the states are devoid of participation in setting tax bases and rates in the manner that satisfy them. Second, should the revenue sharing be divided according to specific formula or should it be included in the grant subsidy is the major issue.[41]

### 1.3.4. Undesignated Power of Taxation

This scheme is one of those that make the Ethiopian division of taxation power different from other federations. Those taxes which are not expressly stated in Articles 96, 97 and 98 are regarded as 'undesignated)' and should undergo a different allocation procedure by the constitution. This category of taxes represents those new taxes, that might be introduced in the future in response to demand of societal and technological advancements the constitution submits the issue to be decided by the joint session of the house of federation and the house of peoples representatives. Art.99 of the Constitution provides "The House of the Federation and the House of Peoples' Representatives shall, in a joint session, determine by a two-thirds majority vote on the exercise of powers of taxation which have not been 'specifically provided for in the Constitution". Thus, taxes that fall under this category should undergo allocation by the 2/3 majority vote of the two Houses.

[40] Id, p.98
[41] Ibid

These taxes that are said to be undesignated, also called residual, are those that are not mentioned as exclusive powers of either levels of government or as concurrent power of both levels. By providing this special procedure for the allocation of undesignated taxes, the constitution departs from the principle of 'residuality' which is followed in the area of expenditure assignment.[42] Under the general division of powers, the constitution provides that residual powers are reserved to states (Art.52 sub1). However, the tax regime departs from the general division of powers by following special procedure. Accordingly, several taxes such as gift tax, inheritance tax or death duties which are found in some other countries as residual taxes may fall under this category. Capital gains tax, royalty from the use of patent and copy right, income from interest on deposits, surtax and VAT can be argued to be residual taxes, despite the presence of some of them in the existing tax laws.[43]

Thus, in relation to undesignated taxes, both federal and state government can exercise taxation power over such taxes only after they are authorized to do so by the joint decision of the two houses. In deciding the allocation of undesignated taxes, it is presumed that the two houses will consider some important points. Solomon provides that in deciding over the issue, the two house need to take some points in to considerations such as the national and state interests, the changing economic conditions, examination of existing division of taxes, the impact of taxes on interstate trade, impact on national economic development, and the overall tax performance.[44]

So far, the two houses in a joint secession met and decide on the allocation of certain taxes which were not constitutionally assigned. In such meeting, the Joint Houses designated income taxes on royalties derived by enterprises as 'concurrent' taxes and royalties derived by individuals as 'regional' taxes.[45] The two houses also decided VAT to be a federal taxation power.[46] However, there are many taxes, which were not assigned by the constitution as exclusive taxation powers of the federal government are enumerated by the federal income tax proclamation as exclusive federal taxes. These taxes include capital gains tax, tax on incomes derived from self-employed persons (musicians, entertainers, and artists), tax on income from interests paid by the

[42] Tadesse supra note 22, p.40
[43] Solomon, supra note 14, p.99
[44] Ibid
[45] Tadesse supra note 22, p.40
[46] የኢፌዴሪ ሁለተኛው የህዝብ ተወካዮችና የፌዴሬሽን ምክርቤቶች 2ኛ የስራ ዘመን 2ኛ የጋራ ስብሰባ፣ሚያዝያ 3 ቀን 1994 ዓ.ም. በ ተጨማሪ እሴት ታክስ ዙርያ የተሰጠ ውሳኔ.

government or individuals, tax on income from interests on deposits, an income from transfer of shares, tax on incomes from royalties on patents and copy rights.[47] This raises a constitutional issue since the federal legislature cannot enact a tax law in relation to the above mentioned areas unless it is expressly authorized by the joint decision of the two federal houses.

One of the controversial issues in relation to undesignated powers of taxation is the regime of VAT. The issue is what constitutes undesignated? Does it refer to those taxes the name of which is not mentioned by name (undesignated by name)? Or does it refer to those which are not mentioned, not only by name, but also by substance? If we take undesignated to mean unmentioned by name literally then since VAT is unmentioned by name, it should fall under art 99. But if we take undesignated to mean not only unmentioned by name but also by substance, though VAT is unmentioned literally, since it is mentioned by substance (if taken as a family of sales tax) in some provisions of the constitution then it should fall under article 97 (4) of the constitution as exclusive power of state taxation.

The ultimate issue is therefore, is VAT a family of sales tax, or different and new tax type. Thus, if VAT is a family of sales tax and is introduced in replacement of sales tax, then it could be said that it is not undesignated taxes; hence decision by joint meeting of the house is not appropriate. It rather requires the amendment of the constitution. This is because; first, VAT is not new tax since it is a family of sales tax. Second, amendment of the constitution is necessary because the introduction of VAT is replacing one of the exclusive powers of states.

The issue was raised in the Joint session of the two houses. However, it is finally decided to be a federal tax though the raised issue is not convincingly addressed by the two houses. In fact, VAT in many federations is assigned to the federal government since it has the potential of generating huge revenue and its capacity in macroeconomic stabilization. The problem in Ethiopia is however in relation to the abolishment of sales tax following the introduction of VAT. If abolishing sales tax because of adoption of VAT is found to be necessary, it would have been appropriately done through constitutional amendment.

### 1.3.5. Local Taxation

[47] See the Income Tax Proclamation, Proclamation No.286/2002, Federal Negarit Gazeta, 8th Year No. 34, Addis Ababa, 4th July 2002, Art.8 (4)g, Art.6 (c), art.6 (j), Art.36, art.37 (1b), and Art.31 respectively

The main task of a federal constitution is dividing powers between the two orders of governments; federal and state. This is also true for the division of revenue raising powers. In many federations, revenue-raising power is allocated between the federal government and states with the possibility of decentralizing those revenue-raising powers of states to local governments. Thus, the allocation local taxation power is not often the concern of federal constitutions. In particular, in federations that follow the dual approach, decentralization of power further to the lower level governments is left to the states in their own territory. For instance, the Constitutions of the United States, Australia and Canada deal only with the power of center and the states. This is because theories of fiscal federalism ordinarily treat local government as subordinate tier in a multi-tiered system and extensions of state governments. Thus, they are usually financially dependent on limited tax sources and charges or grants through intergovernmental transfers.[48]

However, there are some federal countries that provide substantial fiscal autonomy for local governments by constitutionally guaranteed allocation of taxation powers. Germany is typical example in this regard in which tax revenues are distributed among the regional administrative bodies (local governments), using both their assigned revenues and their shared revenues.[49] Their taxation powers include levying taxes on real property and trades.

In addition to their tax revenues, there is another scheme under the German federation that empowers financial autonomy of local governments. In every Land, a local equalization system exists under which the Land government must transfer a portion of its tax revenues to local authorities under an arrangement called "obligatory tax sharing". In addition, the Länder give local authorities a share of further revenues, such as grants from the equalization system among the Länder, grants from the federal government because of economic weakness, and proceeds from the motor-vehicle tax.[50]

In Ethiopia, the constitutional allocation of taxation powers is made only in relation to the federal government and the states. Thus, the revenue powers of local government are to be addressed by

[48]George Mathew; The Functioning of Local Governments and their Relationship with Upper Levels of Government, in Ronald L. Watts and John Kincaid (eds.) 'Local Governments and Metropolitan Regions in Federal Systems.', Unity in Diversity: Learning from Each Other", 4th International Conference on Federalism , New Delhi, 5-7 November 2007, Volume IV, pp.48-50
[49] Id, p.52
[50]Id, p.53

their respective regional governments. Despite the fact that local governments are indispensible with important constitutional recognition (Art.50 (4)), they are however financially dependent on their regional governments. It is true that power is decentralized to local governments up to wereda and kebelle levels. Regional taxes are collected and administered at regional, Zonal and Wereda levels where Wereda levels are entrusted to collect taxes and accrue to the regional treasury. However, the Weredas have no autonomy to spend the revenue they collected.[51]

**Conclusion**

Federalism is not limited to the allocation of expenditure responsibilities. It rater requires that allocation of expenditure responsibilities have to be accompanied with parallel allocation of revenue raising powers to lower level governments. Decentralization of revenue raising powers to sub-national governments have many advantages include, ensuring accountability and efficiency in the delivery of public goods and services, and fostering autonomy of local governments.

If allocating financial powers to different orders of government is necessary, there is no however a universal ideal as to how the division (who levies and collects which tax) is best achieve. Literatures on fiscal federalism provide that certain criteria need to be considered in te allocation of revenue raising powers. These include, efficiency consideration, administrative feasibility, and equity and mobility concerns. More importantly, macroeconomic stabilization, redistribution of wealth and resource allocation roles of revenue sources has to be taken in to account. To this end, taxes that have an impact on macroeconomic life of the nation have to be centralized. Similarly, Taxes that are important in serving wealth distribution has to be centralized. However, taxes that are less mobile and related to allocation of resources need to be decentralized.

In Ethiopia, the division of revenue raising powers is comprehensively addressed by the constitution in a separate regime. The division of tax powers is made to be different from the general division of powers. This is because, for one thing, the constitution provides guiding principles that need to be considered in federal-state and state-to-state tax relations. Such guiding principles are not clearly put in the general division of powers. For another thing, the regime that governs division of taxes in the constitution deviates from the general division of powers in the

[51] Solomon, supra note 12, p141

sense that residual tax powers are not assigned to either level of government, rather are made to be decided by a joint session of the two federal houses.

The constitution divides taxation powers as exclusive federal taxation powers, exclusive state taxation powers and concurrent taxation powers. It also provides a separate provision as to the allocation of taxes that are not assigned as exclusive federal or state powers, or concurrent powers of both levels. All in all however, it can be said that the major type of taxes are assigned to the federal government and this may have an implication on the financial autonomy of state governments.

**Summary Questions**

1. Explain the relevance of decentralizing revenue raising powers to sub-national governments in a federation.
2. Elaborate the points and principles that are relevant in the allocation of revenue raising powers between the federal government and state governments.
3. Discuss the issues that may be raised in relation to the application of concurrent taxation powers under the Ethiopian constitution.
4. Some argue that VAT is a new type of tax the assignment of which has to be determined by the Joint meeting of the two federal houses. Others contend that VAT is not a new type of taxes rather it is a family of sales tax. Furthermore, it is a tax that replaces sales tax. As a result, it is part of state power of taxation and need not to be considered as undesignated tax. Which side of argument do you support? Why?
5. Discuss the facts that show the division of taxation power is different from the general division of powers under the Ethiopian constitution.

# 10. CHAPTER X: FISCAL IMBALANCES AND INTER-GOVERNMENTAL REVENUE TRANSFER

## Introduction

The study of fiscal federalism is generally concerned with the study of the distribution of expenditure responsibilities, the allocation of taxation power, intergovernmental transfers for adjusting fiscal imbalances. Federal constitutions divide expenditure responsibilities between the federal government and states. Parallel to this, federal constitutions divide revenue raising/taxation powers between the two levels of government. Federal experience however shows that the division of revenue raising powers is not equally divided to sub-national governments in a way that enables them to finance their expenditure needs. As a result, states and sub state governments often face with financial deficits in the efficient delivery of public goods and services. Such mismatch between the revenue raising power and expenditure needs between different levels of government is called fiscal imbalance. To address fiscal imbalance, federal systems provide different mechanisms of which inter-governmental revenue transfer is the major.

This chapter therefore addresses concepts such as the meaning of fiscal imbalance, types, causes and solutions of fiscal imbalance in a federal system. It also canvasses the meaning, purpose, and purposes of inter-government fiscal transfer.

## Objectives

After the completion of this chapter, students will be able to;

- ✓ Explain the meaning, types, causes and implications of fiscal imbalance in a federal system;
- ✓ Identify the solutions of fiscal imbalance that are applicable in federal systems;
- ✓ Elaborate the concept of intergovernmental fiscal transfer and its purposes in federal arrangement;
- ✓ Analyze the application of revenue sharing and the grant system as instruments of intergovernmental fiscal transfer;

- ✓ Discuss the instrument of borrowing as one means of addressing fiscal deficit of different levels of government in a federal set up;
- ✓ Elaborate the issue of fiscal imbalance, its types, and causes under the Ethiopian federal system;
- ✓ Explain the types and mechanism of intergovernmental fiscal transfer under the Ethiopian federation; and
- ✓ Elaborate if there are issues that may be raised in relation to the mechanism of intergovernmental fiscal transfer in Ethiopia.

### 10.1. Fiscal Imbalances in General

Fiscal imbalance exists when governments have inadequate own-source revenues to meet their expenditure responsibilities. It refers to the fiscal mismatch between the expenditure responsibility and revenue sources. In federations powers of the government are subject to constitutional devolution among tiers of the governments. This includes financial power of governments to satisfy the public services through expenditure responsibility and revenue raising powers. Though this allocation scheme is designed with many considerations, it is not immune from creating disparity between responsibilities and resources.

Literatures on fiscal federalism reveal that the general nature of intergovernmental fiscal relations is surprisingly similar across a wide range of countries. Almost without exception, countries assign more expenditure functions to sub-national governments than can be financed from the revenue sources allocated to those governments.[1] The result of this mismatching of functions and finances between states and federal government – often referred to as 'vertical imbalances'. Fiscal imbalance is not however limited to vertical imbalance. A difference between expenditure responsibilities and revenue raising powers may exist between or among states – often termed as "horizontal imbalance". A discussion on each type of fiscal imbalance is in order.

[1]Odd-Helge Fjeldstad; Intergovernmental Fiscal Relations in Developing Countries: a Review of Issues, Chr. Michelsen Institute of Development Studies and Human Rights, 2001, p8

### 1.1.1. Vertical Imbalance

Vertical fiscal imbalance refers to a disparity between different levels of government in their expenditure commitments and their access to revenues. Watts provides that vertical imbalance occurs when constitutionally assigned federal and state governments do not match their constitutionally assigned responsibilities.[2] It refers to the mismatch between the revenue capacity and expenditure needs of states or local governments. To put it briefly, when expenditures are decentralized more than revenue, there will be vertical fiscal imbalance. Vertical fiscal imbalance arises when assignments of fiscal competences are made between federal and sub-national governments looking at their comparative advantage in performing budgetary functions. Vertical imbalance is an imbalance, which is common in almost all federations. This type of fiscal imbalance is inevitable even in federations that closely adhere to the theoretical ideal in the allocation of expenditure and revenue powers.[3] Vertical fiscal imbalances are the norm in intergovernmental fiscal relations and are addressed through intergovernmental transfers from higher levels of government to lower levels.

Even though vertical fiscal imbalance is common in all federations, the nature and extent varies from federation to federation. For instance, it is said that Germany, USA and India have low vertical fiscal imbalance while Belgium and South Africa are considered as federations with high vertical imbalance with South Africa as one of the highest fiscal imbalances in the world.[4] The degree of vertical fiscal imbalance has an impact on the extent and nature of intergovernmental transfer. That is to say, in countries where there is high degree of vertical imbalance, a greater need for intergovernmental fiscal transfer is required to rectify the problem.

In Ethiopia, it is not an exception that there is vertical fiscal imbalance. Literature shows that the degree of vertical imbalance is considerably high. According to the official report by the HoF, regional states were able to collect only around 19% of their total expenditure responsibility

[2] Ronald L. Watts; Comparing Federal Systems, 3rd ed. (Montreal and Kingston: McGill-Queen's University Press, 2008), p103

[3] Renuka Viswanathan; Fiscal Federalism and Regional Equity, in Ronald L. Watts and John Kincaid (eds.) 'Emerging Issues in Fiscal Federalism.', Unity in Diversity: Learning from Each Other, 4th International Conference on Federalism , New Delhi, 5-7 November 2007, Volume II, p77-78

[4] Sujit Choudhry and Benjamin Perrin; The Legal Architecture of Intergovernmental Transfers: a Comparative Examination, in Robin Boadway and Anwar Shah (eds.) 'Intergovernmental Fiscal Transfer : Principles and Practice', Public Sector Governance and Accountability Series, the World Bank, 2007, p284-287

during the 2006/07 fiscal year.[5] The remaining portion of their expenditure cost is financed through federal transfers. This clearly shows the existence of considerable vertical fiscal gap in the federation.

However, one should note that vertical imbalance in the Ethiopian systems does not mean that the federal government is collecting revenue more than its expenditure needs. The federal government itself is not collecting revenue to finance its expenditure needs. It is apparent that the federal government has been significantly dependent on foreign aid and loans to cover its expenditure needs. Thus, vertical imbalance in the Ethiopian case is relative meaning that the federal government is better in collecting revenue compared to states. It is only when we compare the capacity of the central and the regional governments that the vertical imbalance is evident from the flow of a large amount of taxes to the centre.

Therefore, what can be said about the Ethiopian system is that neither the centre nor the regions cover their expenditure from domestic revenue sources. All the revenue generated by the federal government through tax and non-tax sources accounts for up to 65 percent of its total expenditure. The bulk of the expenditure needs are covered by finance flowing from domestic loans as well as foreign sources such as loans, aid, and counterpart funds. These sources account for up to 35-40 percent of the total national expenditure.[6]

### 1.1.2. Horizontal Imbalance

When fiscal power is divided by a constitution between the federal government and states, the presumption is that states have equal revenue raising powers as a result of which residents of the states will have equal access to public goods and services. However, disparities among regional states as to their revenue raising capacity are inevitable because of reasons that are not related to the formal division of fiscal power in a constitution. Such disparity is called horizontal imbalance. Thus, horizontal imbalance refers to the fiscal disparity between the constituent units in a federation. Such imbalance occurs when the revenue capacities of constituent units vary so

[5] Solomon Nigussie; Ethiopia's Fiscal Federalism: A Constitutional Overview, in Assefa Fiseha and Getachew Assefa (eds.) 'Instituionalizing Constituionalism and the Rule of Law: Towards a Constitutional Practice in Ethiopia, Ethiopian Constitutional Law Series Vol. III, Law Faculty Addis Ababa University, 2010, p106

[6] Endaweke Tsegaw; Fiscal Federalism, Teaching Material Prepared Under the Sponsorship of the Justice and Legal System Research Institute, 2009, p121

that they are not able to provide their citizens with services at the same level on the basis of comparable tax levels.[7]

Virtually any decentralization of fiscal responsibilities will give rise to horizontal imbalances.[8] The fact that fiscal decentralization is properly made cannot be taken for granted that it address all questions of equality at sub-national level. At times, fiscal decentralization may aggravate income difference among regional governments which is against the principle of '*horizontal equity*'-which is the extent to which sub-national governments have a capacity to deliver n equivalent level of service to their population.[9] It is to rectify this problem that federal governments provide for an 'equalization grant' (discussed in subsequent section).

In Ethiopia, apart from the fact that all the regions have fiscal deficits, they also have widely divergent revenue-raising capacities. This disparity can primarily be attributed to the fact that regional governments at the same nominal level vary considerably in their skilled manpower, financial capacity, as well as in population size. Just two regions, Oromia and Amhara, account for 60 per cent of the total population and one third of the territory in the country, while three regions (Harari, Gambela and Benishangul-Gumuz) do not have more than one percent of the population.[10] They also have variations with regard to management and administrative capacities as well as relative variations in natural resources, infrastructure and the characteristics of urbanization. They also vary in their economic environment for private as well as public investment. This asymmetry causes problems in measuring the imbalances between the jurisdictions.

Table 10.1. REGIONAL GOVERNMENT EXPENDITURE FINANCED FROM THEIR OWN REVENUR F.Y 2006 (in Billion).

| **Region** | **Total Exp.** | **Own Revenue** | **% share of (2)** | **%share of total Regional revenue** |
|---|---|---|---|---|
| | 1 | 2 | 3 | 4 |

[7] Watts, supra note 2, p104
[8] R. Boadway and R. Watts; Fiscal Federalism In Canada, the USA, and Germany, Working Paper, 2004, IIGR, Queen's University, p8
[9] Odd-Helge, supra note 1, p12
[10] Endaweke, supra note 6, p115

| | | | | |
|---|---|---|---|---|
| Tigray | 695.7 | 194.9 | 28.0 | 12.0 |
| Afar | 332.0 | 38.0 | 11.4 | 2.3 |
| Amhara | 1899.7 | 380.3 | 20.0 | 23.5 |
| Oromia | 2958.3 | 624.3 | 21.1 | 38.5 |
| Somali | 506.2 | 31.0 | 6.1 | 1.9 |
| Benishangul-Gumuz | 229.0 | 22.1 | 9.7 | 1.4 |
| SNNPR | 1626.4 | 262.8 | 16.2 | 16.2 |
| Gambela | 156.2 | 12.4 | 7.9 | 0.77 |
| Harar | 119.0 | 20.5 | 17.2 | 1.3 |
| Dire Dawa | 153.9 | 34.3 | 22.3 | 2.1 |
| Total/Average | 8676.4 | 1620.6 | 18.7 | 100 |

**Source:** Ministry of Finance and Economic Development (MoFED) cf. The Federal Democratic Republic of Ethiopia, The New Federal Budget Grant Distribution Formula, May 2007.

The above figure shows the existence of horizontal fiscal disparity among regional states in Ethiopia. To put numerical evidence of the disparity at one instance, in the fiscal year of 2006/07, the fiscal disparity between the states was also high where one of them covered only 6% of its total expenditure while the other covered 28%.[11] For further detail on horizontal imbalance in Ethiopia, read the following excerpt taken from [**Endaweke Tsegaw; Fiscal federalism, teaching material prepared under the sponsorship of the Justice and Legal System Research Institute, 2009, pp116-117]**

> A formal regional fiscal imbalance is measured as the ratio between regions revenue and the total revenue generated by the regions. The total revenue collected by the regions is very much concentrated in a few regions. Just four states account for more than 80 per cent of the total revenue generated by the states. For instance, in 2006/2007 fiscal year Oromia's share of the total revenue raised by the regions was 38.5 per cent, but Gambela had only 0.77 per cent. They accounted for 21.1 and 7.9 per cent of their respective financial expenditures. The largest revenue item in these regions is employment income tax. Their capacity to effectively raise

[11] Solomon, supra note 5, p21

revenue from business-related taxes such as sales, excise, and business profit taxes is very much limited.

A better indication of the horizontal fiscal imbalance is given by the percentage of revenue raised by each region relative to the respective expenditure. The lowest percentage is recorded in the Gambela region. The variation in the revenue capacity is a reflection of the available revenue sources. The lowest percentage of revenue compared with there own expenditure implies that they have the least revenue-generating capacity. The data also show that Tigray and Dire Dawa generate the highest percentage of their own revenue compared with own expenditures, accounting for 28 and 22.3 per cent respectively. Amhara, SNNPR and Harari showed about 15 to 20 per cent, while Somali, Benishangul-Gumuz and Gambela regions were able to account for less than 10 per cent of their expenditure.

Although the percentages show frequent fluctuations, the ratios can be easily interpreted. First, the total expenditure is dependent on the amount of federal grants. When a region receives a higher amount of transfer, the revenue-expenditure ratio will be lower. Second, it reflects the administrative capacity of the regions. Those with the least executive capacity usually generate the lowest percentage of revenue. Third, taking the least revenue-generating capacity into account, Afar, Somali, Benishangul-Gumuz and Gambela are categorized as the least developed regions seeking a substantial amount of federal grants. On the other hand, Tigray, Amhara, Oromia and SNNPR are considered to be relatively developed and entitled to lower per capita federal grants. It is also said that there is a higher level of economic activity in these regions which has led to a larger revenue base. However, these regions also need the provision of goods and services for their large population size. Although these are the general categorizations, for a better understanding of the imbalances it is important to measure the revenue and expenditure disparities on a per capita basis.

### 1.2.Causes and Implications of Imbalances

The causes for vertical and horizontal fiscal imbalance are not the same for the nature of the imbalances is different. Let's see the causes for each separately then to the implication of the imbalances.

## I. Causes of Vertical Imbalance

Literatures provide for different causes of vertical fiscal imbalance. For instance, Anwar Shah provides that four causes give rise to vertical fiscal gaps: inappropriate assignment of responsibilities, centralization of taxing powers, wasteful tax competition policies by sub-national governments, and lack of tax room at sub-national levels due to heavier tax burdens imposed by the central government.[12]

Watts on the other hand provides for two main cause of vertical imbalance.[13] First, major taxing powers had been assigned to the federal government while some of the most expensive expenditure responsibilities such as education, health, and social services have usually been assigned to states. Second, even in regime where an attempt to match the revenue powers and expenditure responsibilities is carefully made, over time the significance of different tax types and the cost of expenditures vary in unforeseen ways. This consequently demands for a need to establish a mechanism whereby these imbalances can be adjusted from time to time.

The preceding paragraphs show that the causes of vertical imbalance can be seen from two dimensions; revenue dimension and expenditure dimension. From the revenue dimension, the major taxing fields have been assigned to the federal governments because these taxes are important instruments for affecting and regulating the economy and for performing a redistributive role. The major sources of revenue, such as customs duties and other charges on imports and exports, which account for the lion's share of the total revenue generated in many federations and are often assigned to the federal government.

In many federations, the total revenue collected by the federal government relative to total government revenue in a nation is higher than what is collected by states. With the exception of Canada in which only 45% of total government revenue is collected by the federal government, in almost all federations, federal government collects more than 50% of total government revenue.[14] In the United States (54%), in Austria, Australia, Belgium, India, Germany, and Spain (60 to 75%), and Argentina, Malaysia, Russia, South Africa

[12] Anwar Shah; A Practitioner's Guide to Intergovernmental Fiscal Transfers, in Robin Boadway and Anwar Shah (eds.) 'Intergovernmental Fiscal Transfer : Principles And Practice', Public Sector Governance And Accountability Series, the World Bank, 2007, p17
[13] Watts, supra note 2, p103-104
[14] Anderson; Federalism: An Introduction, Oxford University Press, Forum of Federations, 2008, p33

(80%) of total government revenue is collected by the federal government, yet Nigeria and Venezuela represent the extreme scenario where the federal government collects 98 and 97 percent of total government revenue respectively.[15]

On the expenditure dimension, vertical imbalance may be caused when more substantial expenditure responsibilities have been assigned to the governments of the states or provinces in the interests of effective decentralization or to meet political pressures from the constituent units for maintaining their distinctiveness. As mentioned above, many expensive expenditure responsibilities such as education, health, and social services are often assigned to states. With such expensive expenditure responsibilities, states have been assigned with tax sources which yield only a limited amount of revenue. Thus, the mismatch between the revenue dimension and expenditure dimension of powers results in vertical fiscal imbalance.

The causes of vertical imbalance in Ethiopia are not different from those already mentioned in the preceding paragraphs. The reading of the constitutional division of taxation power reveals that the major taxes such as customs duties, VAT, income from public enterprises and international organization are assigned to the federal government. Even in the concurrent taxation sources, the sharing formula for the proceeds of the shared taxes favors the federal government. For instance, the sharing federal-state ratio for concurrent taxes under Art.98 according to the formula prepared by the HoF is as follows; indirect taxes from companies 70:30 and royalties from large-scale mining and petroleum operations is 60:40 for the federal government and states respectively.[16] In contrast, states are assigned with expenditure responsibilities such as administration of up to secondary education, major health services, and other social services.

## II. Causes of Horizontal Imbalance

Many reasons could be mentioned as cause for disparity in the revenue raising capacity of states. Varying capacities to raise revenue from the same sources or differing costs of providing the same services in sub-national units, divergence in natural resource endowments in different

[15] Ibid
[16] Solomon, supra note 5, p107

states can also be a fertile ground for regional imbalances in federations.[17] Furthermore, administrative capacity could be a limiting factor under some conditions, particularly when new states or provinces are created in existing federations for reasons of administrative convenience or cultural homogeneity or additional sub-national units are added to existing federations. The new entities are often at a disadvantage vis-à-vis developed existing states in the federation regarding with the capacity to administer and collect their revenue sources.[18]

Moreover, interstate imbalance in the expenditure dimension due to difference in the expenditure needs of different states is another cause of horizontal imbalance. Such variations are mainly the results of differences in socio-demographic characteristics of their population, such as population dispersion, urbanization, social composition and age structure (ration of young, old age and poor), and the cost of providing services (e.g. naturally difficult geographical terrain) are important causes of horizontal imbalance.[19] For instance, the need of public services may be different across states because some states may have a higher percentage of school children and/or elderly people than others. As a result, it may demand such state to relatively higher expenditure on education and social security. Generally, the variation of regions in terms of per capita revenue and per capita expenditure calculated as the ratio of total revenue and expenditure to the total population of the region independently is considered as the ultimate cause for horizontal imbalance.

Similar factors are attributable to the existing horizontal imbalance in Ethiopia. The variation of regions in Ethiopia in terms of per capita revenue and per capita expenditure calculated as the ratio of total revenue and expenditure to the total population of the region independently in the 1999/2000 fiscal year, shows the following facts.[20] During the fiscal year, the lowest amount of revenue raised per person was about 6 birr in Somali and the highest was about 85 birr in Dire Dawa respectively, excluding the Addis Ababa administration. The next highest per capital revenue was raised in the Harari region (65.8). The highest per capital revenue raised in Dire Dawa and Harari is a reflection of the higher level of economic activity as they are urban centers and have a smaller population size.

[17] Renuka Viswanathan, supra note 3, pp91 and 87
[18] Id , P52
[19] Watts, supra note 2, p104
[20] Endaweke, supra note 6, p122

Although Tigray, Amhara, Oromia and SNNPR are in the same group of relatively developed regions, the latter three regions, with large populations and territory, have lower per capita revenue and per capita expenditure than the middle-sized region of Tigray. This demonstrates, among others, that the average size does matter in the per capita distribution of revenue.

## III. Implications of Fiscal Imbalances

Be it vertical or horizontal, fiscal imbalance has an implications. In fact, the implications are different depending whether the fiscal gap is vertical or horizontal. To begin with vertical imbalance, at least two important (of course related) implications can be mentioned. First, the fact that there is higher vertical imbalance implicates the need for a higher intergovernmental (federal-to-state) transfer through different mechanisms to adjust the imbalance. Second, the existence of vertical imbalance of varied degree has the implication that the autonomy of regional states is compromised. This is because of that fat that vertical imbalance makes states to be financially dependent on the transfer that the federal government made to them and this ultimately compromises the overall autonomy of states and subjected them to federal influence. This is particularly true if federal government substantially choose conditional grants as the main tool for intergovernmental fiscal transfer (discussed in a section below). In fact, the degree of state dependency on federal government varies depending of the extent of the imbalance; the greater the vertical imbalance, the lesser state autonomy would be.

Regarding with the implications of horizontal imbalance, it implies that the regions retain different capacities to generate revenue within the regions to cover costs of public expenditure. This in turn results in varied access to public services and goods among residents of different states. It also reflects the extent of support they need in the form of federal transfers, usually equalization transfers.

Similar implications inevitably exist in relation to horizontal and vertical imbalances in Ethiopia. The fact that the regional states are substantially dependent on federal transfers to finance their expenditure needs obviously makes the states to be dependent and influenced by the federal government. In practice, it may be less plausible to say that regional states are influenced by the federal government because of the existing imbalance. This is

because of the fact that there is party congruence between the federal government and majority of the states; i.e. the party ruling the federal government is also governing majority of the regional states through its member parties or affiliated parties.

### 1.3.Intergovernmental Revenue Transfers

As it is discussed in chapter eight, expenditure assignment needs to be and is the first and fundamental step in the design of a decentralized system of intergovernmental finances. This is because, without a specific assignment of expenditure responsibilities it will not be possible to assess the adequacy of the revenue and tax assignment to different levels of government, or the need and effectiveness of a system of intergovernmental transfers. However, no matter how the expenditure and revenue powers are carefully designed, at the end of the day, it is likely that, in many countries, taxes reasonably assigned to sub-national governments will not be adequate to finance the provision of services assigned to those governments (vertical imbalance) or that they will result in horizontal fiscal disparities. If so, it may be desirable to use intergovernmental transfers of different type from higher level governments to compensate for vertical fiscal imbalance or to offset horizontal fiscal disparities.

Furthermore, administrative capacity could be a limiting factor under some conditions, particularly when new states or provinces are created in existing federations for reasons of administrative convenience or cultural homogeneity or additional sub-national units are added to existing federations. The new entities are often at a disadvantage vis-à-vis developed existing states in the federation. Such a situation calls for substantial assistance in terms of funds, training and technical assistance to build up over time a structure of governance that can respond to voters' preferences. This may perhaps be the best justification for asymmetrical assistance extended today to "special category" states in India.[21]

A point worthy considering is that the concept intergovernmental fiscal transfer in theory applies to all possible federal-to- states, state-to- federal, state-to- state and intrastate fiscal transfers. However, since federal governments do often control major revenue/tax sources, inter-

[21] Renuka Viswanathan , supra note 3, P52

governmental fiscal transfers have usually taken the form of transfers from the federal government to states.

## 1.4.Objectives and Types of Transfer

### 1.4.1. Objectives of Transfer

As it is repeatedly discussed throughout this material, the devolution of powers and responsibilities to sub-national governments under a federal system aims at enabling sub-national/state governments to act independently on matters considered to be in the interest of their constituents. In addition to the formal devolution of responsibilities, other mechanisms such as political and economic are employed by federations to accommodate diversities in conformity with local preferences or capacities to perform the responsibilities. This is considered to be one way of accommodating diversities and enhancing regional autonomy. However, when the above measures are taken to promote diversities, they may result in disparities related to governmental financial capacities or individual incomes.

Fiscal decentralization in a federal system serves many purposes. Commonly accepted objectives for fiscal decentralization include those of an efficient allocation of resources via a responsive and accountable government, an equitable provision of services to citizens in different jurisdictions, and preservation of macroeconomic stability and promotion of economic growth.[22] To achieve this in general and in order to manage the income disparities while preserving diversities fiscal instruments in particular, effective intergovernmental fiscal arrangements, called intergovernmental revenue transfers, are vital.

The main objective of intergovernmental revenue transfer is addressing the states' financial constraints, caused either by vertical or horizontal imbalance, in executing their expenditure responsibilities. The process of adjusting the horizontal as well as vertical imbalances is known as 'fiscal equalization system'. While fiscal arrangement taken to address vertical imbalance is called vertical fiscal equalization, measures take to adjust horizontal imbalance is called horizontal fiscal equalization. Intergovernmental fiscal transfer serves a lot of

[22] Charles E. McLure & Jorge Martinez-Vazquez; The Assignment of Revenues and Expenditures in Intergovernmental Fiscal Relations, in "The Tax Assignment Problem: Conceptual and Administrative Considerations in Achieving Subnational Fiscal Autonomy" by Charles E. McLure and "The Assignment of Expenditure Responsibilities" by Jorge Martinez-Vazquez, papers prepared for the World Bank Institute's Decentralization, Homepage (www.worldbank.org/decentralization), p6

purposes include, bridging vertical fiscal gaps, bridging the fiscal disparities through fiscal equalization transfers, setting national minimum standards, compensating for benefit spillovers, influencing local priorities, and dealing with infrastructure deficiencies and creating macro-economic stability in depressed regions.[23] The following can be mentioned as general purposes that intergovernmental fiscal transfer tries to serve.

**a. Equity purpose**

This objective of intergovernmental fiscal transfer is particularly relevant when there is horizontal imbalance. The principle in fiscal federalism requires that each state should have a broadly comparable level of resource to finance their expenditure needs so that it can provide the same standard of public services such as education, health, social welfare, etc. to their citizens. However, federal practice shows that disparity among regional states is in evitable mainly because of difference in their revenue raising capacity and/or their expenditure needs. Consequently, citizens in the same nations are subjected to different treatments in the delivery of public goods and services for the mere reason that they reside in different states. To rectify such unfairness and inequity, federations provide a scheme for intergovernmental transfer usually in the form of [horizontal] equalization grant.

**b. Promoting an economic union**

This objective is closely related to the purpose of ensuring equity. The disparity in the capacity (of revenue raising and expenditures) of the states also raises the question as to how to balance their role in the interest of the economic development of the federation as a whole. Inefficiency in some constituent units can have an impact upon the capacity of the federal government, on the one hand, and on efficient execution of responsibilities by the states, on the other. A state which lacks adequate revenue to finance its expenditure needs inevitably becomes ineffective in ensuring the overall economic development of a federation.

Establishing one economic union or community is one cohesive factor for different groups

[23] Anwar Shah *et al;* Emerging Issues in Fiscal Federalism, in Ronald L. Watts and John Kincaid (eds.) 'Emerging Issues in Fiscal Federalism.', Unity in Diversity: Learning from Each Other, 4th International Conference on Federalism , New Delhi, 5-7 November 2007, Volume II, *p23*

found in a federation. This in turn requires efforts towards ensuring that those different groups living in states have equal access to public services and goods. Thus, in the process of revenue transfer, there is also a need to consider, to the extent possible, the equitable distribution of income between individuals residing in different states within a nation. In this way, intergovernmental transfer serves as a redistributive instrument thereby promoting te cohesive factor of one economic union in a federation.

**c. Attainment of specific programs and targeted services**

Federal-to-state fiscal transfer can also be made by the federal government in order to finance local spending on condition that it can be spent on specific services or targeted objectives. Such type of transfer is called conditional grant (discussed in a section below). This type of conditional transfer will at the same time enable the implementation of federal policies at the state or local level. In addition, federal-to-state transfer may be made to serve some political goals. If the decentralization in a federation target to keep some economically non-viable, culturally non-sustainable and non-dominant groups autonomous from the influence of majority or historically unjust marginalization, transfer makes it to place.

**d. Adjusting externalities/spill-over**

Intergovernmental fiscal transfer may be made to compensate for damages that states may sustain because of some externalities. At times, local spending by a given state may provide significant extra-territorial benefits to a neighboring state/s. such spending is called a positive externality or benefit spillovers for the neighboring state. Benefit spillovers occur when services provided and financed by a local government also benefit members of other local governments that do not contribute to their provision. However, benefit spillover increases the local burden to the state due to the goods and services provided for the neighboring state or local territories. Since the providing government bears all the costs but obtains only a portion of the benefits, it tends to under-provide the goods. If the affected communities cannot negotiate compensation, the situation can be corrected by a higher government subsidizing provision of the service through grant system.

Similarly, an activity that benefits a given state may cause harm to a neighboring state. Such

effect is called negative externality. For example, local spending on schools and health centers could in fact mean the provision of services to people coming from neighboring local governments. Unless these external benefits that are given to the other communities are compensated, the quality of goods and services to the local community remains below standard or the local government will be forced to undertake additional costs. Thus, the revenue transfer system is expected to take this issue into consideration and aim at compensating the spillover effects of local costs.

However, it is important to note at this point that intergovernmental fiscal/revenue transfer does not always have a positive effect. Measures taken for the attainment of the objectives of an equitable transfer of revenue might encounter several problems which should be handled with care. For instance, several economists warned that if the transfer solely aims to fill the budget deficit and if sub-national governments rely on the amount transferred, it can have a disincentive effect on efficient tax administration.[24] Inefficient local taxation can also reduce accountability and responsibility towards local residents.

Thus, transfers should, to the greatest extent possible, reduce the impact of inefficiency and unaccountability. Also transfers may undermine the autonomy of state or local governments if they involve federally set priorities or conditions. So, one should be careful not to create a loss of local or state autonomy. The role of transfers should be purely for addressing the special problems of financial incapacity rather than benefiting states for political expediency. In this regard, there should be a clear legal mechanism and an unbiased institution to administer the system of revenue transfer so that it cannot be manipulated based on the outcome of an election. It should not be used to appease those states which may join a coalition in government or to penalize the rest.

### 1.4.2. Types of Transfer

To adjust vertical and horizontal imbalance in general and achieve the above discussed objectives in particular, federations use various instruments of intergovernmental fiscal transfers.

[24] Endaweke, supra note 6, p130

Even though the processes, extent and nature of transfer to reach the desired level of equalization vary widely across federations, federal constitutions often provide an arrangement for intergovernmental transfers in the form of sharing tax bases, joint tax revenue and allocation of grants. In some federations, the type, extent and power on intergovernmental transfer may be recognized formally in a constitution while in other cases, the issue may be left up to the discretion of the federal government.[25] In the subsections below, the two main types of fiscal transfer are addressed.

#### 1.4.2.1.Revenue Sharing

Revenue sharing is one of the common instruments of intergovernmental fiscal transfer in federal systems. Revenue sharing is an arrangement in which the revenue from a given tax base accrues to both the central and sub-national governments. Revenue sharing has important purposes especially for states. It ensures sub-national governments with specified sources of revenue to carry out their functions while attempting to provide greater harmony in levying taxes.[26] It also serves as instrument for closing both vertical fiscal gap horizontal imbalance issues at the same time.[27]

However, revenue sharing may have drawbacks especially when it is not carefully made. For instance, disadvantage of revenue sharing is that it does not enhance local autonomy, accountability, or efficiency since it may allow states and local governments receive transfer funds regardless of their tax effort. A revenue system intended to ensure horizontal equalization can thus create poor incentives for local governments to raise their own revenues. This effect is most obvious in a revenue-pooling system, such as that used in Germany, the Russian Federation, and other countries, in which a given share of locally collected taxes is distributed among all sub-national governments. In such a system, local governments receive only a fraction

[25] Solomon, supra note 5, p106
[26] M. Govinda Rao; Resolving Fiscal Imbalance: Issues in Tax Sharing, in Robin Boadway and Anwar Shah (eds.) 'Intergovernmental Fiscal Transfer: Principles and Practice', Public Sector Governance and Accountability Series, the World Bank, 2007, p322
[27] R. Boadway and R. Watts, supra note 8, p11

of the revenue collected in their own jurisdictions, with the rest distributed to other governments, usually through an equalization formula of some sort.[28]

Revenue sharing is a feature in a number of federations, both developed and developing. The system is most prominent in Germany, where tax sharing is formally mandated by the constitution. All broad-based taxes, such as individual income tax, corporate income tax, and VAT, are shared. The revenue from individual income tax is shared by the federal government (42.5 percent), states (Länder) (42.5 percent), and municipalities (15 percent). Corporate income tax and capital yields taxes are shared equally by the federal government and the Länder. The VAT is distributed between the federal government and the Länder on the basis of legislation approved by the *Bundesrat* (the national legislature representing the Länder).[29] Where as in the United States, revenue sharing is not a common practice to close the vertical fiscal gap rather a wide array of conditional transfers, both block and specific are applied to close fiscal gaps.[30]

Revenue-sharing arrangements can be of two types: those in which multiple levels of government share the tax base and those in which revenue is collected by one level but shared by different levels. In the first type of system, the federal government determines the tax base, and the lower levels levy rates supplementary to those levied by the federal government or attached their tax rates on the tax base determined by the federal government.[31] In the second approach, revenue from a given source is collected by one level so that the proceeds will be shared by different levels of governments. In this approach, important issues must be considered about the proportion of central revenues to be shared between central and sub-national governments and the formula for sharing among sub-national governments.[32]

When a federation adopts the revenue sharing arrangement in which revenue is collected by the federal government but shared with states, two important issues need to be addressed; what proportion of revenue collected should be allotted to states (vertical division) and how is the

[28] Michael Smart; The Incentive Effects of Grants, in Robin Boadway and Anwar Shah (eds.) 'Intergovernmental Revenue Transfers: Principles and Practice, Public Sector Governance and Accountability Series, the World Bank, 2007, p211-212
[29] M. Govinda Rao, supra note 26, p328
[30] R. Boadway and R. Watts, supra note 8, p11
[31] M. Govinda Rao, supra note 26, p322
[32] Id, p323

actual share of states is determined (horizontal division).[33] In this regard, the system of revenue sharing (the formula of sharing) can be specified in the constitution, determined by an *ad hoc* committee established for this purpose or decided on the basis of agreements between the central and sub-national governments.[34] Though the origin of revenues can be reflected in such formulas, it is more common for formulas to be based, *inter alia*, on population size, tax capacity, or measures of need, such as per capita income.[35]

Even though the systems of revenue sharing can vary widely, depending on the scope of shareable taxes and the methods and criteria adopted for sharing, there are two basic approaches which have been adopted by countries when allotting revenues collected by the federal government to states; the sharing of revenue on a *tax-by-tax* basis or the sharing of revenue *pooled by the central government* from all the taxes destined to be shared.[36] In *tax-by-tax sharing*, the revenue collected by the central government from each tax base is divided between the centre and the regions using percentages set by the constitution or other pertinent legislation. The German financial equalization scheme is a typical example in this regard. In the second approach, a common tax pool with defined shares for the participating jurisdictional levels based on a single formula is applicable.

In both cases, the actual proportion of tax to be allocated to the respective states is determined by either the *derivation/origin principle* (also termed as tax sharing) or the *redistribution/equity* principle (also termed as revenue sharing). If sharing is based on the *derivation/origin principle*, states receive fixed fractions of revenues from particular national taxes originating within their boundaries. In such case, commonly the sharing rates are uniform across jurisdictions (though not across taxes).[37] To put it more clearly, a derivative principle is meant that each state receives a share based on the amount of revenue collected in that specific state; transferred revenues accrue to revenue-raising jurisdictions. In such approach, transferred revenues accrue to revenue-raising jurisdictions.[38] However, if the sharing is according to the *redistributive/equity principle*, the allotment of revenues of federal government to lower levels of government is made on the

[33] Solomon, supra note 5
[34] M. Govinda Rao, supra note 26, p323
[35] Charles E. McLure & Jorge Martinez-Vazquez, supra note 22, p18
[36] Solomon, supra note 5, p107
[37] Charles E. McLure & Jorge Martinez-Vazquez, supra note 22,p18
[38] Ibid

basis of formulas. Revenue sharing in such approach is not based on the origin of revenues rather a formula is used for equitable allocation of revenue to all, irrespective of their capacity to generate the shared revenue.[39]

#### 1.4.2.2.Grants

Grants from national to sub-national governments are an intrinsic feature of all federations. In virtually all federations, fiscal decentralization involves decentralizing to sub-national governments the provision of important public services and some targeted transfers. In parallel, accountability principle in fiscal federalism requires that at least some revenues used to finance these decentralized expenditures be raised by sub-national governments. However, both expenditure and revenue decentralization can conflict with national objectives (e.g. the standard economic objectives of efficiency and equity) for which the federal government bears special, though not necessarily sole, responsibility. Thus, Grants can be viewed as instruments for moderating that conflict. That is to say, for facilitating the achievement of the advantages of decentralization while minimizing its adverse consequences for national objectives.[40]

**Purposes of grant**

Intergovernmental grants constitute a distinctive and important policy instrument in fiscal federalism that can serve a number of different functions. Literature reveals certain potential roles for grants such as the internalization of spillover benefits to other jurisdictions, fiscal equalization across jurisdictions, and an improved overall tax system.[41] More specifically, Boadway provides three different perspectives through which the role of grants in federations can be distinguished.[42] These are;

1. **Adjusting vertical fiscal imbalance:** The first views grants as instruments for jointly balancing federal and sub-national budgets—that is, closing a given vertical fiscal gap.
2. **Horizontal Equalization:** Decentralization of expenditure and revenue raising inevitably

[39] Solomon, supra note 5, p107
[40] Robin Boadway; Grants in a Federal Economy: A Conceptual Perspective, , in Robin Boadway and Anwar Shah (eds.) 'Intergovernmental Fiscal Transfer : Principles and Practice', Public Sector Governance and Accountability Series, the World Bank, 2007, p55
[41] Wallace E. Oates; An Essay on Fiscal Federalism, Journal of Economic Literature, Vol. XXXVII (September 1999), p126
[42] Robin Boadway, supra note 40, p57-65

creates different fiscal capacities, expenditure needs, and expenditure cost across regions, making it impossible for them to provide comparable levels of public services at comparable rates of taxation. For all regions to be able to provide comparable levels of public services to their citizens at comparable tax rates—can be achieved by a purely redistributive set of interregional transfers, usually grant system.

3. **Achieving national objectives:** Some of the public services assigned to regions are important for achieving equity objectives. A high proportion of regional expenditures consist of education, health, and welfare programs, all of which are important policy instruments for achieving redistributive equity. To the extent that the federal government has an interest in equity and regards the provision of these public services as contributing to national equity, it might want to ensure that program design satisfies minimal national standards. To achieve this, the federal government may use conditional grants.

Generally, federal government may use the grant system for two broad purposes; negative and positive. In the positive purpose, grants can also be used to induce regions to introduce particular types of policies, such as health or welfare programs. In this case, grants can be more specific and include a financial inducement, such as a matching component. In the negative purpose, conditional grants may be used to prevent regions from engaging in policies that reduce the efficiency of the internal economic union or impinge on achievement of the national objective of equity component.[43]

#### 1.4.2.2.1. Conditional / Unconditional Grants

Grants can take either of two general forms; conditional grants and unconditional grants. A discussion on each is in order.

**i. Conditional/specific purpose grants**

Conditional grants are intended to provide incentives for governments to undertake specific programs or activities. Conditional transfers typically specify the type of expenditures that can be financed by the grant. Such grants may also require attainment of certain results in service delivery. Conditional grants are grants that place any of various kinds of restrictions on their

[43] Id, p72

use by the recipient. The grantor may require, for example, a state to use the funds for a specific activity in the education sector, such as the construction of post-secondary institutions or the purchasing of books, with a possibility of further specifications. As the conditions become more specific, the states will in effect be left with no option but of spending the money in the area specifically required by the centre.

As discussed elsewhere above, federal governments use conditional grants is to impose conditions on the use of grants in order to maintain nationwide standards for the provision of services such as health and education. However, its objective may go further to address the problems associated with the provision of public goods in the less developed and asymmetrical societies by allocating funds to scarcely endowed areas. Further, it can also play a role in curbing financial embezzlement, inefficiency and corruption, as the federal government retains the power to set conditions, to control and audit the spending. This will be consistent with the principles of financial responsibility and accountability to the taxpayer.

Such grants are common in the U.S.A and typically address specific functions or programs. In the United States, the vertical fiscal gap is closed by a wide array of conditional grants, both block and specific. This widespread use of conditional transfers is a relatively unique feature of the US federal system. It arises at least partly as a device to inducing accountability in state executive branches that, unlike in parliamentary systems, are not accountable to state legislatures. [44]

#### 1.1.1.1.1. Matching and Non-matching Grants

Conditional grants may further be classified in to two; *conditional matching grants* and *conditional non-matching grants*.

a. ***Conditional matching grant*** refers to a grant where the level of grants from a federal government is determined simultaneously with the level of local expenditure. Such type of grant may incorporate matching provisions by requiring grant recipients to finance a specified percentage of expenditures using their own resources. Matching requirements can be either open ended/blocked, meaning that the grantor matches whatever level of resources the

[44] R. Boadway and R. Watts, supra note 8

recipient provides, or closed ended/specific, meaning that the grantor matches recipient funds only up to a pre-specified limit.[45]

The theory on fiscal federalism prescribes that conditional grants in the form of matching grants (under which the grantor finances a specified share of the recipient's expenditure) are to be employed where the provision of local services generates benefits for residents of other jurisdictions (neighboring states).[46] The rationale here is simply that policy makers and electorates need to incorporate spillover benefits into their decision-making calculus of grants so that the magnitude of the matching shares reflects the extent of the spillovers.[47]

The main reason for the federal government to introduce matching grants is for the purpose of encouraging states to spend on activities which at the same time benefit the nation at large, and also to economically utilize the scarce federal resources. At the same time, matching requirements encourage greater scrutiny and local ownership of grant-financed expenditures and ultimately enables the central government to influence the states instead of directly interfering in their autonomy. Furthermore, matching grants have the objective of encouraging recipient states to 'maximize the initiative for self-financing'. Matching grants can be constitutionally entrenched, as is the case in Germany, or unilaterally decided by the federal government as is the case of the USA.[48]

Matching requirements, however, represent a greater burden for a recipient jurisdiction with limited fiscal capacity. In view of this, it may be desirable to set matching rates in inverse proportion to the per capita fiscal capacity of the jurisdiction in order to allow poorer jurisdictions to participate in grant-financed programs.[49] Such type of grant enables the federal government to influence the fiscal programs of regional governments to comply with national objectives such as efficiency and equity.

b. ***Conditional non-matching*** grants on the other hand are conditional transfers from the

[45] Anwar Shah, supra note 12, p5
[46] Oates; supra note 41, p127
[47] Id, p127
[48] Endaweke, supra note 6, p128
[49] Anwar shah, supra note 12, p5

federal to the state governments but without any matching requirement on the part of the latter. The states are not required to spend a portion of their income to match the funding by the central government. Such grant system provides a given level of funds without local matching, as long the funds are spent for a particular purpose. General-purpose non-matching transfers are preferable, since it enhances the welfare of local residents, and preserve local autonomy.

**ii. Unconditional (General Purpose) Grants**

Unconditional grants are characterized by the absence of significant restrictions on the use of funds, as it is at the region's discretion to spend the money for any preferred purposes. Unconditional grants provide for lump-sum transfers to be used in any way the recipient wishes. Unconditional grants are typically the appropriate vehicle for purposes of fiscal equalization. The purpose of these grants is to channel funds from relatively wealthy jurisdictions to poorer ones. Such transfers are often based on an equalization formula that measures the "fiscal need" and "fiscal capacity" of each province, state, or locality. These formulae result in a disproportionate share of the transfers going to those jurisdictions with the greatest fiscal need and the least fiscal capacity.[50]

Grant recipients often prefer unconditional non-matching transfers, which provide them with maximum flexibility to pursue their own objectives and preserve their autonomy. Because such grants enlarge resources without influencing spending patterns, they allow recipients to maximize their own welfare.[51] Such type of grants well suited for correcting inefficiencies in the provision of public goods arising from benefit spillovers, or externalities.

**1.2.Federal-States Transfer in Ethiopia**

Ideally, a federal arrangement would be characterized by a fiscal balance, whereby regional governments would have taxing powers sufficient for them to meet their service delivery and governance obligations. This is not however the case in many federations including Ethiopia. As discussed in the foregoing sections, the revenue raising power of federal government often found to be dominant which results in vertical imbalance. The Ethiopian

[50] Oates, supra note 41, p127
[51] Anwar shah, supra note 12, p5-6

case is not an exception in which the dominance of the Ethiopian Federal Government in revenue generation has resulted in state governments' extensively relying on transfers from the central government in order to meet their obligations.[52]

Intergovernmental fiscal transfer in Ethiopia practically applies to federal-state transfer and the reverse is not yet a reality. Like many federations, two important tools are used to adjust fiscal imbalance in Ethiopia; revenue sharing and grants. A brief discussion on each is in order.

1. **Revenue sharing**

The system of revenue sharing in Ethiopia had existed since the transitional period. The authority for the revenue sharing approach during the transitional period was Proclamation No.33/1992, which was intended to achieve the following objectives.

- ✓ Enabling the Central Government and National/Regional Governments to efficiently carry out their respective duties and responsibilities;
- ✓ Assisting National/Regional Governments to develop their regions on their own initiative; and
- ✓ Narrowing the existing gap in development and economic growth between regions to encourage activities that have common interest to regions.[53]

From the proclamation, it is possible to infer that the revenue sharing arrangement had been intended to achieve three important considerations; ensuring efficiency, preserving autonomy of regional governments, and achieving horizontal equalization. Revenue sharing scheme continued in the federal constitution. The present revenue sharing arrangement has its basis under Arts.62 and 90 of the federal constitution.

As discussed elsewhere above, revenue sharing should address two important questions; how should the share of the federal government and the states be determined (vertical division) and how should the share of each regional government be determined (horizontal

[52] Edmond J.Keller; Ethnic Federalism, Fiscal Reform, Development and Democracy in Ethiopia, African Journal of Political Science, 2002, Vol 7 No. 1, p36

[53] Negaret Gazeta of the Transitional Government of Ethiopia. Proclamation No.33/1992: A Proclamation to Define the Sharing of Revenue between the Central Government and the National/Regional Self-governments. No. 7 (20 October 1992

division). To this end, it is expected that federal systems will have a revenue sharing formula.

In Ethiopia, the power to prepare sharing formula is given to the House of Federation.[54] At this point, it is important to note that revenue sharing in the Ethiopian federal system applies only for those revenues that are derived from concurrent tax powers provided under Art.98 of the constitution. As discussed on concurrent taxation powers, such taxes are collected by the federal government and shared with states. Thus, the power of the HoF to determine revenue sharing formula is limited to the concurrent sources of revenue.

The issue is therefore, what principles are to be considered by the HoF in determining the revenue sharing formula. Designing a formula of revenue sharing that satisfies all levels of government is a challenge. In Ethiopia however, literatures reveal that there have been few disagreements between the center and regional states with regard to the formula used for revenue sharing.[55] Regarding this and related issues, read the following excerpt [taken from **Solomon Nigussie; Ethiopia's Fiscal Federalism: a Constitutional Overview, in Assefa Fiseha and Getachew Assefa (eds.) 'Institutionalizing Constitutionalism and the Rule of Law: Towards a Constitutional Practice in Ethiopia, Ethiopian Constitutional Law Series, Addis Ababa University, Faculty of Law, Vol III, 2010]**

> …One of the guidelines could be the principle set under Art 90 of the constitution which requires that, given the resource constraints, the government policies shall aim at providing all Ethiopians access to public health and education, clean water, housing, food and social security. The percentage can also be determined considering factors such as how much the financial capacity of the centre is dependent on shared taxes, whether the division of shared taxes plays a role in income redistribution, and the need to reward efficient regions.
>
> The modality to determine the division of revenue from these sources involves some form of relation between the federal government and states. The current arrangement (which began in 2003/04 fiscal year as per the decision of the HoF ) is to divide direct taxes from companies in the proportion of 50:50 and indirect taxes in the proportion of 70:30 to the centre and the states

[54] Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, 1st year, No.1, 21 August, 1995, Art.62 (7)
[55] Edmond J. Keller, supra note 52, p38

respectively. Similarly direct taxes from large-scale mining and petroleum operations are to be divided in proportion of 50:50, whereas royalties to be divided in proportion to 60:40. Unlike the previous experience, it is expected that current arrangement may encourage the states to consider the benefit from joint taxes and to cooperate for an efficient tax administration. At present the states receive whatever share is transferred from the federal revenue and custom authority, and they complain that they do not have any role in the administration of the taxes.

By applying the above scheme, the system aims at increasing the revenue capacity of the sharing government and also promoting efficiency in the levying and collection of taxes. Normally, revenue from these sources can be spent on responsibilities and priorities determined by the respective regional governments. Furthermore, it encourages the states to consider the benefit from joint taxes and to cooperate for an efficient tax administration. However, its drawback emanates from the failure to clearly indicate whether the principle in place follows consumption (origin), residence or equity principle. Whether the division of royalties from mining, petroleum and gas operations will be feasible in the long run is also another issue. To date, earnings from royalties are less significant. But in the future the fifty percent share could be challenged since the Constitution confers ownership rights in natural resources on the state and on the peoples of Ethiopia in general and not on a specific region.

The revenue sharing formula for concurrent tax sources under the Ethiopian federation can be generally put in the following manner.

Table 10.2 Types and Sources of joint Revenue

| **Types and sources of joint revenue** | | | **The share of the centre and the regions on a tax-by- tax basis from each type of tax in %** | |
|---|---|---|---|---|
| | | | Share of the Centre | Share of the Regions |
| 1 | Revenue from Enterprises jointly established by the centre and region | | N.A. (not available) | N.A. * |
| 2 | Revenue from companies | | | |
| | 2.1. | Profit taxes | 50 | 50 |
| | 2.2. | Service, sales (V AT) and excise taxes | 70 | 30 |
| | 2.3. | Tax on dividends | 50 | 50 |
| 3 | Revenue from large-scale mining | | | |

| | | | | |
|---|---|---|---|---|
| | and all petroleum and gas operations | | | |
| | 3.1. | Tax on profits | 50 | 50 |
| | 3.2. | Royalties | 60 | 40 |

Source: The revenue-sharing scheme as reported by the Ministry of Revenue, December 2003.

*Since there are no enterprises jointly established, the sharing of direct or indirect taxes from this source is not currently applicable.

From the reading of the preceding paragraphs, revenue sharing is in application in Ethiopia with a view of achieving the objectives of intergovernmental fiscal transfer. Acknowledging the significant disparity in terms of levels of economic development, the inequality throughout the regions in the country, and differences in the revenue generating capacities of the states, the government has turned to a form of revenue sharing as a way of implementing equity based development strategy.

A factor especially relevant for countries like Ethiopia is the relationship between revenue transfer and economic development. The challenge here is to create a level playing field for the regions, that is to strike a proper balance between regional economic efficiency and competitiveness on the one hand, and the existence of political cohesion based on equity on the other. While reducing regional economic disparities promotes national unity and peace as an important prerequisite for national development, horizontal equalization must not be a disincentive to regional development activities. It seems that it is for such reasons that concurrent taxes are collected at the center and then devolved to the regions according to a formula that has a significant equity component.

### 2. Grants

Grants are another instruments of intergovernmental fiscal transfer recognized under the constitution of Ethiopia. In fact, the constitution provides a general provision governing grant without specifying the type of grant to be allocated to states and the points to be considered.[56] However, it seems that the constitution is providing for general purpose blocked grant to states.

[56] The FDRE constitution, supra note 54, Art.62 (7)

Though, Art.67 (2) of the constitution is silent as to the criteria to be considered in allocating grants, there are other provisions in the constitutions that are relevant in this regard. Art.94 (2) of the constitution for instance provides that 'the Federal Government may *grant* to States emergency, rehabilitation and development assistance and loans, due care being taken that such assistance and loans do not hinder the proportionate development of States.' Art.89 (4) is another relevant provision which says 'Government shall provide special assistance to Nations, Nationalities, and Peoples least advantaged in economic and social development.' Yet, Art.90 provides that 'o the extent the country's resources permit, policies shall aim to provide all Ethiopians access to public health and education, clean water, housing, food and social security.'

The overall reading of the relevant constitutional provision tells us that grants shall be allocated to states in a way it ensures helping states developmental needs, citizens' equal access to government services, and upbringing less developed states to equalize with other states. It is also important to note that the power to determine the allocation of grant is left to the discretion of the federal government subject to the consideration of federal principle as provided under Art.95 of the constitution as discussed under chapter 9.

With a view of implementing the constitutional objectives, grants have been applicable since the inception of the federal system. To this end, different criteria have been in place in the federal experience in determining formula for grants. The criteria have been changing from time to time. For instance, during the first experience of constitutional federalism (1994-195 fiscal year) grants were made taking different indicators depending of the type of expenditure for which the grant is to be given; capital expenditure or recurrent expenditure. Grants for capital expenditures of the regions were determined on the basis of five indicators: population (30 percent), I-distance, representing a region's relative development based on eight factors against a hypothetical region (25 percent), tax effort (20 percent), and capital expenditure in the previous year (15 percent) and area (10 percent). Recurrent expenditure grants on the other hand were determined on the basis of the number of

administrative units at the sub-regional levels, the structure of bureau and offices, and own revenues of the regions.[57]

The 1995-96 year saw considerable simplification of the formula to determine the total expenditure envelope for the regions. Only three factors; population, I-distance and budgeted state revenues-were used, each having equal weight. 1996-97, the formula substituted the I-distance with a development index comprising five indicators (number of health clinics, number of primary schools, and number of telephone lines, electricity consumption and road length).[58] Yet, in 1997-98, the formula was changed in terms of weighting, with population given a weight of 60 percent, development index a weight of 25 percent and the revenue effort variable a weight of 15 percent. The development index was re-estimated on the basis of six underlying factors: education level, health sector indicator, road density, electricity consumption, water supply and telephone coverage.[59]

Generally, the variables considered in the grant formula and the relative weight for each variable since the 1995 is provided as follows.

Table 10.3 variables and their relative weight in grant formula (1994/95-2004/2005)[60]

| **Year** | **Variable** | **Weight in percentage** |
|---|---|---|
| **1994/95** | | |
| | Population size | 30 |
| | I-distance | 25 |
| | Revenue generating capacity | 20 |
| | Capital budget allocation in 1993/94 | 15 |
| | Geographical size | 10 |
| **1995/96-1996/97** | | |
| | Population | 33.3 |
| | Development level | 33.3 |

[57] Edmond J.Keller, supra note 52, p39
[58] Ibid
[59] Ibid
[60] Solomon, supra note 5, p11-112

| | | |
|---|---|---|
| | Revenue generated in the previous year | 33.3 |
| **1997/98-1999/00** | | |
| | Population | 60 |
| | Development index | 25 |
| | Revenue generating capacity | 15 |
| **2000/01-2002/03** | | |
| | Population size | 55 |
| | Expenditure need on selected areas (education, health, safe drinking water, roads, recurrent budget implications) | 20 |
| | Level of poverty | 10 |
| | Revenue raising capacity, | 11 |
| | execution efficiency (changes in health centers, education participation, and length of roads) | 4 |
| **2003/04-2004/05** | | |
| | Population size | 65 |
| | Level of development (expenditure need) | 25 |
| | Revenue raising capacity (8%) and output performance | 10 |

### a. Intrastate Transfers

Literatures reveal that there often exists a heavy reliance of local governments on transfer from above to discharge responsibilities assigned to them. This is mainly because of the fact that local governments may have fewer revenues than their expenditure responsibilities. The existence of spillover between neighboring local governments can also be one ground for the need of fiscal transfer from governments in the above level. The fiscal transfer for local governments can be allocated either by the national government or regional governments. For instance, in the United

State, there are many such programs under which states provide equalizing grants to local jurisdictions—notably school districts.[61]

An important point regarding with transfers to local governments is the constitutional status of local governments. The status of local government as a third order of government, distinct from the federal and state orders varies across federations and this has had an impact upon the financial arrangements affecting local governments. For instance, in German the self-governing status of local governments is constitutionally guaranteed include specific arrangements relating to municipalities.[62] On the other hand, local governments in the United States and Canada are not formally recognized in the constitutions as a separate order of government. The effect is that, in case where local governments do not have a constitutional status, their organization and financial arrangement is totally left to the discretion of state governments.[63]

Another point worth considering is that when intrastate fiscal transfer is found to be necessary, how this going to be made? The issues that we have discussed above on federal-state fiscal transfer are also applicable here. These issues include, how should the total volume of revenue transferred from the states (to the local governments as a whole) be determined? And how should this gross amount is distributed amongst the local governments? Intrastate transfers to local governments require special considerations, as local governments vary in population, geographic size, area served, and type of services offered. In addressing this, literatures provide that it is advisable to classify local governments by population size, municipality type, and urban/rural character, creating separate formulas for each class of municipality.[64]

Coming to Ethiopia, there is no clear trend that implicates the practice of intrastate fiscal transfer. In fact, the Constitution recognizes local governments and provides that adequate power shall be granted to the lowest units of government.[65] Following this, there exists three-tier of local governments in most of the states, i.e. state, zonal (or special wereda) and wereda governments. In a federation where local governments have constitutional status,

[61] Oats, supra note 41, p1127
[62] The Basic law of the Federal Republic of Germany, 1948, Art.28 (2); See also Arts.104a-115
[63] R. Boadway and R. Watts, supra note 8, p5-6
[64] Anwar Shah, supra note 12, p44
[65] The FDRE constitution, supra note 54, Art.50 (4)

they must be accorded with certain constitutional means of protection, including their taxing power and entitlements in the transfer mechanism.

Against this background, intrastate revenue transfer was not implemented in the regions, except for some attempts in Amhara and SNNPR until it was formally introduced in the 2002/03 fiscal year in all regions. The states of Amhara and SNNPR have introduced the allocation of grants to sub-regional levels in the 1997/98 fiscal year according to a formula similar to the one used for federal transfer. The SNNPR has allocated grants to zones and weredas, but the Amhara region has done so only to the zones. Both regions have attempted to allocate grants by dividing them into recurrent and capital expenditure. Tigray's attempt to distribute resources equitably is indeed appreciated, but they have encountered a number of difficulties due to capacity constraints, lack of available data, and the uncertainty of the volume of federal grants (particularly the unpredictability of foreign aid and loans). Furthermore, they have problems in properly distinguishing the role of zones and weredas.[66]

**b. Regional Borrowings**

Federal systems are, in principle, expected to design a transfer scheme that provides regional governments with the needed revenues and the correct incentives for efficient and equitable spending, taxing, and borrowing. Borrowing is therefore the other possibility by which states may supplement their financial constraints. Federal experience however shows divergent paths regarding with the extent of power of regional governments to borrow in order to finance their expenditure needs. In some federations, the central government has sufficient constitutional authority and sufficient motivation to place effective restraints on the spending and borrowing autonomy of regional governments. Especially, federations with high levels of vertical fiscal imbalance tend to restrict borrowing by regional governments and Brazil can be mentioned as an example in this regard.[67] While in others, regional governments face few restrictions in their spending and borrowing powers. For instance, state governments in Germany face very few restrictions on borrowing and the central government has no power to restrict or review the

[66] Endaweke, supra note 6

[67] Marianne Vigneault; Grants and Soft Budget Constraints, in Robin Boadway and Anwar Shah (eds.); Intergvernamntal Fiscal Transfers: Principles and Practice, Public Sector Governance and Accountability Series, the World Bank, 2007, p135 and 146

borrowing activities of the states.[68]

The major issues concerning borrowing are the adoption of appropriate criteria for acquiring the loans, setting the upper limit to be borrowed, interest obligations, the repayment period and debt servicing capacity. Unlike the centre, sub-national governments are mostly restricted to domestic borrowing and they may even be subject to direct control by the central government. The main reason for participation and control by the centre is that monetary and fiscal policies are centralized. But there are various forms of control and the extent of central control might significantly differ from one country to another. In a more general approach, control mechanisms have to be designed to suit the circumstances of a particular country. Moreover, it requires the creation of possibilities for a timely adjustment, depending on the capacity and fiscal balances or imbalances of regions.

In Ethiopia, though the federal constitution recognizes the states' right to borrow from domestic sources sub-national borrowing has a very limited application. The constitution (Art.51 sub 7) stipulates that the federal government shall determine by law the conditions and terms under which states can borrow money from domestic financial institutions. This provision, on the one hand, affirms the possibility that states can borrow from domestic sources and, on the other, grants the regulatory power to the central government. To this end, the federal financial administration proclamation is issued and requires the regional governments to provide all the necessary information to determine the amounts to be borrowed by individual regions.[69] Thus, the states have to fulfill the obligation to submit to the Ministry of Finance and Economic Development the loan amount required to cover their deficit together with statements showing the relations of the requested amount with their revenue collection forecast and with economic indicators, and shall attach a copy of their consolidated loan as required with the loan application form.[70]

According to the proclamation, regional governments may borrow from the National Bank of Ethiopia and/or from other commercial banks. However, states access to borrowing is not without limit rather the proclamation provides certain requirements. First, if they borrow

[68] Id, p135 and 147
[69] Federal Government of Ethiopia Financial Administration Proclamation No. 648/2009, Federal Negarit Gazeta, 15th Year No. 56 Addis Ababa 6th August , 2009, Art.65
[70] Ibid

from the National Bank, the amount has to be determined by the ministry and its disbursement has to be managed by the National Bank.[71] According to this law, each region must convince the Ministry of Finance and Economic Development that the money is required for financing a specific project and they have a capacity to repay the loan within the appropriate time as laid down by law. Second, if borrowing is to be made from commercial banks (or other financial institutions), the respective regional government and the federal Ministry of Finance shall jointly agree on the administrative arrangements related to such borrowing.

**Conclusion**

In almost all federations, expenditure responsibilities and revenue raising powers are divided between federal and state governments. The principle is that when a given level of government is assigned with a spending responsibility, enough revenue sources must be assigned to same so that it can finance its expenditure needs. However, federal practice reveals that sub-national governments are assigned with less revenue sources than needed to cover their expenditure costs. Particularly, federal governments are often assigned with major tax types while states are assigned with many of the expenditure earning responsibilities such as education and health services.

Furthermore, no matter how the division of spending and revenue powers are assigned based on the accepted ideal, fiscal disparities may still exist among different regions. This is mainly attributable to variations among regional states in relation to their population, natural resource endowments, and cost of delivering public goods and services.

The consequence of the above mentioned facts is fiscal imabalance. Fiscal imbalance refers to the fiscal mismatch between the expenditure responsibility and revenue sources. It exists in almost all federations though the nature and degeree/extent of the imbalance may vary from federation to federation. When such imbalance is between the federal government and states, it is called vertical imbalance while the imbalance among and between states is called horizontal fiscal imbalance.

[71] Id, Art.48

The inevitable existence of fiscal imbalance in federal systems necessitates for a mechanism to rectify it. The main instrument to rectify fiscal imbalance is intergovernmental fiscal transfers. It refers to the financial transfer from one level of government to another. It may be federal-to-state, state-to- federal, or state-to- state transfer though federal-state transfer dominates federal practice of intergovernmental fiscal transfer. Intergovernmental fiscal transfer has many purposes include, ensuring equity among different jurisdictions, promoting targeted services and achieving national objectives, addressing externalities, and establishing one economic union.

Different fiscal instruments may be used in intergovernmental fiscal transfers. The main are revenue sharing and grants. Revenue sharing refers to an arrangement in which the revenue from a given tax base accrues to both the central and sub-national governments. Grants on the other hand are fiscal instruments which aim at, among other things, losing vertical fiscal gaps, ensuring horizontal equity among regions, and achieving national objectives. Grants can be conditional or unconditional and matching or non-matching. Apart from revenue sharing and grants, borrowing from domestic and foreign sources may be used by different levels of governments in a federal system.

In Ethiopia too, the major source of revenue (major taxes) are assigned to the federal government while states are burdened with major expenditure responsibilities. This inevitably results in vertical fiscal gap between the two levels of government. Apart from this, there is difference across regional states in relation to their population, expenditure needs, and administrative capacity which ultimately results horizontal imbalance between states. These factors make regional states to be dependent on federal transfer to finance the delivery of public goods and services to their citizens.

Intergovernmental fiscal transfer is applicable in Ethiopia. The constitution provides for the possibility of federal grants to states in the form of subsidy though it does not clearly provide the type of grant and the points to be considered while effecting grant to states. The House of Federation is vested with the power to determine the criteria to be used in apportioning federal grants to states. There is also revenue sharing mechanism that is applicable only in relation to revenues collected by the federal government from concurrent taxation sources. The share of each level of government from the proceeds of concurrent source is made as per the formula

prepared by the House of Federation. States are also allowed to adjust their financial deficit by borrowing from domestic sources.

**Summary Questions**

1. Discuss the types of fiscal imbalance and their main causes.
2. Explain the concept of intergovernmental fiscal transfers and the major purposes that such transfer aims to address.
3. Elaborate how the FDRE constitution addresses revenue sharing and grant system with as a means of intergovernmental fiscal transfer.
4. Discuss the types of grants and the purposes that each grant type aimed to address.
5. The assignment of major revenue sources to the federal government and major expenditure responsibilities to states is considered as one reason for vertical fiscal gap in Ethiopia. Do you agree? Why? Do you think that the federal government is practically with enough revenue to finance its expenditure needs? Why/why not?