Introduction

Background

Despite the wealth of differences among the federal systems, all combine self-rule for some purposes and shared rule for other purposes or combine unity with diversity. Commonly it is understood that unity is achieved through the exercise of power by the federal government in relation to the polity as a whole while diversity represents the exercise of power by the constituent states over a portion of the population.

The new laws proclaimed in Ethiopia to define the powers and responsibilities of the HoF and the CCI have granted extensive discretion to these organs to develop general principles of constitutional interpretation.

Territorial approach (which is the conventional division of power into geographically defined constituent units rather than linguistic, cultural, ethnic or other bases of identity) is a wrong solution to multicultural federal systems.

Chapter one

The Context of the Federal System in Ethiopia

Part One

1.1 HISTORIC ETHIOPIA AS A DE FACTO FEDERATION

Except for the twentieth century, a cursory reading of history reveals that Ethiopia has for the most part been under a decentralized rather than a centralized system of governance. One observes a co-existence of a duality of authorities, mainly that of the Imperial throne, representing the center and a number of *provincial nobilities* effectively exercising decentralized power. Provincialism is slightly different from the notion of ethnic attachments. It refers to a special attachment or affection between a person or group indicating one's origin. It represented a sense of parochial identities and diversity of sentiments and interests. The territory defined as a province also represented economic and political interests, which it defended collectively against trends of centralization, under the leadership of the local nobility.

In short, the majority of the Kingdoms of the South, South West and Eastern sides existed as autonomous units only indirectly associated with the center usually marked by the payment of tributes

The imperial throne served as a symbol of unity and the political system combined a balance of forces between the monarchy and regional nobility, the former playing a centripetal role and the latter moderating the power of the center.

Except during the tenth century when Yodit/Gudit attacked the Christian empire, during the campaign of Imam Ahmed (1527-1543) and during the (Age of Princes) *Zemene Mesafint* 1769-1855, three important periods in which the power at the center had to subject itself

almost completely to regional forces, the balance often swayed, albeit slightly to the *Niguse Negast* (King of Kings). The stronger the imperial power, the smaller the autonomy would be and vice versa, but it appears that regional power was far from being a mere instrument of central power although its economic and social foundation was entrenched in the imperial system. Rather, a mutual dependence between the two forces seems to have been the dominant feature of historic Ethiopia.

The long-standing tradition of consciousness of unity and autonomy, that is to say duality in the exercise of power, is not only found on the records of history, it is also well symbolized in the notion of *Niguse Negast*. Nothing symbolizes the duality of authority better than the notion of *Niguse Negast*. It implied the existence of deep-rooted and strong kings in several of the provinces exercising, as briefly indicated above, important powers in their own territory. The clearest manifestation of the Empires *de facto* federation.

Until the twentieth century where provincial nobilities were effectively and systematically abolished, the Ethiopian state did not posses the structure and means required to impose the absolute claims the throne may have demanded. To the extent that the central power was hindered, it meant also that regional forces enjoyed themselves as autonomous kingdoms merely acknowledging the existence of a distant emperor. Provincial sentiments usually precluded the appointment of outsiders.When a conducive environment was found, provincial forces never hesitated to crown themselves emperors

One aspect of the constitutional practice limiting the power of the Emperor, emanated from the famous *Kibre Negast*, This is probably one of the oldest constitutional documents in the entire world, written in 1320 by a group of authors from Axum. It provided the rules for succession to the highest office. It provided the rules for succession to the highest office. Accordingly, no one except the descendant of King of Solomon shall ever reign to the Ethiopian throne. It also provided about the complex organization of the imperial court and government and regulated the relation between the state and church.

The plurality of kings, with the *Niguse Negast* above them signifies some kind of federal or confederal government structure. The throne and the church represented the symbol of unity and regional forces exercised decentralized power.

The beginning of the twentieth century marked the first serious attempt to curb the autonomy of the regional forces. But this is far from the measures taken by Haile Selassie. Menlik did not decisively undercut the authority of the great provincial lords and towards the end of his reign the provincial *rases* became largely independent.

Issuance of the 1931 Constitution, the first *written* constitution in the history of the country, marks a new epoch. It heralded the end of the role of the duality that existed for centuries. Provincialism and/or the autonomous kingdoms, the traditional check against the power of

the king of kings, were completely absorbed into the centralized administration. Haile Selassie in conformity with his policy of centralization refused to confer the title of kings, thereby disappointing expectations at the time of his coronation. This is particularly clear from the nature of the two houses established under the 1931 Constitution. The emperor made sure that all potential contenders for power were members of these chambers that in effect had only an advisory role. Haile Selassie's measure of direct individual taxation without the involvement of the intermediary notables, which in a way centralized the taxation system.

The process of centralization, was not without consequences.

1) The incorporation of the South, the Southwest and the Eastern sides from their previously autonomous position to complete absorption meant that the notion of the state, its institutions and culture were imposed on the incorporated kingdoms.

2) It brought about all sorts of diversities in terms of religion, language, tradition and culture. Because the state failed to accommodate them, the religious, lingual, cultural as well as political and economic dominance gave birth to the 'question of nationalities.'

3) The state became extremely centralized at the expense of regional rulers.

In the 1960s, however, things started to change. The new forms of resistance changed significantly in terms of leadership, social composition, motivation and ideological orientations.

1.2THE PROCESS OF CENTRALIZATION (1930-1991)

1.2.1The Era of Written Constitutions

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

1.2.1.1 The 1931 Constitution

The Emperor was motivated to grant this constitution. Emperor's progressive inclination to join the international organization were externally, there was the intention to convey an impression of modernity through the introduction of a legal framework for government, human rights, two-chamber legislature, and the abolition of slavery. The Constitution was designed to be a legal weapon in the process of centralizing governmental power and in limiting the authority of the nobility.

The first measure the Emperor took along the process of centralization was the grant of the Constitution. The emperor was the head of the executive, the fountain of justice, the agent of change and the law-giver, albeit moderated by parliament that lacked the competence to enact law.

The Constitution vested supreme power in the hands of the emperor and heralded the establishment of the institutions of the chamber of Deputies and the Senate. These two houses were important instruments for curbing the power of the nobility. Close scrutiny over the provisions and the practice revealed that both houses were merely meant to play a strictly *advisory* role

The Constitution's major outcome was its ability to establish the legal framework within which governmental power was to be channeled and distributed. It was aimed against the personal, arbitrary and ill-defined powers traditionally held by the nobility. It reflected the traditional principle of absolute imperial power without any practical limitations.

1.2.1.2 The 1955 Revised Constitution

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

A basic development in the revised Constitution compared to its predecessor was the introduction of the representative principle for the chamber of Deputies whose members were elected on the basis of universal adult suffrage. But parliament was granted no control over the ministers indirectly or collectively, who remained responsible to the Emperor. While one of the two chambers of parliament was popularly elected, it was balanced by the senate, which was appointed by the Emperor. Indeed critics state that, even more than its predecessor, the Revised Constitution was a legal charter for the consolidation of absolutism.

Regional nobility were weakened with the result that the nobility drawn from Showa replaced the regional nobility. This led to'the Showanization of the state,' that weakened not only the nobility but also the bond between the government and the people.

Towards the 1960s the regime was caught between series of contradictions: between the need for further modernization that needs efficient and decentralized administration on the one hand and the reliance on personally appointed and centralizing regime.

1.2.2 The Ethio-Eritrean Federation (1952-1962)

After World War II, Italy renounced all right and title to its colonies and the Treaty of Peace signed in Paris in 1947 provided for the final disposal of the former Italian colonies to be determined by agreement among the four allied powers, the USA, USSR, UK and France. Failing agreement, the matter would be submitted to the UN General Assembly for disposition. The four victorious allies established an investigating committee to come up with a proposal on the future of Eritrea. The United States based on its interest in the region and good relations with the Emperor was keen to see Eritrea joined to Ethiopia in unity. The USSR and some Afro-Arab countries were on the other hand opposed to this move. They took the position that only separate existence could guarantee the sovereignty and progress of Eritrea.

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

On the Ethiopian side, Haile Selassie demanded the full incorporation of Eritrea and nothing less. Ethiopia's claim was based on her need for access to the sea and by the claim of historical title and cultural affinity of the two populations. Furthermore, Ethiopian diplomats successfully invoked the OAU principle of non-territorial intervention in the internal affairs of the state and the need to respect the territorial integrity of African States whose territories were defined by colonial borders.

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

There seemed a consensus though that the term autonomous unit signified not a sovereign state but rather a politically organized unit linked federally with Ethiopia and that the

phrase under the sovereignty of the Ethiopian crown implied that the federation, not the autonomous unit, enjoyed sovereignty.

More controversial were the status of the federation and its subsequent dissolution in 1962. Closer observation of the 1955 Constitution and the Eritrean Constitution seems to suggest that Eritrea was only an autonomous region rather than a full-fledged unit in a federation, as we understand it today. The Resolution had provided for a Federal Council, an institution that was a faint approximation of a federal body. This body was to comprise Ethiopian and Eritrean representatives in equal numbers and *advise* the Emperor on matters of the federation. The Council was simply ignored and practically done away with before it could even start functioning. As a result, the federal powers belonged to the Ethiopian government. The Ethiopian Emperor was the sovereign, the Ethiopian courts were the federal courts and the Ethiopian Ministers were the ministers of the federal government. Tekeste states, 'For all intents and purposes the resulting relationship between Ethiopia and Eritrea was not in the least federal. Even according to the intentions of the union, Eritrea was not granted a federal status but only a status of autonomy.'

However, this constitutional ambiguity could not serve as a justification for not implementing even the regional autonomy. Even Eritrea's mere status of autonomous region was not tolerated by Haile Selassie's regime. The government had a notion of territorial integrity that was incongruent with federal or other structures of decentralization and hence the dissolution was no surprise. By contrast, the Eritrean Constitution was one modeled on those of Western democracy. It provided for three branches of government based on rule of law, it stipulated for fundamental freedoms and a multi-party system.

The arrangement under the Resolution merely conceived of Eritrea as an autonomous decentralized unit, which is conceptually different from confederation and federation. Legally speaking, such an autonomous status can be modified by the central government and the Ethiopian Crown being sovereign, had every right to do what ever it wanted, though politically it was not advisable. Regarding the charge that the re-incorporation of Eritrea in 1962 was illegal, it is important to note that it was the elected Eritrean Assembly that unanimously decided to terminate the federation in the first place.

Haile Selassie's ambition of centralizing power, the failure of the Ethio-Eritrean short-lived autonomous experience was no surprise. The failure of the decade of federal experience also fits the hypothesis that a federal system should be based on a covenant, should have internal support and should not result from outside. There is another bitter lesson for those who still claim to follow the Eritrean example of secession. Secession or the emergence of an independent state does not necessarily result in the establishment of a stable and democratic state. 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.

1.2.3 The Revolution and the Coming to Power of the Military

The aristocracy that had lost its military and administrative functions to the new elite was no longer the pillar of the monarchy. The young returnees from school abroad on the other hand thought they were working for a regime in which personal loyalty was of prime importance. It was clear to them to see how ignorant, corrupt and inefficient their superiors were.

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

had to be loyal. The aborted Endalkachew Cabinet sought to rescue the collapsing regime by replacing it with constitutional monarchy. Another crucial aspect of the Revolution, however, came from the military. It started with a modest request for economic and social reform like food and uniforms for their members.

As far as the affairs of the government were concerned dual power prevailed for something like a month between that of the Endalkachew cabinet and the *Derg* but power continued to shift out of the hands of the former to the latter. The *Derg* continued to replace or isolate those who were not amenable to its whims. As a result Micheal Imiru replaced Endalkachew Mekonen as a Prime Minister on July 22. The *Derg* arrested the then Minister of defense Abiye Abebe and replaced him by Aman Andom. This time *Derg's* control of the cabinet was almost complete.

Despite its popular background, there was no organized civil force that could articulate 'a road map' for the masses. It was only the military that was organized and that filled the political vacuum. The two leftist political groups that were in existence allegedly, MEISON (All Ethiopian Socialist Movement) as of 1968 and EPRP (Ethiopian Peoples Revolutionary Party) as of 1972 had remained clandestine and their activities were limited to their student constituency. Through the mentors, mainly MEISON, the *Derg* was able to catch up with the leftist dialogue and declared the National Democratic Revolution (NDR) Program in 1976 and its ultimate objective was the setting up of the Peoples Democratic Republic of Ethiopia (PDRE) which came out in 1987. From 1974 up to 1987 the *Derg* ruled by decree.

The large section of the peasantry saw a stock in the emerging regime and was to constitute the bulk of the army. However, even this popular measure had its own drawbacks. Not only did the proclamation fall short of making the peasant the absolute master of the plot but it was also accompanied by a series of unpopular measures. These measures ranged from state control of agricultural marketing that required the peasant to supply produce at fixed government prices to forced resettlement, collectivization and the relocation of peasant neighborhoods to new sites selected by government cadres (villagization)

1.2.3.1 The 1987 Constitution

The draft constitution was completed in 1986 and was formally submitted to public debate and ratified by a referendum in February 1987. In an election in which a single party, WPE members, participated members of the National *Shengo* (parliament) were elected. While formally the *Shengo* constituted the highest legislative body, in practice, the *Shengo* was not to be sitting continuously but only once a year for a set period. The role of the *Shengo* was undertaken by the State Council. It was the visible administrative organ of state power

with the highest responsibility for undertaking the day-to-day state functions. It was also the permanent executive, legislative and administrative organ of the National *Shengo.*

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

Despite all the forces the regime employed to destroy all opposition, the struggle to overthrow the regime persisted in some quarters of the country, mainly in Eritrea and Tigray. With a view to calm this resistance and to rob the rebels' cause, the PDRE Constitution expressly stated the possibility of organizing regional autonomies. This Constitution was also the first to recognize the presence in Ethiopia of different nationalities. It sought to combine the recognition of the cultural identity of ethnic or national groups and a measure of autonomy for them, with overall subordination to the center in the name of the ultimate supremacy of class solidarity over national identity. What is mysterious is why it came to this point late in time as the regime hinted its acknowledgement of the nationalities' right to self-determination as early as it took power. Paragraph 5 of the Program of the NDR of Ethiopia which was the basic political guiding document until the promulgation of the new Constitution and the formation of WPE read: The right of self-determination of all nationalities will be recognized and fully respected. No nationality will dominate another since the history, culture, language and religion of each nationality will have equal recognition in accordance with the spirit of socialism.

Given Ethiopia's existing situation, the problem of nationalities it was stated, could be resolved if each nationality was accorded full right to self-government. This means that each nationality would have regional autonomy to decide on matters concerning its affairs. As stated above the Constitution of FDRE was a unitary one but the unitary state comprised administrative and autonomous regions. The National *Shengo* was empowered to determine by subsequent legislation the autonomous regions, their powers and boundaries. Accordingly, the *Shengo* proposed five autonomous regions and twenty-four administrative regions. The five autonomous regions were Eritrea but without its Afar inhabited areas, Tigray, Assab for the Afars, Dire Dawa for the Issas, and Ogaden. Institute for the study of Nationalities was established on 23 March 1983 by proclamation No. 236 of 1983. Its objectives were twofold: 1. 'to collect information and undertake studies on the different communities and nationalities of Ethiopia.' 2. 'To undertake studies leading to the drafting of a national constitution and the restructuring of the central and regional organ of

government based on democratic and socialist principles.' Some 83 nationalities were recorded. The most original and perhaps the most controversial contribution of the Institute to the new republic was the reorganization of administrative regions of Ethiopia constituting 5 autonomous regions and 24 administrative regions. It is also contended that this study has served as a background for the post 1991 state restructuring.

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

Yet, it soon became clear that the PDRE project with its approach to the regional autonomy of some districts were all a means never taken seriously. Critics are unanimous in pointing out that it was a sham attempt. Opposition to the regime stated 'It remained the *Derg*'s Republic not a people's republic. Those familiar face who were in power before the establishment of the Republic were indeed serving the new Republic and by the new Constitution they acquired a democratic legitimacy.

The ideological vacuum for legitimizing the state shifted to Marxism-Leninism as they perceived a relationship between oppressed nationalities and an oppressor nation, which they traced in the image of the state. It also advocated secularism and declared the equality of religion. As already noted even the land reform failed to maintain its popularity.

It gives no space for individual autonomy. Similarity of patterns between the 1955 and 1987 Constitution is worth quoting. 'In a sense the two documents could scarcely be more different. The first was issued in the name of Haile Selassie I elect of God emperor of Ethiopia, conquering Lion of the Tribe of Judah, the second in the name of 'we the working people of Ethiopia', the role which in one is played by God and the emperor was in the other taken over by the alliance of the workers and peasants, the vanguard party. But in a sense the two can be seen as very similar documents. Both of them were intended to consolidate the power of an existing regime by giving it a formal basis, which on the one hand sought to convey an impression of legality and participation to the domestic population and on the other sought external support and recognition by adopting an acceptable external model.

Under these circumstances, the *Derg*'s commitment to regional autonomy was viewed with suspicion. The extent of the administrative and autonomous regions to exercise power decentralized to them was severed by the WPE's centralized decision-making structure and regional autonomy remained a dream that was never fulfilled. It was a grant from the centralized government that could easily be revoked but besides that it was too little too

late. Certainly, the belated measure did not attract the Eritrean groups for which an early federal accommodation would have been more appealing.

Continuity or Reversal?

1.3 THE TRANSITIONAL PERIOD (1991-1994)

A national conference for discussion on details of transitional period was convened in Addis Ababa from July 1-5, 1991. The Conference resulted in the signing of the Charter by the representatives of some 31 political parties, the creation of an 87 seat Council of Representatives and the establishment of Transitional Government of Ethiopia (TGE). The Conference also agreed on the modalities of the transition process to last two years.

The national conference adopted an interim constitution, otherwise known as the Charter for the TGE. Composed primarily of leaders of nationality-based parties spawned by the civil war, the conference reflected a dramatic shift of political power from the center to new politicians from hitherto marginalized regions. The Charter established the framework for the provisional government and guaranteed nationalities to preserve their identity, administer their own affairs within their own defined territory, the right to participate in the central government based on fair and proper representation, and the right to self-determination.

The establishment of national regional self-governments was provided for in another proclamation. The Charter and the proclamation explicitly provided that the boundaries of the territorial regions be defined on the basis of nationality in order to guarantee the nationalities the right to self-administration. The proclamation distinguished between regional self-governments based on an agreement of two or more adjacent nationalities, and national self-governments, established by any nation, nationality or people. Accordingly, the proclamation enumerated sixty-four identified nations, nationalities and peoples and set up fourteen regions. The law provided for forty-eight of the identified nationalities to be able to start their own national/regional self-government at the *wereda* level or above. The remaining other nationalities and peoples with small populations were defined as minorities. Meaning a 'nationality or people which can not establish its own *wereda* self-government because of the small number of its population.' These nationalities and peoples with small populations and known as minority nationalities nevertheless were provided with appropriate representation in the district council.

The striking point is that nowhere do the charter and the proclamation employ the term federation in either their preamble or specific legal provisions.

If one looks at the legal framework from the angle of a federal system, there is no doubt that the balance swayed in favor of the center. A somewhat ambiguous and less precise language was introduced in the proclamation implying that except for specifically

enumerated powers of the central government, all other powers including residual powers belonged to the regional self-governments. But the enumeration of the powers of the central government was not exhaustive and contained broad terms.

In the language of the Charter, the Transitional Government shall exercise all legal and political power for the governance of Ethiopia. In no unequivocal manner, the proclamation also stated that national regional transitional self-governments are in every respect, entities subordinate to the central Transitional Government. Moreover, the national /regional council (local parliament) that was the repository of overall political power regarding the internal affairs of the regions, was made accountable to the people which elected it and to the Council of Representatives of the TGE. Besides, the ultimate power arbiter too was the Council of Representatives. More importantly, in the exercise of the powers of the states, the relevant general policy and laws of the central government were to be respected. Yet, despite the powers granted to the center the political dynamics as it was practiced and as designed by regional forces indicate that what was envisaged was no less short of a federation. The national/regional governments had law-making, executive and judicial powers and have used them extensively.

Two political developments were clearly observable: these are the choice of ethnicity as a basic principle of political organization of the state, and society and the reconstruction of the Ethiopian centrist and unitary state by introducing a federal system of government.

The promising beginning did not end as intended. Following the reorganization of the state structure and the national/regional governments, a regional election was scheduled for June 1992. The regional election to regional council was a cause of serious disagreement. While OLF and AAPO asked for postponement, as they were unprepared to compete in the regions, EPRDF insisted to continue as scheduled. Following this and other disagreements OLF, one of the major actors during the making of the Charter, withdrew from the government and attempted to re-launch guerilla insurgency. Critics state that EPRDF resulted in a process of replication of one existing organization, the TPLF, than a union of existing actors from the spectrum of Ethiopian opposition forces. No doubt the TPLF was dominant and remains to be so at least until 2002 because of its considerable seniority.

TGE was the most legitimate and democratic government that the country had had in its entire history. One of the major tasks of the transitional Council of Representatives was to direct the process of constitution making and pave the way for a new national election based on the ratified constitution. A constituent assembly was elected in 1993, the TGE established a constitutional commission to prepare a draft instrument

Observation of the last few years of the transition, it is a formal process devoid of content. The spirit of the democratic transition was missing completely as democratization became

purely formal exercise, the major contenders of power from the opposition missing throughout'. Hence, the argument that the post 1991 political development did not reverse the historical pattern of domination. It would be useless to put all the blame on the ruling party. Firstly, the opposition so far has formed a united front only in one respect: in its consistent but at times uncritical opposition to the ruling party. Until the May 2005 election none has come up with a comprehensive policy alternative that convinces the public and hence secures it to their side, the necessary vote to win seats in parliament. Secondly, having gone through two most despotic regimes, it is simply naive to expect that Ethiopia will overnight turn into democracy.

One general pattern discernable throughout the emergence of the modern state and which still seems to prevail is the problem of fixation in the Ethiopian discourse with the politics of 'zero sum game.' It is for this reason that I earlier noted the TGE was more legitimate and inclusive than any other regime in the country's history.

Part Two

1.4 THE CHALLENGES OF BUILDING A MULTICULTURAL STATE

Putting the Conflict in Perspective

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. Strangely enough the ruling party, EPRDF and its most known critic Mesfin Woldemariam seem to agree on one point: in defining the post 1960s crisis as 'ethnic' by the latter and 'national' by the former the conflict is never exclusively ethnic.It could be stated that the state failure could be analyzed in terms of failing to build a multicultural state (touches all spheres of the state, political power, resources, identity and language issues) from all the diversities that the modern state has brought together during the second half of the 19th century and the relevance of federalism as an idea for forging unity out of diversity springs from this.

1.4.1 The Instrumentalist

Over centralization of power and economic resources by the 'dominant' group, principally from Showa which despite genealogical mixtures defined itself and the state along this narrow perspective, and the subsequent marginalisation of others should be considered as the underlying factor in exacerbating the prolonged war in Ethiopia. The outbreak of ethnicity in public discourse is the result of this marginalization and hence can not be

considered as a factor on its own to analyze the conflict: to be specific, ethnicity is the consequence, not the cause.

Where the state controls the production and distribution of material and social resources, exclusion from state power is tantamount to material and social deprivation. Access to state power is essential for the welfare of its subjects, but such access has never been equally available at all. The ultimate goal of most parties to the conflict, of course, is to enlarge their share of the resources commanded by the state.

Markakis casts doubt on the characterization of the conflict as ethnic. Whether such differences in themselves are sufficient cause for conflict is debatable and to define the conflict a *priori* as ethnic is questionable'.

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

The process of centralization, 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.

Explaining the Crisis

Attempts at explaining the cause of the state crisis have not only been less satisfactory but are also found to be diverse ranging from those who even today consider it was all a normal process of "nation building" and hence consider the liberation struggle as a form of tribalism to the instrumentalists that focus on the concentration of political and economic resources at the center as a core source of tension. Such thinkers are called instrumentalists because they view religious and ethnic groups as a means to achieve some political and economic goal and having no relevance thereafter.

A few political elites even went further to state that it must be seen as a form of "internal colonialism."

Certainly the advocates of the "nation building" process and the instrumentalists fail to grasp one of the central issues of the debate in diverse societies like Ethiopia. The Ethiopian state that emerged as a result of the centralizing trend was qualitatively different from historic Ethiopia not only in terms of its territorial size but also in terms of ethno-linguistic composition and religious diversity. The majority of the ethno-linguistic groups incorporated were told in no ambiguous terms to assimilate into this state. Rather than attempting to forge a state from the newly introduced diversity, the regimes imposed a narrowly defined state, whose cultural, social, political and religious foundation and its institutions failed to reflect the existing diversity on the ground. It is not surprising then that the legitimacy of the government, its institutions and the values upon which it is established remain one of the sources of tension and at times the cause of its terminal crisis. While the nation builders have a point as they emphasize on the shared values and the difficulties of integration and the instrumentalists by focusing on the economic and political factors, two of the core causes of political instability, they often fail to consider the identity factor as a cause of tension in multicultural societies.

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. But it is also ***undemocratic nation building*** project that was bound to fall, only waiting for the opportune moment to happen. The attempt to homogenize also contradicts the multicultural nature of these countries and negates the idea of mutual recognition. This has implications in the establishment of public institutions, in the design of national symbols such as the flag, national anthem, currency and values of the state. In a diverse society, the most essential element for stability and order is the acceptance of the value of diversity and of the possibility of multiple loyalties expressed through the establishment of constituent units of government with genuine autonomy for self rule over those matters most important to their distinct diversity.

The National Oppression Thesis and the Question of Nationalities

As a solution to the 'national oppression' described by the ESM there emerged contending views. Those who advocated for the regional autonomy formula as in the *Waz League*, those like MEISON and EPRP that in principle acknowledged the existence of 'national oppression' but whose dominant orientation was towards unity and they saw the struggle of the oppressed people as indivisible, a solution to be sought within class rather than along national lines and the third set constituted all the ethno-nationalist movements who preferred to define their struggle on the basis of

'nationality' than class. The last group held that a new and democratic Ethiopia could only be constructed through the voluntary and consensual association of its parts. According to Merera, there are two paradoxes that need to be noted here. The first paradox is that the ESM and the multiethnic leftist movements had popularized the right of nationalities to self-determination to solve the national inequality. However, the national liberation movements effectively used it for mass political mobilization. The second is that the students and the civilian left brought about the 1974 popular revolution but the military usurped the leadership of the revolution and used it to destroy the civilian left dubbing them counter-revolutionary forces.

EPRDF defined its struggle not on the basis of class or multinational principles but as a nationalist one. It believed that emphasizing the nationality question was the right strategy to rally the oppressed people by rejecting the class-based approach of the ESM that EPRP and MEISON chose to follow.

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

The Tigrayan Cause

At the national level, however, no special economic as well as political benefit accrued to Amharas distinct from other nationalities and therefore national oppression is merely reduced to linguistic oppression. The Tigrayan student movement was not homogenous. Evidence seems to indicate that it harbored three different political tendencies. The first was an option to construct what they coined as 'Greater Tigray' that includes the Tigrigna speakers both in Tigray and Eritrea. Perhaps this was the agenda of the little known TLF. The second group was more in line with the ESM in suggesting that the liberation of Tigray should be seen in the context of liberation of Ethiopia, hence joined the EPRP. The third that was to be the basis of the TPLF focused on the liberation of Tigray both in terms of national and class, leaving the issue of post independence Tigray unsettled.

Merera's major thesis in his PhD is to make a widely held view in the private press that everything is heaven in Tigray and the Tigrayans dominate the whole federal system. His position suffers from two major setbacks. There is more convergence than divergence among the elites of the several nationality groups and the attempt to show so much divergence does not seem to be convincing. Another limitation is his articulation of the Tigrayan struggle as resurgence. Maybe this is a confusion

resulting from a mix between his dissatisfaction with the TPLF/EPRDF led government.

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

The ruling party has for long advocated that it is the oppression of nationalities that is at the heart of the crisis and the political and economic marginalization is a consequence rather than a cause. The 1995 Constitution long advocated for nationalities right to self-determination up to and including secession. Yet, this in itself fails to underscore the point that in the end political and economic factors are crucial factors behind every conflict. Besides, this perspective fails to address adequately the problem of minorities within the different units and cities that often are inhabited by ethnically intermixed individuals. Thus, an approach that combines the accommodation of diversity with genuine sharing of power and resources among the diverse groups and the commitment to human rights will better explain the success or failure of the state in multicultural societies.

1.4.2 The Other Relevant Perspectives

The Views from the South

There are certainly several views emerging but at least two are dominant. There is the EPRDF-member SEPDF has recently undertaken a lot of reforms, particularly after the TPLF crisis in 2001 and in 2002 merged some dozen ethnic fronts to form one movement. The attempt is to forge one party representing all nationalities. Despite troubling history, the region seems to be content with the federal option of unity in diversity.

Over all assessment of the federal experiment in the South exhibits both fear and

hope. The fear is that there is continuous rivalry among some of the political elite for controlling regional power at the expense of others and that seems to be fueling those that felt marginalized at regional level to raise issues of further redrawing of new zones. A newly emerging multicultural federation may need to remain flexible in order to adjust territorial boundaries to meet new ethno-linguistic demands which is an expected thing in holding together federation but too much flexibility may lead to the Nigerian federation's logic of fragmentation.

The hope and rather promising point about the South given its size and incorporation into main stream Ethiopian politics is the potential role that it can play in stabilizing the federal game have a major potential role to play in bringing equilibrium to the two potential threats of the Ethiopian federation: centralism

The Afar Region

The sultanates of afar enjoyed some level of authonomy. This was to be changed with the introduction of commercial farming in the 1960s. This was indeed a turning point in the sense that after its introduction, the Afars lost a large area of land. There were attempts to handle the matter with care as the emperor was also interested in incorporating Djibouti.The nationalization program of all rural land not only led to the expropriation of the holding of the Ali Mirah, an influential sultanate, who had a large private holding but also deprived the Afars of land that could be used for dry season grazing. Sultan Ali Mirah fled to Saudi Arabia and that marked the end of friendly relations between the center and the Afars.

After 1991 the ALF whose main support came from the Awsa region, predominantly nomadic, dominated the transitional process as well as regional politics. Close to the ALF is the ANLF that draws support from the Tigray speaking Afar in the Berahle area bordering the Tigray region and is said to be a faction that broke away from the ALF. It was influential in regional politics and stood second to APDO in the 1995-2000 elections for regional parliament. After March 1996 the regional presidency was transferred to APDO chairman. In short, except the ARDUF, present circumstances in the Afar region seem to suggest that their claims can be satisfied with a genuine federal set-up that grants the Afars autonomy of their own. Apart from those mentioned above there are two other parties in Afar. This group claims to represent all the Afar in the Horn, including those in Ethiopia and Eritrea, although it seems to be less interested in those who are in Djibouti. It is now called the ARDUF (Afar Revolutionary Democratic Unity Front) formally set up in 1993 from a coalition of three other parties. It aims to reunite at least the Afars in Ethiopia and

Eritrea-Greater Afar land. Of late one wing of the ARDUF joined the ruling party (forming ANDM) and the remaining faction remained with the UEDF.

The Somali Situation

What is striking about the Ethiopian Somali case is that its cause, however genuine it may have been, is complicated by political developments in the Horn and particularly by the intervention of neighboring Somalia state. Somalia Republic embarked on an irredentist policy of bringing all the Somalis living in the three neighboring countries: namely Ethiopia, Kenya and Djibouti, hence the five star flag. To this effect it created WSLF (Western Somali Liberation Front) to represent the Somalis of the Ogaden and SALF (Somali Abo Liberation Front) to represent the Somalis in Bale and parts of southern Sidamo and some portions of the Oromos (which the Somali Republic thought were Somalis but mistakenly considered themselves as Oromos. Since the break up of the Somalia Republic, the Ethiopian Somalis then seem to face a dilemma between genuine autonomy within federal Ethiopia, creation of independent Ogadenia or joining one of the newly emerging 'states. The first party to come to power during the transitional period in the Somali region, which at present is one of the units of the federation, was ONLF (Ogaden National Liberation Front) after winning most of the regional seats. However, shortly after it was established, the council dominated by ONLF demanded a referendum on independence. This move angered the central government, which eventually organized more than 13 tribal fronts and organizations to unite and challenge the policies of ONLF, forming the ESDL. In the next election, ESDL won but it was boycotted officially by ONLF (though there were individuals who ran in ONLF name) and formed the Regional government alone. Internal party squabbles led to a coup in the region, that caused the federal government to intervene but thereafter the ESDL was weakened due to the crisis. So the federal government commissioned a new unification initiative of ESDL and ONLF. ONLF broke into two factions between those that accepted this proposal and those who rejected any deal saying our question is a colonial one. The new region was then ruled, firstly by ONLF, then ESDL and currently by the SPDP.

After considering the national oppression at length, it is perhaps appropriate to conclude with the following note of precaution. To argue that the conflict has to be able to be seen in a broader fashion that takes into account the cultural and identity element, apart from political and economic factors in the Ethiopian context is *far from endorsing* the idea that the whole conflict should be solely interpreted along this line. This approach like the instrumental model will lead to another narrow

perspective and indeed that is the problem with the national oppression thesis. While explaining another dimension of the conflict, it fails to transcend.

Ethnicity and its socio-political use are embroiled in political, social and economic issues and has to be addressed through the latter, the proponents of national oppression have no satisfactory answer. One other writer has equally and rightly so pointed that the nationality question might be one cause but certainly is not the exclusive one. 'Oppression, exploitation, poverty, injustice are trans-ethnic and could be more adequately dealt with if they were given answers that are also trans-ethnic.

Chapter Two

Some Common Features Among Federations

2.1 INTRODUCTION

Federalism as a political idea remains still popular for reconciling unity and diversity under a single political system. Some twenty-five countries of the world covering 40 per cent (two billion) of the population live in countries that claim to be federations.

There are a number of reasons for this increased interest in federalism. Federalism as a political concept and federations in the form of institutions seem to provide 'the closest institutional solution' combining shared rule for some commonly shared purposes and self-rule for other purposes of regional interest in the world today. It is not that the states are disappearing; it is that the state system is acquiring a new dimension. There are now networks of agreements that are not only militarily and economically binding for *de facto* reasons but are also becoming constitutionally binding *de jure*. This overlay increasingly restricts what was called state sovereignty and forces states into various combinations of self-rule and shared rule rather than limited into federations.

There is a global interdependence among highly unequal states and increased interstate linkages of a constitutionalized federal character. This development began after WWII but it was not until the collapse of the former Soviet Union that the extensive and decisive character of this paradigm shift became discernable to most people.

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

2.2FEDERALISM AND FEDERATIONS

Federalism 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 rather than in operational reality. In the African context, federalism is associated with the colonial experience of divide and rule.

Federalism refers to an ideology, a normative principle, while federations refer to institutions. Federation is descriptive concept referring to the actual system of governments. Federalism as a political philosophy is essentially an organizing principle. Deeply rooted in the Latin term *foedus,* federalism refers to the 'coming together of humans as equals to establish political bodies in such a way that all reaffirm their fundamental equality and retain their basic rights. Federalism has been examined as a political ideology in the sense that it reflects values and benefits, which recommend specific forms of federation. The particular type of federation prescribed is determined by the interests that the framers and the actors want to achieve. Thus, federalism is not as such a universal value. Federalism can have centralizing or decentralizing trends and several values.

The essence of federalism as a normative principle is the perpetuation of both union and autonomy, in the latter for accommodating, preserving and promoting distinct identities within a large political union.

Federations on the other hand refer to tangible institutional facts. They constitute the institutional and structural techniques for achieving one of the goals of federalism. Federations are used to describe actual systems of governments. Federal political systems refer to a whole spectrum of more specific non-unitary forms of governments ranging from decentralized system of governments, federations to confederations and beyond. This broad concept called federal political systems refers to all sorts of multi-tier governments. Federations constitute one among them. Others include, federacies and associated states. In the former a smaller political entity is linked to a larger one, usually a former colonial power, but the smaller unit retains considerable autonomy, perhaps more than is constitutionally granted to constituent states in a federation, in return for a minimal role in the government of the larger one. It is based on a bilateral arrangement and is given to a part of a state hence creating asymmetrical self-government. The latter refers to a more or less the same kind of relationship except that in this case the arrangement can be dissolved by either of the units acting alone.

There may be federalism without federations, but there can be no federations without some matching variety of federalism. Some form of federalism is always implicit in any given federation. This is to imply that federalism could still be manifested, for instance, in decentralized government forms, or confederal arrangements.

2.3. SOME COMMON FEATURES AMONG FEDERATIONS

2.3.1 Division of Power

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.

The federal government is often empowered with those powers that are shared in common and the states with those powers considered relevant for the expression of regional identity, hence the famous expression that defines federations as shared rule through common institutions and self-rule for constituent units. Through the former, one of the cardinal values, unity is promoted and through the second, the other cardinal value, diversity is equally promoted. It is important to emphasize that in federations, the units are not only entitled to regional self-rule or administration by right but they also share in the process of common policy-making at the center.

2.3.1.1 The Notion of Co-ordinate Relationship

However, there is an endless debate as to whether in federations, in which power is divided between one center and perhaps two or more states, the relationship between the center the states is *co-ordinate*, *balanced*, only *autonomous*, or even at times *subordinate*.

The units in a federation should have produced for themselves stable governments with some history and tradition of working in the regions and with some roots in the people. People must have an established government to which they can be attached, but that attachment must not be too strong. Therein lays always a possible source of weakness in federal government that state loyalty may prevail over general loyalty. More likely is this to be true where state boundaries coincide with racial, linguistic or national boundaries.

In short, there should exist a balance between the forces of unity and the forces for diversity. That the two forces should be co-equal (co-ordinate) and one should not prevail over the other. Study of post war commonwealth federations equally reinforces the importance of not only the dual loyalty to unity and diversity but also the point that there should exist a balance between the two.

First, the geographical distribution of diversity within each of these societies with the result that demands for political autonomy were made on a regional basis and second, there existed at one and the same time powerful desires to be united for certain purposes.

There are two essential conditions for federations. First, the units involved must have many interests in common because of which they are convinced that there is good reason to unite and secondly, the units also possess by virtue of historical, political, social, cultural, linguistic, economic or other factors of diversity, the desire to look for an expression of their diversity.

Federations in theory are then expected to reflect this unity-diversity combination among others in the constitutional division of powers and because the two have to be balanced or that one should not have power over the other. The co-ordinate theory is theoretically less convincing and is contradicted by federal practice.

'King' points out that federalism as ideology reflects at least three different orientations: centralist, decentralist and an appeal to balance. Centralist ideology in the abstract may lead to a complete integration (absolutism) among the states but is in practice limited to a more feasible form of integration that is partial and which does not attempt to be absolute. This principally reflects the process of center-seeking federations. Recently, the centralizing ideology has taken another form: 'universalism' referring to the normative thought about the desire for ultimate unity of mankind based on the assumption that it is only through global democratization and by working towards embarking on world citizenship that chaotic dangers of political fragmentation and uneven economic development will be overcome. Such universalist thinking appears to be behind the creation of larger political units.

The decentralizing ideology refers to the opposite of complete integration: complete anarchy. In practice it aims at creating a less powerful center.

Federalism as a doctrine of balance or of co-ordination- in federations neither the forces of unity nor of diversity should predominate. Federalism has been conceived as a doctrine of balance, it is bound up with the goal of finding an equilibrium between forces of centralization and decentralization reflecting the societal desire for union ... the federal idea in short is generally conceived as a compromise between unity and diversity, autonomy and sovereignty, the national and the regional.

2.3.1.2 Limitations to the Co-ordinate Theory

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. 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.

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. 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 authorities of both orders come into conflict, to the federal government. It is not by coincidence that many federal constitutions provide for the supremacy clause, which, among other things, states that in case of conflict between federal and state law, the former prevails.

Federations are viewed from a wider perspective as single political units with a coherent decision-making procedure. Theoretically speaking it is a perfect equilibrium or equality between the forces supporting unity, including federal unity and those opposing it. 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 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.

Although it may be sometimes tempting to state that the states in a federation are sovereign, such a declaration is incorrect. Sovereignty as a matter of political discourse lies in those who are considered to be sources of authority and if we are talking about modern polities, this means in the people. It is true that this is somehow modified in federations. Federations also incorporate the principle of territorial representation. In this sense, the states have some role in establishing the federation, but this is far from saying that they are sovereign. In terms of constitutional federalism too, we talk of a supreme constitution to which both the federal government and the states should submit and in this respect both are strictly speaking not sovereign. They are only autonomous in as far as they have the power to act freely within the spheres assigned to them by the constitution. Of course, as far as international relations are concerned it is only the federal government that is treated as sovereign.

One may add the formal constitutional approach and practice of federations in support of the assertion that federations are not strictly speaking based on the doctrine of balance.

Their federations have only been adopted and maintained where the desire for union is significantly greater than the desire for independence. Where the two desires are approximately balanced, as one notable author wrote, federal political institutions are aborted.

As far as those powers assigned to them by the federal constitution are concerned, however limited those powers may be, they remain autonomous. It is the core of the federal principle that the political as well as the territorial autonomy of the states has to be respected.

In sum, federations strive to forge unity and build a nation while at the same time preserving the autonomy of the states. The functions of the two governments are never completely delineated from one another, as it is not easy to state what matters are within the sphere of the federal government and within the states respectively.

2.3.1.3 Confederations, Federations and Decentralized Forms of Government

Essentially, it is the constitutionally guaranteed autonomy of both the federal and state governments and their ability to act directly upon the citizens that distinguishes federations from other looser forms of alliances like confederations. The latter permit joint actions regarding some matters but the allied governments retain full authority.

Hughes defined confederations as 'the sharing of any institutions of government between two or more unitary states.

Irrespective of some of the peculiar natures of the United States and German confederations, in both cases the central government lacked the capacity to act directly upon the people. Only the states can act directly upon the citizen. Confederations are organized on the principle of subordination of the common government to the states.

Decentralized System of Government

As opposed to confederations, in decentralized governments the units, often called local governments, are subordinate to the center. However wide powers they may exercise, the local governments are merely creations of the center by a statute and as a result they may be wiped out by the center at any time. The arrangement presupposes the existence of central authority, which may for one reason or another delegate a portion of its authority to the local governments but such delegation is subject to unilateral withdrawal, amendment or revocation by the center. The center's decision to end the local units merely requires the passage of legislation. In some instances, the autonomy of local governments may be incorporated in a constitution, yet such clauses granting authority could be changed by the central legislature alone. Besides, in decentralized systems, the emphasis is on self-rule rather than on shared rule. In a federation on the other hand, the division of power is constitutionally guaranteed and the states are not creations of the federal government. Both the federal government and the states derive their authority from the federal constitution and as a result neither level can change the terms of the compact as enshrined in the constitution.

2.3.2 Written and Supreme Federal Constitution

Federalism as a Covenant?

The division of power between the federal government and the states is based on a written and supreme federal constitution to which both orders of governments must submit. Federations originate from particular bargains struck at a particular time designed to serve for generations. Written constitutions are, therefore, necessary records of the terms of the bargain. Indeed, to write and adopt a constitution is to agree to the bargain itself. The terms of the agreement, which establish the federal government and the states and which distribute powers between them, must be enshrined in a supreme federal constitution, which is binding. This is a logical necessity deriving from the nature of the federation itself. If the federal government and the states are to remain autonomous within their respective spheres of jurisdiction, the authority of one should not depend on the other but must derive from something supreme to both of them. In short, the federal arrangement presupposes the existence of a supreme federal constitution from which the federal government and the states derive their authority.

Many federal constitutions express the essential supremacy of the constitution. Legislation is subject to the constitutional order; the executive and judiciary are bound by law and justice. Equally, the Ethiopian Constitution too declares, 'The Constitution is the supreme law of the land...'

Federations are based on a 'compact,' covenant or to use the Latin word *foedus.*They are considered to have resulted from the federal idea of compact, implying an agreement that is freely and mutually consented to. 'Federations evolve from a compact which is a deliberate coming together of humans as equals to establish bodies politic in such a way that all reaffirm their fundamental equality and retain their basic rights. Each polity remains as a matrix compounded of equal partners who come together freely and retain their respective autonomy even as they are bound in a common whole. The autonomy of the states and the unity through the shared powers emanates from the covenant. 'The nature of consent to a covenant is critical for the legitimacy and perpetuation of the federal arrangement. A 'federal will' seems to be an absolute prerequisite.

Limits to the Notion of Federalism as a Covenant

The assertion that federations are based on contracts needs to be adopted with a serious qualification.

First, federations unlike confederations are not exclusively based on the presumed existence of sovereign states. Equally important is the individual citizen who is subject to two orders of government. Federal governments and the institutions that result there from are organized partly on the principle of majority based on population size and partly on representation of territories, which may grant the territories equal or unequal

representation. Stating that federations are based purely on covenants gives too much emphasis to the role of the states during the federal bargain and ignores the role of the citizen as a source of legitimate authority.At the heart of the social contract in federations is the fact that both the individual and territory represent certain interests requiring recognition and protection from the constitution.

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. we are entitled to regard the constitution as an imposed arrangement. Accordingly, the argument that federations result from freely concluded covenants remains far from a universal principle.

Thirdly, even if it results from contracts, it still has a *unilateral* character. If we focus on the center-seeking federations (as in Switzerland and the US), the central government, crucial for the federation is absent during the federal bargain.

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.

The principle that federations are based on a 'compact' should therefore be taken in a qualified sense. It is certainly true that some level of participation should exist when the federation is about to be set up. But beyond that is it difficult to prescribe any level of participation. The agreement must be enshrined in a constitution that is both supreme and written; which only in that sense may be considered as compact.

2.3.3 Rigid Constitution

Federal constitutions must be rigid and require the participation of both the federal government and the states for their amendment. 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. The term rigidity means here that the procedures for amending the constitution differ from the procedures for amending an ordinary law. Often the former require a more rigorous procedure.

Federal constitutions differ significantly both as regards the specific procedures they prescribe and the degree of states participation for any amendment

The Ethiopian Constitution is perhaps more rigid compared to the other federations.
In principle, the Constitution does not incorporate unamendable provisions.
If ultimate control over constitutional changes is in the hands of all the states, such a system based on unanimity seems to have not moved from an association of states to a federation, if for any amendment the consent of every single component unit is required. On the other hand, if only a vote of federal parliament is required, such a system makes the amendment process indistinguishable from a unitary system.

2.3.4 Umpiring the Federation

Equally important in a federation is the presence of a body that umpires disputes concerning the constitutionality of laws in general and the division of powers in particular. The meaning of the division of powers must not rest either with the federal government alone or with the states.
The division of powers between the federal government and the states cannot be delineated in such a way as to avoid all conflicts. As R. Davis notes the 'division of power is artificial, imperfect and a generalized skeletal thing. Political life cannot be perfectly or permanently compartmentalized. The words can rarely be more than approximate crude and temporary guides to the ongoing or permissible political activity in any federal system.'
In Ethiopia, the HoF is responsible for adjudicating constitutional cases in general and federal issues in particular.
An impartial body, independent of the federation and the states, that decides on the meaning of the contested provisions concerning the division of power is essential for a federation.

2.3.5 Origin of Federations and Territorial Autonomy of the States

The constitutional guarantee of the existence and autonomy of the states distinguishes a federation from decentralized unitary states.
Federalism is considered the territorial distribution of power presupposes that the states have a stable territory.
Federations could be established in one of two ways. The older federations like the United States (1789) and Switzerland (1848) are often described as center-seeking or 'coming together' federations. The regions which desired to unite, had all had a previous existence, although it is to be noted that none of them had a long history as a truly sovereign, independent state.
In both federations despite their respective peculiar history is the fact that some of the states predate or pre-existed the federation. The states entered into a federal bargain, negotiated and at a certain point decided to establish a federal government, while retaining for themselves some degree of state autonomy. They represent 'n+1' type federations in

which federal government was non-existent (if it existed only in a different type) and at the time of the bargain evolves as a new but important entity into the political process. What is important in this respect is that the process of evolution of the federal system has some relationship with the autonomy of the constituent states. The constituent states, at least during the initial phase of the federation, remain powerful. It is not by coincidence that it took a century or so in the United States and Switzerland to transfer power from the states to the center either by amendment or judicial interpretation.

We have federations resulting from either a previously unitary state or a retiring colonial state. For want of a better term, these states are called centrifugal or 'holding together' federations. Some of them may have had federal or otherwise decentralized experience, 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.

The center creates the states. The constituent states do not exist at the time of the bargain or if they do exist they are in a very premature state. For this reason they are in a weaker position compared to their counterparts in 'coming together' federations.

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.

Ethiopia leaves the matter of reorganizing states almost entirely to the states, rather than to the federal government. the Constitution provides that ethno-linguistic groups within the states enumerated by the constitution have the right to establish their own states. 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. state formation requires the approval of the local government and the consent of the concerned people as expressed by a referendum. One needs to note here the fact that it is not the state per se that seems to have the last word but the ethno-linguistic group within the state(s) that brought the demand. Besides, interestingly enough, the constitution leaves no room for any role to be played by the federal government. Nor does it provide any procedure for the possibility of merger between two or more states.

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

It has already been indicated that the units in centrifugal federations are outcomes of either the federal constitution or subsequent law issued by the federal government. The states did not as such exist in the form they have following the federal arrangement. This will definitely have implications on bargaining power. It is a federal arrangement made in their absence. As a result there is a tendency to have strong central government on the one hand and less powerful states on the other and a constant urge for more decentralization of power from the center.

Where the federations evolve from center-seeking states, the fact that at least some of the states pre-existed the central government, may imply the existence of a strong identity aware of its historic autonomy which they want to jealously guard in the anticipated federation. Some of them may already have their own constitution that pre-dates the federal constitution. As a result they will be major contenders for powers, compared to the non-existing units in centrifugal federations, in the federal bargain. They try to settle what belongs to the non-existing center and leave the rest to the extent possible for themselves.

Motives for Esatablishng a Federation

Federalism is a means for bringing down power to the people, a purpose more or less similar to the horizontal separation of powers. It was also a means for creating greater economic market an objective which the European Union later aggressively pursued. In Ethiopia, federalism is being used as a means to end the age old concentration of power and as a means for accommodating identity issues of the various ethno-lingustic groups.

2.4 EXTRA CONSTITUTIONAL FACTORS

For a federation to be a successful political structure it must be honest to its proclaimed nature. That is to say, it should be a federation in form as well as in operational reality. Others have emphasized the importance of democratic pluralism and the existence of decentralized party system.

Federalism is considered as a means of conflict management. In multicultural federations, the political expression of diversity is a key factor in this regard.

Chapter Three

Federations and Second Chambers

3.1RATIONALE

Although bicameral houses can be found in unitary systems, owing to the federal idea, second chambers are more common, if not inherent in federations. The lower house is often uniformly organized on the principle of proportional representation and there is a less strong federal element in it. But the upper chamber is often expected to reflect some federal idea and its legislative role is defended for at least two reasons.

1st emanates from the qualified application of the concept of sovereignty in federations. While there may be many circumstances in federations in which majority rule is qualified, the point here is that federal arrangements by providing second chambers based on a different organizing principle from the lower house, limit majority rule. 'The distribution of seats in federal second chambers in terms of units may appear to counter the democratic majoritarian principle' in favor of an equally important value in federations, the promotion of diversity. 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. The people are represented as *whole* and *as parts*.'Federal parliament in a federation is expected to reflect the unity of the country in the lower house (elected by a popular vote) on the one hand and the diversity of the country in an upper house representing the states or some other regional interest, on the other.

'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.' In this sense, federations are said to be 'polyarchic' in which not only individual citizens have an equal entitlement to vote but states also enjoy some form of right to influence the federal decision-making process.

The second explanation for the legislative role of second chambers emanates from the idea that in federations political power is constitutionally divided between the federal government and the states. Such division of power in itself is premised on the idea that federations are principally organized on the concept of 'self-rule' for some purposes and 'shared-rule' for other purposes. The role of the second chamber is crucial in this regard but it is also possible to envisage that the notion is also taken into account in the executive as well as the federal judiciary.

The division of powers in a federation is the outcome of series of negotiations among the several actors. The negotiations are formally conducted and are enshrined in the federal constitution. 'If we agree that a federal system has the dual role of creating *a nation* and preserving the *identity* of the units, it is clearly essential that constitutions and institutions must be appropriately devised for both purposes. One of the required institutions in a federation is the House of States'.

The guarantee of states participation in the law-making functions entrusted to the federal government is an important function of federations' and this is often done by setting up second chambers.

The 1995 Ethiopian Constitution fulfils the minimum requirement of having a second chamber but with a totally different function. Close observation of Articles 39(3) and 62 reveals that the right to equitable representation in federal government only ensures the various nationalities in the federal executive, in the mostly non-legislative House of the second chamber and perhaps in other federal agents, but not in the federal legislature. Even though Article 53 states that 'there shall be two federal houses, namely the House of Peoples Representatives [HoPR] and the House of Federation [HoF]' in the sense of having two chambers, the legislative power of the latter is very much contested. The only provisions where one may by stretch of imagination trace legislative functions are Articles 99, 62(7) and 105. Under the former, the HoF has concurrent power with the HoPR in the determination of residual powers over taxation. In essence this provision refers to reserve powers regarding unspecified future tax bases. Article 62(7) refers to the 'division of revenues derived from joint Federal and State tax sources and the subsidies that the Federal Government may provide to the states.' In both cases, it appears that there is a role to be played by the HoF, but it is far from clear whether this role is legislative or otherwise. In the latter at least the practice so far indicates that the function of the HoF is to set the criteria that the HoPR may use in allocating shared taxes as well as subsidies concerning fiscal transfers to the states.

A less frequent but important power of the HoF is the role it plays in the amendment of the Constitution. Except in these cases, which one can hardly consider to be legislative functions, at least not within the list of law-making functions entrusted to HoPR under Article 55(2), the HoPR remains the sole and highest law-making authority of the federal government.

Unlike the other federations, the Ethiopian Constitution fails to entrench the states or to use the terms of the Constitution, the nations, nationalities and the peoples to be part of the federal law-making process.

Ethiopian Constitution 'betrays' the federal idea significantly. It may be argued here that the role that the second chamber plays can be achieved otherwise. For instance, by taking into account regional interests in the composition of the federal cabinet, executive level co-operations between the federal government and the states (see chapter seven for more on this) or by introduction of proportionality in elections.

Ethiopian Constitution needs to be reconsidered seriously to empower the HoF to be part of the federal law-making process. There are three reasons for this assertion. Primarily, cursory reading of Ethiopian history proves that one of the perennial tensions has been the strife for power between centripetal and centrifugal forces.

Secondly, because the states are organized on a purely linguistic basis, there is an immense disparity among them in terms of population and geographic size, resources, administrative capacity and other elements of diversity. The power to legislate on federal matters is left to the exclusive authority of the HoPR organized on a proportionality basis. As a result, the existing glaring political asymmetry among states is constitutionally further reinforced at the center.

Thirdly, both the federal principle, in the sense of requiring the incorporation of the states in the federal law-making process and federal practice, at least the second chambers included in this study, support the case for a second chamber that has a role in law-making.

3.2COMPOSITION

In terms of the basis of composition of second chambers, one observes a range of variations starting from those federations which organise on the basis of equality of territory to those federations balancing the principle of territoriality and citizen equality in the middle and those federations which are closer to the proportionality principle, on the other extreme.

The less populous states often fight to safeguard their interests from being swamped by the legislature composed by a popularly elected lower house. Accordingly, second chambers based on equal state representation[31] are instituted to take care of the concerns of the less populous states.

In federations where the legislative representation of regions is equal, any strict equality of votes among the regions creates a necessary inequality of representation between the citizens of the different regions. And in federations where the representation of the regions is unequal, the degree of entrenchment of regional power is thus far diminished. To diminish the entrenchment of regional power is equally to increase the degree of inequality between regions. There is simply a conflict between making regions more equal, or making all citizens more equal. In any event, inequality of regional representation in the upper houses of federal legislature is only a compromise. It represents an acknowledgment of the dilemma and does not eliminate the underlying conflict between the two distinct principles of representation in play.

'The principle of equality of citizens is eroded where the equality of regional representation is entrenched. The principle of equality of regions is eroded where precedence is accorded to citizen equality. In a democracy, it is distinctive that citizens enjoy a right to vote on an equal basis. In a federation, viewed as a particular type of democracy, it is distinctive that representation of regions is in some manner entrenched.

31 Campbell Sharman, 'Second Chambers' in Herman Bakvis and William M. Chandler eds., *Federalism and the Role of the State* (Toronto: University of Toronto Press, 1987) at 83.

Federations incorporate necessarily and unavoidably some degree of inequality between the citizens of the different regions.

What can only be stated with safety is that none of the federations have adopted a full measure of equality among the citizens. Strong bicameralism requires a second chamber that is dissimilar in congruence in terms of its composition compared to the first chamber. The incongruence is reflected by the conscious choice of providing overrepresentation to certain minorities or the smaller states of the federation.[41]

The more severe the inequality in representation among the states in the upper house, the lesser the distinction in terms of composition will be in the other house and the more this defeats the rationale for having the second house in federations. This is exactly the dilemma one faces under the Ethiopian Constitution unless one justifies it by saying that after all it has functions other than law-making. Article 61(2) of the 1995 Constitution, the organizational principle of the HoF is the same with the HoPR except that there is a significant difference in the number of constituencies, 100,000 for the former and one million for the latter. 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.

In sum, the composition of the upper chambers varies significantly, from the nearly majoritarian House of Federation in Ethiopia to that of minority protection in the US and Switzerland, with the German and Indian Houses balancing the tension between territorial and citizen equality, in between.

3.3 SELECTION OF MEMBERS

In the Ethiopian situation Article 61(3) envisages two possibilities. Members of the House of Federation may be elected indirectly by the state legislatures or the state legislature may decide the members to be elected directly by the people. So far experience indicates that all members are indirectly elected by the states.

Article 61(1) of the Ethiopian Constitution provides that the HoF is composed of representatives of nations, nationalities and peoples. Membership in the HoF appears to be not based on the principle of territoriality but on what the 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

41 Arend Lijphart, 'Bicameralism: Canadian Senate Reform in Comparative Perspective' in Bakvis and Chandler, *supra* note 31 at 105.

be observed from the Preamble and Article 8 it does not begin by the familiar formula of 'We the people of Ethiopia.' It rather stipulates 'We, the Nations, Nationalities and Peoples of Ethiopia.' In the words of Fasil, the constitution defines Ethiopia expressly as a nation of nations.

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. But this is merely rhetoric.

The federal role of the second chamber may range from being the forum for expressing the preference of state governments (Germany) to being an institution directly reflecting a pattern of electoral preference weighted in favor of the residents of the smaller units of the federation (Switzerland and the US) and pretension of house of nationalities in Ethiopia.

3.4 POWERS

It is not clear whether or not the second chamber is to function as co-equal legislature as in the lower house, in the sense of guaranteeing both participation and protection of state interests or is required to remain a subsidiary house, for instance only making sure that the interests of states are taken into account in the process. A three-fold classification can be made in this respect.

There are those that are fully symmetrical second houses as in the US and Switzerland where the two chambers are co-equal in power and are directly elected.

In both the United States and Switzerland, the power of the Senate is further reinforced by the separation of powers between the legislature and the executive. Their equality is seen in matters of legislation, no law can be enacted unless both houses agree on the same text.

A bill requires the consent of the upper chamber if it has financial implications or affects the duties of the Länder or lays down administrative procedures for them in their function of implementing federal legislation. The *Bundesrat*, however, took an expansionist view of what constituted an administrative procedure and regarded the presence in a lengthy bill of a single clause requiring its consent as being sufficient to give it an absolute veto over the bill as a whole. German federalism is often uniquely described as 'executive federalism,' signifying the fact that federal government is predominantly responsible for legislating most of the laws while the states are responsible for implementing such laws.

The second chamber of India with subsidiary power and playing a precipitate function in the law-making process represents a third group. It represents a second chamber with a general power to revise legislation potentially able to amend bills but only with a suspensive veto.

With a completely different role, the Ethiopian HoF appears to stand as a fourth category. As already stated, the HoF does not have a legislative function. Some of the important powers conferred to the House under Article 62 include constitutional interpretation and organizing the Council of Constitutional Inquiry. According to the Constitution, it is believed that, constitutional interpretation is considered as a political rather than a judicial function. Explanations can be inferred from Articles 8 and 61. Article 8 stipulates, 'All sovereign power resides in the nations, nationalities and peoples of Ethiopia.' And Article 61(1) provides the fact that the House is composed of such diverse nationalities. By inference it can be concluded that, if sovereignty is placed on the nationalities and because the nationalities are sources of sovereignty, the house, which reflects their sovereignty, must interpret the constitution. The fact that members of the House are at the same time active members within the regional government, only visiting the Capital when there are calls for a meeting, often twice within a year, raises doubt about its institutional competence as a regular federal body. It is perhaps in the area of fiscal federalism that the HoF could be considered important.

3.5 THE ROLE OF THE HOF IN INTERGOVERNMENTAL RELATIONS

Although the theory might provide scientific basis for sorting out federal, state and local roles, in practice it is hindered by other values of federalism. The values of federalism as well as the specific objective of fiscal transfers might differ from one federal system to another. For example in Germany and Switzerland, fiscal transfers aim at creating more equitable life standards among the citizens as well as among the states. This brings us to the brief consideration of the regime of co-operative vs. competitive federalism. There are costs and benefits associated with each. Advocates of competitive federalism argue that just as economic competition produces superior benefits compared to monopolies or oligarchies, so competition between governments serving the same citizens is likely to provide citizens with a better service. They equate co-operative federalism with collusion directed at serving the interests of governments rather than of citizens. such as accommodation of diversity, conflict management, solidarity and so on. The values of fiscal federalism often come into conflict with other values of federalism.

As far as the law is concerned the Constitution emphasizes the federal principle. Indeed, it expressly declares 'The federal government and the states shall respectively bear all financial expenditures necessary to carry out all responsibilities and functions assigned to them by law.'

It should also be born in mind that the Ethiopian Federal system adheres to 'dualism,' somewhat strictly. Each level of government has its own legislative, executive, financial and judicial powers.

As a result, comparative studies indicate that in most of the federal systems the states are not able to cover the whole of their expenditure responsibilities and some form of fiscal transfer from the federal government is inevitable.

Different kinds of fiscal transfers from the center to the states (at times it also included horizontal equalization between the states) are not often without problems. The states dependency on the federal government affects the constitutional autonomy of the states. Financial resources affect and limit the capacity of the government to perform its assigned legislative and executive responsibilities. Whatever responsibilities are assigned to the states unless they are matched by resources that will enable them to exercise it, the autonomy becomes less effective.

Many have argued that the autonomy of the states is heavily eroded because of their financial dependency on the federal government. While there may be several other reasons for concluding that the federal system is more centralized in practice than it appears in text, this evidence alone does not seem to warrant such an assertion because unlike many federations the fiscal transfers in Ethiopia for the most part have been unconditional. substantial portions of federal transfers in parliamentary federations are unconditional and this is perhaps attributable to the fact that the legislature is able to control the cabinet as the latter is part of the legislature. This contrasts with the United States where Congress attaches specific conditions to 80 per cent of the fiscal transfers hence leading to tight expenditure accountability.

It is in the field of fiscal transfers that the HoF is playing a crucial role. According to the federal Constitution, while this role of the House is crucial in light of the states' dependency on fiscal transfers, the fact that its composition is more or less similar with the lower house creates a problem in the decision-making process. Despite the widely held view that the HoF is the house for nationalities, is majoritarian in much the same way as the lower house.

The Ethiopian federal system has yet to define for itself clearly along which lines it is going to evolve. At early stages, the fiscal transfers aimed at enhancing 'war torn' areas and also seemed to adhere to federal solidarity rather than competition among the states. However, the idea of federal solidarity is becoming less and less relevant.

Other powers of the HoF include: deciding issues related to self-determination of nations, nationalities and peoples, promoting the equality of the peoples; deciding disputes or misunderstandings that may arise among states; exercising concurrent powers together with the HoPR and this includes: the residue power on tax, election of the federal president, and constitutional amendment under Articles 104 and 105.

Chapter Four

Forging Unity out of Diversity in Multicultural Federations: The Ethiopian Experience

4.1 INTRODUCTION

In the context of multi-ethnic federations the main emphasis, among other things, is on federalism's ability to reconcile the forces of unity and diversity.

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. Some have pointed out that social fragmentation and diversity in themselves are not threat to integration, but they become a fertile ground for the same if the political system is not able to let the articulation of diversity manifest itself and if the political institutions are designed to reflect the interests of only some fraction of society.

4.2 Federalism and the Accommodation of Diversity: The Ethiopian Experience

Federalism, Diversity and Conflict Management in Ethiopia

1. Introduction

The plurality of kings, with the *Niguse Negast* (king of kings) above them signified some kind of federal or confederal government structure. Thus the seeds of what Livingston calls "federal Society" (regionally grouped diversity) has been there for long. These are essential features of what we understand today as the federal principle. Suffice to emphasize here that before the emergence of the modern federal system in the United States in 1787, its features were never as clearly articulated as they are today. The more amorphous confederate form was predominant.

Explaining the Crisis

Attempts at explaining the cause of the state crisis have not only been less satisfactory but are also found to be diverse ranging from those who even today consider it was all a normal process of "nation building" and hence consider the liberation struggle as a form of tribalism to the instrumentalists (Such thinkers are called instrumentalists because they view religious and ethnic groups as a means to achieve some political and economic goal and having no relevance thereafter) that focus on the concentration of political and economic resources at the center as a core source of tension and that emphasize the proliferation of ethnicity as an erroneous comprehension of political and economic deprivation and the ruling party- Ethiopian Peoples Revolutionary Democratic Front (EPRDF), a product of the 1960s Ethiopian Student Movement focused on the "operation of nationalities," that is, a ruling elite dominantly from one nationality controlling power, resources and narrowly defining the values and institutions of the state as a main cause.

It is not surprising then that the legitimacy of the government, its institutions and the values upon which it is established remain one of the sources of tension and at times the cause of its terminal crisis. In other words, the challenging issue once again is how to constitute a legitimate government from all the ethno-linguistic groups that do not squarely fit the usual notion of national majorities versus national minorities. The nation state as is commonly understood has its own assumptions, which is not suitable for multicultural societies. The so-called "civil-nation state," the only alternative that liberal democracy pretends to prescribe is itself founded on some exclusionist element.

Main architect of the transition and the 1995 Constitution, stipulated a distinct clause that placed sovereignty on the "nationalities, nations and people" and consequently reorganized the constituent states in a manner that ensures self-rule to at least the major nationalities and even permits them to secede after going through some procedures. Yet, this in itself fails to underscore the point that in the end political and economic factors are crucial factors behind every conflict. Thus an approach that combines the accommodation of diversity with genuine sharing of power and resources among the diverse groups will better explain the success or failure of the state in multicultural societies in general.

The federal system that started *de facto* since 1991 and *de jure* following the adoption of the 1995 constitution attempts to end the cycle of political crisis by decentralizing power and resources to nine constituent states and two autonomous cities and by ensuring self rule to the ethno-linguistic groups at various levels.

4.3. Federal Features

In terms of origin, while some contend that it is a 'coming together' federation, the Ethiopian federation as it appears on text reflects both aspects of 'coming together' and 'holding together.' Some of the features of the coming together include: first, the Preamble, distinct from many other federal constitutions, commences with the phrase 'We the Nations, Nationalities and Peoples of Ethiopia ... are strongly committed in full and free exercise of our right to self-determination ... ' Furthermore it is stated, 'All sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia.' Elsewhere it is indicated that ethno-linguistic criteria are the sole basis for organizing the units that constitute the federation (art 46 and 47). If the federal government abuses their right to self-administration, they are entitled to reassert their powers of sovereignty by changing or abolishing the government. This collective right of nations, nationalities and peoples is clearly spelt out as the right to self-determination. This right is not even subject to derogation during national emergency. Thus the foundation of the Ethiopian state as well as its continuance now requires the consent of each nation, nationality and people. This gives one the impression that the federal state is a union formed through the free consent of each

of the nations, nationalities and peoples.

Surely, the present state organization is not something that reflects the previous organization of the provinces. In fact it is meant to introduce a significant and deliberate departure from the former provincial experience as the provinces were not convenient to ensure self-rule to the nationalities. In short, it is a federation established from a formerly unitary state. And the states have had no prior existence as states and if any one existed, it is only as a province in a highly centralized imperial state, a military dictatorship, or during brief transitional period (1991-1994). Besides the overriding power of the federal government in practice, the limited role of the constituent states in influencing the federal law-making process, explains its 'holding together' aspect.

Although it is a fact that none of the constituent states existed as autonomous entity, owing to the aggregate nature of the federation, the federal government appears to be one with enumerated and limited powers (article 51) and the states hold residual powers (art 52 and 52(1),52(2)) The Constitution also comprises a brief account of some state powers in addition to the reserve power. It might appear that, by virtue of the reserve clause, any power not mentioned in Article 51 belongs to the states. But the Constitution gives other powers to the federal government, powers which are not mentioned in Article 51 but which are distributed through out the text. These include the power to enact labor, commercial and penal codes, to approve federal appointments submitted by the executive and to establish federal institutions. So the reserve powers of the states only apply after discounting all the powers of the federal government, which are enumerated through out the text of the Constitution, and not just in Article 51. It is also worth noting that the Constitution provides neither 'a necessary and proper clause' as in the United States Constitution, nor a comprehensive list of shared powers as in the German Basic Law. Even those powers that appear to be exclusive federal powers seem to have some limitations in terms of the extent of their scope

The Constitution empowers the federal government to '*formulate and implement the country's policies, strategies and plans in respect of overall economic, social and development matters...; ...establish and implement national standards and basic policy criteria for public health, education, science and technology...*'(art 51(10 and (2)) One may state that this is perhaps more than the 'necessary and proper' clause for it grants the federal government with wide powers on economic, social, health and education aspects. It seems to put primary responsibility on the federal government to determine major policy directions and standards.

There is no doubt that these powers cover the bulk of concurrent power on a vast field of social and economic affairs as stated in other federations. However it is also possible to

argue with equal force that if one follows the terms closely, the powers of the federal government even in these vital areas do not seem exhaustive. The same Constitution also empowers the states, among other things 'to formulate and execute economic, social and development policies, strategies and plans for the state.'(Art 52(2)). There is obviously a lot of overlap between the powers of the federal government and the states concerning economic, social and development plans as well as health and education. But the extent of power of the respective governments is not clearly stipulated. To what extent could the federal government outline the national standards and policy criteria or the breadth and depth of the nationwide policies? It is consequently also not clear what is left for the states. But it seems clear from the provisions that the federal government cannot exhaustively legislate on all these matters. The wording of Article 52(2) seems to suggest that the states are endowed *not merely with administrative power* but with the power to formulate and execute economic, social and development policies. No doubt that this power is the basis for shared/framework power covering the bulk of social and economic sphere.

There is more to the power of the constituent states. Although there is no exact congruence between the territory of the states and the ethno-linguistic groups, every attempt has been made to make sure that the major nationalities have their own 'mother states.' See arts. 39(1, 2, 3), 9,11,13,45,53 and 54.

The constitution states 'all federal and state legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this (third) chapter.' As a result states cannot deviate from the guarantees enshrined under the federal constitution.

Except in the area of foreign affairs and policy making at federal level the regional governments in Ethiopia, at least, formally speaking do have wide powers. See art 70 and 71.

The most powerful federal executive figure remains to be the prime minister along with the Council of Ministers. See art (72-74). There is another point that the constitution shares with other multicultural federations like India and Switzerland: in its attempt to forge unity in diversity, it has adopted a pluralistic approach towards language.

Language Policy

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 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. The counterargument is that a single national language serves both as lingua franca and as a means for promoting national unity.

The 1995 Federal Constitution 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 (art 5 (2))

At first sight, the present constitution may not seem to be significant departure from the 1987 Constitution, which also gave all Ethiopian languages equal state recognition. The present Constitution entitles member states to determine by law their respective working languages. Three different approaches seem to be discreniable

1. Some states have adopted their own majority language as the working language of their respective regional administrations.
2. Other states which do not have a majority ethnic group have chosen Amharic as their working language.
3. In state of harari oromiffa and harari have been chosen as official language.

4.4 Distinct Features of the Federal System

4.4.1 The Explicit Recognition of Nations/Nationalities as Building Bricks of the Federation and Its Implications

One feature one notices throughout the Constitution is the utmost importance given to the ethno-linguistic groups within the Ethiopian polity. Unlike many constitutions, the Preamble of the Ethiopian Constitution does not commence with the traditional constitutional formula of "we the people," but with "We the Nations, Nationalities, and Peoples of Ethiopia" and somewhat vaguely the Constitution grants ethno-linguistic groups a kind of 'confederate' position, in the federation. (art 8)

A consequence of this is the fact that the Constitution organizes the constituent states on "the basis of settlement patterns, language, identity and consent of the people concerned." (art 46(2)) 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. See art 47(1), (2), art 62(6), Art 46, 47 and 49, Art 47(4).

4.4.2 Viable Federal Units?

In Ethiopia, the state structure represented by the central government was forcefully dismantled in the hands of national liberation fronts (in 1991) that fought against the system representing the ethno-linguistic groups in different parts of the country. The decision to create the federation came from the victorious national liberation movements under a circumstance where the military and security apparatus of the unitary state was

practically abolished. The Ethiopian approach is therefore, revolutionary in its straightforward grant of self-determination and self-rule to all nations and nationalities. The point is that federal autonomy has been accorded to groups that had not in fact been politically mobilized. Nations/nationalities in the sense they are understood in the west are much more than ethnic groups with a possible candidacy for statehood and so many of them claim that right in Ethiopia. So not all of them could be dubbed as ethnic groups. Some of the constituent states under discussion include: Afar, Somali and Gambela. The two-tier nature of the federal system (those with relatively better experience in self-rule versus marginalized ones) has been made clear in a number of studies.

Thus close observation of the performance of some of the states suggests that they have not yet been able to articulate distinct regional interests, a viable political unit that can compete with the federal government in intergovernmental relations. In short, some do not seem to have acquired the status of nation/nationality, which the Constitution seems to generously grant them. In such circumstances, it may be wise to rethink the federal system again and set up an asymmetric federal system. In a way this is not an earth-shattering discovery. The federal system in practice is asymmetric in many respects. For instance, as far as intergovernmental relations is concerned, the constitutional principle "Member states ...[of the Federation]... shall have equal rights and powers" is compromised to a considerable extent in relation to some of the member states. The fiscal competence of the states, the court structure, their representation in the second chamber, the political implications of Articles 46 and 47 (constituent states for some and not for all) are clear evidence of an already existing political asymmetry.

4.4.3 Shared Rule

Several studies have indicated that diversity as such is not in itself a threat to integration but it becomes a fertile ground for federal instability if the political system is not able to give it political expression.

The emphasis on self-rule should be complemented by proportional representation in elections, in the civil service, in the executive and the judiciary. One might state that there is Article 39 (3), which provides for the equitable representation of the states at federal and state level as well as the composition of the ruling party (that is a coalition of parties from different nationalities) that looks like typical of Lijphart's model of consociational ethnic accommodation, namely the principle of power sharing among ethnic leaders at federal level. Yet this has its own limitations.

First and foremost, the practice so far indicates Article 39(3) is limited to executive power sharing and does not include legislative power sharing at federal level. Secondly, the decade of federal experience points out that coalition within the ruling party is conditional

upon subscribing to the ruling party's membership and its ideology.

In the area of fiscal transfers too, the role of the smaller nationalities is becoming less significant and the HoF that is supposed to be their guardian is evolving along the interests of the more populous states and nationalities. The fact that its composition is more or less similar to the lower house is creating a problem in the decision-making process. The most populated states are pushing the House to increase the weight of population size in the allocation of shared revenues and grants. The less populated states are consistently becoming the losers and it seems it is hardly possible to reverse this trend. As a result, while the HoF might have been envisaged as the most legitimate body to decide on fiscal transfers, it is becoming less relevant to the less populated states. It is for this reason that one might be tempted to conclude, as far as the less populated nationalities are concerned, the federal principle is not taken seriously.

4.4.4 Congruence between the Nationalities and the Territories?

However, the presentation of the federal system as granting "mother states" to nationalities could be misleading. Despite the attempt to grant a mother state to some of the dominant nationalities, the process has not resulted in homogeneous states. Ethiopia like other multicultural federations is "partial ethno-territorial federalism" or is "indirect consociationalism." In the ideal (non-existent) case of perfect "integral ethno-territorial federalism" there will be a perfect coincidence of all intra-federal and national boundaries. However, in the case of partial ethno-national federalism it is a federation in which only major nationalities have and administer their own autonomous units.

The SNNPRS is peculiar in some respects. One can make two conflicting hypotheses. On the one hand, it is possible to state that the territorial approach is less feasible taking into account the many ethno-linguistic groups. Certainly, there has been a move along that line in recent years. It has become the region in which the EPRDF has experimented party reform for the first time.

These are the states in which the grant of "mother states" has not fully been materialized because of an alleged lack of a dominant nationality or because of constituting too many small ethnic groups.

As can be observed from the federal experiment in the SNNPRS, the region exhibits both fear and hope. The fear is that there is continuous rivalry among some of the political elite for controlling regional power at the expense of others and that seems to be fueling those that felt marginalized at regional level to raise issues of further redrawing of new zones, *Weredas* and even new states. A newly emerging multicultural federation may need to remain flexible in order to adjust territorial boundaries to meet new ethno-linguistic demands which is an expected thing in holding together federation but too much flexibility

may lead to the Nigerian federation's logic of fragmentation.

The hope and rather promising point about the SNNPRS given its size and incorporation into main stream Ethiopian politics is the potential role that it can play in stabilizing the federal game.

4.4.5 Unicameral Legislature/Adjudication of Disputes

It is the lower house (HoPR) that has exclusive power as far as law making at federal level is concerned. See art. 51, 55, 54(3), 61(2)

Each Nation or Nationality shall be represented by one additional representative for each one million of its population.' The provision does not even apply any rational upper limits like the German one. According to this arithmetic, the population or ethnic group with the largest number will have as many seats as its size may allow in the HoF. As for the selection/election process Article 61(3) envisages two possibilities. Members of the HoF may be elected indirectly by the state legislatures or the state legislature may decide the members to be elected directly by the people. So far experience indicates that all members are indirectly elected by the states.

An over all assessment over the performance of the HoF in the adjudication of constitutional issues reveals that it has played important role particularly over those cases that are of high political significance- cases. This is linked with the HoF's quasi political nature. However, this is not without possible implications as to its impartiality as Ethiopia is venturing into multiparty politics. So far, as federal system operated under one dominant party system and its impartiality has not been brought to test.

Federalism and Secession

The Constitution expressly incorporates the right of nationalities to secede after complying with some procedures. This right cannot even be suspended during a state of emergency (Art (93)). Part of the argument for secession is based on the construction of the principle included in the Preamble and the clause that declares the nationalities as sovereign (art 8). The nation/nationalities are the founders of the constitution in general and the federation in particular and hence, have the right to go away from it when they feel aggrieved by the fact that the terms of the compact are abridged by the federal government. In a way this takes us to the compact theory and the limitations hinted above.

The inclusion of such right, it may be contended, is justified by extra federal factors. The argument for the inclusion of right to secession is based on the notion of-right to self-determination, which in turn is the outcome of the leftist oriented Ethiopian Student Movement of the 1960s, the ideology of the 'nationality question' and as implemented by EPRDF. Its exact scope is not often clear for it has been used by different political parties to mean different things. For many it means nationalities right to self-rule within a

multicultural and democratic Ethiopia in which there is equal recognition of culture, religion and language but for the ruling party it also includes secession.

Some contend that the procedures for its exercise are strict and even doubt the political will to exercise it. Ethnic groups that had been historically oppressed in Ethiopia were promised the right to self-determination but it soon became clear that what the EPRDF envisioned was regional autonomy for ethnically based sub-states within the context of an Ethiopian federal union.'

There is a bitter lesson that one can learn from Eritrea's secession in 1993. Secession or the emergence of an independent state does not necessarily result in the establishment of a stable and democratic state. 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.

4.5. Some of the Contending Views on the Federal System

The federal system with its overriding features focusing on the right of nationalities and particular emphasis on self-rule has generated an intense scholastic interest. Broadly speaking, one can make three apparently contradictory perspectives.

The first groups of scholars consider the "ethnic" federation as a sign of the first mark of disintegration. It is stated that "regionally based ethnicity may reinforce the demands of some ethnic groups for more and more states and finally for secession."

Yet, the argument that "ethnic' federalism tends to sharpen and institutionalize previous differences and carries with it the danger of fragmentation, although with some validity, needs qualification. It is a global problem that any multicultural federal system carries with it two existential problems, however successful it may be. There is always the problem of integration in any country with minorities and more so in multicultural federations.

A related point frequently mentioned in the debate is the idea that ethnicity or sociological diversity should be left to the private sphere. However, this approach of separation of state and ethnicity is not only based on a wrong analogy but is also based on the wrong transplantation of American ideas into a multicultural federal system.

The second group of observers rightly point the most obvious limitation of the federal system, that is, the paradox between generously granted constitutional powers and a centralized federal system in practice resulting from centralized policy making process and a dominant ruling party system that is responsible for generating most of the policy documents. As a result, some observers contend that the autonomy of the states is limited in practice

Practically, the EPRDF is controlling all the regional state governments in the Ethiopian federation either directly through the member parties or indirectly through affiliated parties that apparently look autonomous but have strong links with EPRDF.

The point is that the party structure in Ethiopia undermines the federal division of power and subordinates the regional governments to the federal government. In the area of intergovernmental relations, an area not well regulated in the constitution, for example, the evolving practice indicates that it is a top-bottom approach in which the states have not yet commenced establishing forums for airing their common agenda in their relations with the center.

The third groups of observers argue that given Ethiopia's multicultural and multi religious context, the present federal system is the only panacea to the country's age old political crisis as it provides a decisive remedy for Ethiopia's long-standing problem of the "nationality question".

On Restructuring the Constituent States

Final point of contest among academicians and practitioner's of federalism relate to the issue of how best to restructure the constituent states. While the authors of the Constitution argue that one way to resolve ethnic tension is to redraw the states boundaries along language criteria and that territories should meet the interests of people, not vice versa, others stipulate the return to the pre-1991 epoch of provincialism as a basis of dividing political power or at least suggest the American style of territorial ("ethnic-free") federalism.

So far, three divergent perspectives seem to be emerging.

1. some argue for the 'restoration of Ethiopia's historic provinces and organizing them on a federal basis.'

   Implementing an American style of federal system uniformly and throughout, is incompatible with the context of multicultural federal systems. That the states should reflect the essential attributes of the existing diversity in a society is the crucial element. We can think of organizing some of the larger states in Ethiopia along the same pattern. Among other things we can think of three or more Amhara states and equally four or more Oromia and Somali states. This settles the issue of political asymmetry as well as the limits of establishing the language based constituent states. As some authors note: 'Ethnicity may guide efforts at drawing or redrawing regional boundaries, yet using it as a sole basis for legitimacy could have disastrous consequences.'
2. EPRDF insists, at least so far, on maintaining the status quo. The ethnic based political parties other than EPRDF, such as SEPDC and ONC, as well favor a more balanced federation based on genuine linguistic or ethnic criteria, which also take into consideration

the rights of all Ethiopians as citizens.

3. Somewhere in-between there is an emerging middle position in the internal debate inclined to consider the granting of 'mother states' only to those nationalities that have been mobilized and fought for it while applying a different criterion for the other regional states. Some of the drawbacks of the present constitutional approach is the fact that some of the constituent units have not yet been able to evolve as viable regional governments. Some do not seem to have acquired the status of nation/nationality which the constitution ascribes to them. Pragmatism may thus urge for a greater role of the federal government in some rather than in other constituent states for at least a transitory period.

Since the introduction of the federal system, there has been a significant shift of discourse from assimilation to an open accommodation of the nationalities and redefinition of the values of the Ethiopian state, creating a political space to historically marginalized groups.

4.6 **Federalism and the Treatment of Minorities in the Regions**

Minority implies that they are less in number compared to the rest of the population of the country and as a result of the democratic game of numbers they are in a non-dominant position. Yet in the Ethiopian case we observe some aberrations to this general notion. If majority is understood to be a numerical majority dominating a certain political process, then at federal level none of the nationalities taken alone constitute a majority. In principle the Constitution appears to transform every nationality into a majority by granting a "mother state" or local government but that applies only to some of the dominant ethnic groups. Absence of such a numerical majority that dominates the political process at the center has a lot to explain for the persisting regime instability, the interethnic tension and rivalry among the groups for exclusive control of power.

Another notion of minority for instance in relation to the composition of HoPR and HoF: out of 547 representatives in HoPR 20 seats are allocated for special representation of minority groups. There a single seat in HoPR represents an electoral constituency of roughly 100,000 population and implicitly minority refers to those groups whose population is less than 100,000. In the case of the HoF there is one representative for every one million population but even those who constitute less than one million do have one representative. Hence an ethnic group that constitutes of less than one million people could also be considered a minority.

The danger is that the respective regional states and the dominant ethnic groups consider themselves "owners" of the "mother state." Other citizens of different ethnic background or those who do not like to associate themselves with any ethnic group have practically no place, which certainly contradicts the constitutional provisions that stipulate the right to work and live in a place of one's choice.

The threat against local minorities has not yet been given the necessary attention from federal and regional government authorities. Further confusion to this delicate position of minorities is the constitutional clauses of some of the regions issued after the decision of the HoF that further relegates their status to second rate citizenship. For example the Revised Benishangul Gumuz Regional Constitution and that of Gambela Article 34 distinct from what is provided in other state constitutions only ensure the right of minorities to work and live and do not provide for the right to elect and to be elected unlike Tigray and Amhara.

Thus, in the five regional states (Oromia, Amhara, Tigray, Somalia, and Afar) with dominant nationalities, the dominant nationalities constitute a majority in their respective states and any one other than them is a minority. In the three (Gambella, Benishangul, Harar) remaining constituent states, the situation is slightly different from that in the other regional states. What is distinct in these regional states is the fact that the tyranny arises from a minority against the majority.

The Way Forward

From the brief discussion of the issues concerning local minorities two conclusions seem to be inescapable. Firstly, there is obvious tension between a constitutional form implying multicultural federalism in which the forging of unity in diversity is the goal. Ethnicity is a state of mind emanating from a feeling of separate identity, which in turn is based on shared cultural markers (culture, language, religion etc.), but more importantly on the myth of common descent The myth of common descent serves as a basis for excluding people who share the culture but not the common descent or in the opposite case to include people who share the common descent but not the culture.

Secondly, as long as federalism is viewed as a means of sharing power and resources among contenders and a means for accommodation of diversity and peaceful coexistence of diverse groups in multicultural federations, the cases hint that a lot remains to be done in this respect.

One possible solution is the setting up of two chambers at *state level*, one composed on the basis of the democratic principle (population size or one man, one vote) and another house for the protection of local minorities. Both houses should have law-making powers and the second chamber could even be granted veto power on some crucial issues of prime importance to minorities. Secondly, the federal executive, the federal and state judiciary and the institutions of Human Rights Commission and Ombudsman have to be well-organized throughout the country if the bulk of human rights provisions enshrined in the constitution are to be enforced in meaningful manner. This is perhaps the only way to guarantee interstate mobility of labor and capital.

Challenges to the Democratization Process

As can be observed from the politics of the early 1970's and following the May 2005 election Ethiopia's transition to democracy is facing a serious threat. This challenge in the transition to multiparty democracy comes partly from an incomplete process of transition and partly from an authoritarian, uncompromising and rigid political culture within the political elite.

One great obstacle in the operation of the federal system and that is often reflected on both sides of the political spectrum (that is the ruling party and the opposition) partly the result of deep rooted authoritarian tendency but partly the result of what one may call the "Ethiopian factor" is the *militant political culture* (events of the Red Terror, trends of centralization in the decade old federal experiment, and the latest violent clashes in June and November 2005 clearly manifest this tendency) within the political elite that stands in sharp contrast to the *federal political culture*. Each of the major actors in the political process consider the other as "enemy" and do not trust one another and hence could not evolve as political partners with some common goals.

Chapter Five

Division of Legislative Powers

The constituent units in the Ethiopian federation at least *formally* speaking do have important powers, and at times their powers even far exceed the powers of the constituent states in other federations. Yet, this constitutional grant of power is constrained by a centralized party structure and centralized policy-making. The current trend of centralization is not, therefore, inherent in the constitution. It is true though that compared to the states in other federations, the constituent states in Ethiopia do not share much of the federal power.

5.1 The Form and Scope of Distribution of Legislative Powers

Federations resorted to centralized law-making, mainly entrusted to the federal government with a more decentralized executive structure reserved to the states and an integrated judicial system. This is based on the assumption that it is impossible to avoid overlaps and there is a heavy reliance on a large measure of interdependence between the federal government and the states.

By *forms* of distribution of legislative power we are referring to the ways in which these powers are constitutionally allocated between the federal government and the states. While the *scope* of legislative powers refers to the areas and amount of jurisdiction assigned to each order of government. In other words, with the latter we refer to the substance of power allocated while with the former we refer to the technique of allocation of power.

The constitutional allocation of legislative power is 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. In some of these federations the federal constitution defines the federal power in a limited fashion while in others the constitution defines it broadly.

5.2 EXCLUSIVE POWERS

In general, the powers to be distributed in federal systems fall into one of two main categories: exclusive powers and non-exclusive powers. Traditionally, the use of exclusive powers refers to the powers for which the federal constitution has created a monopoly, which either is in the hands of the federation or of the states. There must be some matter, even if only one matter, which comes under the exclusive control of the federation and likewise under the states' because shared power can in the end be absorbed, at least potentially, into the exclusive list to the extent that the federal government chooses to regulate it. Despite some differences, generally speaking, defense, the functioning of the economy and the monetary system, major taxing powers, foreign trade and foreign affairs have been the domains of the federal government.

While State actions in contrast are valid as a matter of federal constitutional law, unless, prohibited explicitly or implicitly by the constitution. This is what is known as the doctrine of enumerated powers.

The 'necessary and proper clause' has been the basis of the doctrine of implied powers which empowers Congress to make all laws which shall be 'necessary and proper' to execute both the specific legislative powers.

The chief justice, Marshall, constructed the necessary and proper clause and the gist of implied power of Congress as follows: 'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution are constitutional.' In interpreting what is necessary and proper clause Marshall stated it as meant 'useful and convenient' rather than 'absolutely indispensable.' Thus, the power of the federal government to establish a national monetary and banking system is an implied power arising from the constitutionally enumerated power to levy taxes and to regulate trade. Ever since this was an important 'channel for the federal government's infiltrations of the states' power through the necessary and proper clause,' also called elastic clause.

Broadly stated the German Basic Law like the United States Constitution stipulates that state authority is the rule and federal power the exception. But the granting of authority to the federal government differs significantly from that in the United States. Federal powers

in Germany include not only those subjects which have always been federal under the United States Constitution and most of the economic and social matters that were federalized in the United States during the New Deal, but also fields like contract, tort, criminal law which in the US belong to the states.

In germany the law making function is mainly the role of the *bund*(federal government) while the executive function is that of the *lander*(states). Hence, some prefer to call the German federation executive, or functional.

The Ethiopian Constitution in general follows the United States and Swiss forms of distribution of powers (Article 50(2)). See arts. 58 and 60. Art 77, 82, 83, 87, 90, 92, 93, 98, 99, 101, 122, 123.

Although it is a fact that none of the constituent states existed as autonomous entity, owing to the aggregate nature of the federation, the federal government appears to be one with enumerated and limited powers and the states hold residual powers.

It might appear that by virtue of the reserve clause, any power not mentioned under Article 51 belongs to the states. But other provisions of the Constitution also indicate additional powers entrusted to the federal government. It also worth noting that the Ethiopian Constitution provides neither for the 'necessary and proper' clause nor for any express comprehensive list of shared powers. As a result, it seems difficult to extend the federal powers in light of the fact that the Constitution commits itself more towards self-determination and 'sovereignty of Nations, Nationalities and Peoples.

The Constitution empowers the federal government to '*formulate and implement the country's policies, strategies and plans in respect of overall economic, social and development matters...; ...establish and implement national standards and basic policy criteria for public health, education, science and technology...*' One may state that this is perhaps more than the 'necessary and proper' clause for it grants the federal government with wide powers.

This is the practice, at least so far, although it is not clear whether this is because of state government's lack of expertise or whether this is considered to be federal power. It is also possible to argue with equal force that if one follows the terms closely, the powers of the federal government even in these vital areas do not seem exhaustive. The same Constitution also empowers the states, among other things 'to formulate and execute economic, social and development policies, strategies and plans for the state.' The big question is to draw the borderline between the two but certainly there is no doubt that the *legal framework of most of the policy-making areas remain concurrent*. However, as the HoF does not have law-making power there is no institutional mechanism reflecting the potential concurrent legal framework.

Of interest in the Ethiopian federal system is the fact that some state governments have chosen to follow the Latin alphabet in education as well as in printed media while other states have continued to use the *Geez* alphabets. It also appears that the former states prefer to follow the Gregorian calendar than the Ethiopian calendar. The question then is how far can the states differ in this crucial area in light of the fact that the federal government has the power to 'establish uniform standards of measurement and calendar.

Despite the whole range of variations among the federations a common pattern of sorts emerges. The general principle on which allocation of responsibilities has usually been based, is the vague concept 'that matters of national importance should be reserved to the federal government while matters of regional importance should devolve to the states.' But the principle does not tell us much about the specifics of what powers should go to the federal government and which ones to the states. Besides, it has not been possible to avoid the provision of a wide range of shared powers. What is of national or of local importance cannot be decided on any *a priori basis* and federal constitutions show variations in this regard.

Broadly speaking, the exclusive federal powers include defense, foreign affairs, immigration, major taxation powers, currency and foreign exchange, foreign and interstate trade, maritime shipping, inter-regional communication and matters physically transcending state boundaries and key aspects of economic activity for which uniform regulation is deemed important, including currency and postage. Transportation and communication are services which embrace the whole country and not only bring considerable revenue into the central treasury but also enable the federal government to make its authority felt by all citizens. These are the postal, telegraph and telephone services which are wisely assigned to the federal government. To entrust these to the states would mean unnecessary multiplication of authority, creation of inconsistent directives and increased chances of friction. Defense and foreign affairs are usually considered beyond the reach of the states but there is indeed some element of sharing even in these fields.

The field of defense is considered mostly an exclusively federal power. It is the essence of federalism to accommodate diversity but warlike circumstances require centralized power to be discharged effectively. Besides, the history of older federations indicates that one of the reasons to join the federation was to have a common defense. Furthermore, the centralization of defense is supposed to back foreign relations. For these reasons the control of armed forces, control of land, naval and air forces, were not only believed to reinforce political influence in international politics but also to minimize the risk of secession. Yet, while maintaining the basic principle that defense remains federal, the states have in many cases been involved one way or another with at least the police power (responsibility for

maintaining law and order within their borders). In Ethiopia under Article 52, which empowers the states to establish and administer a state police force and to maintain public order and peace within the state. It is possible that the states may use such force to defy federal power although the general basis of sharing is to enable the states to maintain internal order or defy attacks from other states.

In the field of foreign affairs, it has now become common to see variations among federations. Traditionally it is the need for centralization of foreign powers in the hands of the federal government.

The United States there often is a constitutional provision not only conferring foreign relations to the federal government but also prohibiting the units from exercising foreign relations and if they have to, only with the consent of the federal government. This position is often described as ‘external unity and internal diversity’ that is to stand together against the world outside in a potentially threatening international environment, while safeguarding diversity within the federation.

Crucial in the treatment of foreign affairs is the issue of defining the role of the units in shaping foreign policy as well as the impact of foreign policy on the rather formal division of powers between the federal government and the states. We know that the control of foreign relations includes among other things treaties concluded between the federal government and foreign states. In this global world treaties cover a whole variety of subjects, if the federal government has exclusive power over conclusion and execution of treaties, then it can use this power to legislate laws on subjects including those that are within the competence of the states, thereby invading the exclusive competence of the states.

There is a dilemma here. On the one hand if foreign affairs is exclusively federal as has been the case in the older federations, then the fear is that the exclusive power of the states may become ‘concurrent over time or nil at worst.This brings to the front the question whether the mere fact of concluding a treaty on a given subject confers on the federal government legislative power over that subject in so far as is necessary to implement the treaty and if allowed does not this amount to an intervention in the power of the units over the same subject matter? On the other hand, if the states have too much influence on foreign policy then the federal government may not be effective on the international scene to protect national interests.

Control of treaties involves at least two processes. There is the making of the treaty between the federation and another state normally within the domain of international law and there is the execution of the treaty in the domestic sphere. It is crucial to identify as to

whether the federal constitution confer both powers, the making and implementation on the same organ, or if it is a shared power.

The United States, India and Ethiopia adhere to the dominant thinking that foreign affairs are exclusively federal while Germany and Switzerland have introduced some departure from this approach in which mechanisms are designed for the constituent states to have some say when a treaty has impact on matters within state jurisdiction.

5.3SHARED LEGISLATIVE POWERS

Although the constitutional division of power between the federal government and the states is the central point in federations, we find, however, that the dividing line between the two powers is never clear. There are deliberate and some unintentional overlaps in the division of power. Shared powers represent the meeting point of the two levels of governments, otherwise considered exercising exclusive shares of federal and state powers.

Because the allocation of powers to the federal government and the states could not be done neatly, federations provide another set of powers commonly described as shared powers. These powers refer to that category of powers in which both the federation and the states exercise at some point at least part of the power. Experience has shown that there are certain matters which cannot be allocated exclusively either to the federal government or the states. It may be desirable that the states should legislate on some matters but it is also necessary that the federal government should also legislate to enable it in some cases to secure uniformity across the nation. Another reason for having shared powers is the fact that the federal government may need to guide and encourage state efforts and more importantly some measures taken by the states may have spill-over effects and for this reason the federal government may need to intervene. Shared powers as well avoid the necessity of enumerating complicated minute subdivisions of individual functions to be assigned exclusively to one area of government or the other, thus serving as a flexible channel for adjustment to new circumstances. They are introduced in recognition of the inevitability of overlaps of jurisdiction between the federal government and the states.

Because the regime of shared powers is unavoidable, federal constitutions often provide mechanisms of handling conflict situations between the federal government and states. Because shared powers assume an overlap of legislative functions, in case of conflict it is often stated federal law whether passed before or afterwards should to the extent of the inconsistency prevail.

Shared powers add another series of disputes about jurisdiction to the already formidable list of possible conflicts, which are inevitable in even the simplest federal systems. Where the system is organized with an exclusive list leaving the rest to the others, there is then one list of subjects and disputes and interpretation can be confined to the meaning of words in

that list. If a shared list is added, there are not only disputes about the meaning of the words in the new list but about the extent to which these words overlap or conflict with the words in the exclusive list and about the extent to which laws passed by the unit exercising shared powers conflict with each other. If to an exclusive list and a shared power list another exclusive list is added as in India then the problems of interpretation becomes even more complex. Three lists must be compared.

The co-ordinate theory implying dual polity, in which each government acts directly towards the citizen and assumes a clearly layered division of power that is far from real. The existence of shared powers is simply another reflection of the fundamental impossibility and also the undesirability of dividing political powers neatly and permanently.

Economic affairs (that include regulation of trade and commerce, industries and labor and economic planning) raise issues because both levels of government have a lot of vested interest in these spheres of activities. It is for instance rarely possible to demarcate the line between trade and commerce which is interstate and that which is intra-state. On the one hand there are bound to be conflicts of economic interests between states specializing in different products and the fear that measures taken by the federal government integrating the national economy might undermine the cultural distinctiveness of the diverse societies. Besides, in the economic sphere states are often concerned to ensure the economic welfare of their citizens and to develop policies related to their own particular economic interests. On the other hand there is the need for guarantee free trade and economic development and in developing countries there is the urge for rapid economic growth through active federal participation. These provide the reasons for federal government's involvement in these fields.

Social services-regional governments often have the primary constitutional responsibility. The personal nature of the services, the need to adapt them to local circumstances and their close relation to other aspects of local government urge for state power. However, extensive federal financial assistance has often been necessary because of program costs and because of the pressure for federal wide standards of service to the citizen. Besides, greater scale of research and specialization is possible at federal level. Experience so far indicates that one can distinguish at least two types of shared powers: concurrent powers and framework powers.

5.3.1 Framework Powers

When framework legislation has been prescribed for the exercise of a power, a special type of shared power exists that in principle grants the federal government the competence to

issue general legislation in a specific policy field. This federal legislation is subject to strict conditions because it has to leave substantial room for the states to issue their own legislation within the limits set by the federation.

The federal government may use framework legislation to regulate federation-wide standards while leaving the states room to legislate the details and to deliver the services in a manner adaptable to local situations. The states under this category of powers are allowed to fill in the gaps with more detailed laws. Unlike the concurrent powers in which the federal government has the potential competence to absorb, federal framework legislation indicates an interesting compromise that requires significant decentralization of policy-making authority without sacrificing uniformity where it is needed. Especially in the social services the federal government may legislate to secure a basic national uniformity and to guide regional legislation while leaving the states with the initiative for details and for adaptation to local circumstances.

There is less guidance as to how far framework legislation enacted by the federal government could possibly go into details.

As far as the law is concerned, for the federal government, the framework powers are more restrictive than concurrent ones as it is obliged to leave room for the states to issue their own legislation. Framework powers not only preserve the right of the states to legislate but also positively presuppose future state legislation. Federal government may not in principle exhaust the subject.Although it has traditionally been argued that the Ethiopian Constitution has no shared powers except in the area of taxation, it is clear that it provides some provisions dealing with framework powers. In principle by virtue of Article 52, civil law is a matter reserved to the states. However, as a matter of exception the federal government may enact civil laws when the HoF states that it is necessary to enact such laws to establish and sustain one economic community. The constitution does not define what the content of civil law is but traditionally it is understood to include all matters covered by the existing civil code, which in principle is within the jurisdiction of the states unless the constitution itself federalizes it as in the case of land.

The last clause states that whatever is not expressly given to the federal government alone or concurrently with states remains with the states. But here the approach is that whatever is not expressly given from the civil law to the federal government is not necessarily with the states. It points out that federal government may legislate even in areas of civil law. It appears that like its German counterpart, if the federal government through the HoF decides that uniformity in some fields of civil law should be achieved in light of the potential and actual variation among states in terms of culture, religion and tradition, which

may have a bearing on the rights of children, women or even inheritance, then the HoPR may be compelled to enact such laws.

On the other hand, in Ethiopia civil law is the residual power of the states and in the context of the ethno-linguistic and religious diversity within which the federation operates, the reasons for some level of uniformity remains compelling. However, this attempt has to be considered in light of the sensitivity to accommodate the diverse nationalities in Ethiopia. Yet this clause is potentially a key provision for guaranteeing uniformity in some fields of civil law. Falling under the framework legislation appears to be Article 51(2) and sub (3) versus 52(2) (c). The former states, 'It [the federal government] shall establish and implement national standards and basic policy criteria for public health, education, science and technology as well as for the protection and preservation of cultural and historical legacies (art 51(3)) And in another section stipulating the power of the states, it is stated that the states have power 'to formulate and execute economic, social and development policies, strategies and plans of the state (art 52(2)). There is obviously a lot of overlap between the powers of the federal government and the states concerning economic, social and development plans as well as health and education. But the extent of power of the respective governments is not clearly stipulated. To what extent could the federal government outline the national standards and policy criteria or the breadth and depth of the nationwide policies? It is consequently also not clear what is left for the states. But it seems clear from the provisions that the federal government cannot exhaustively legislate on all these matters. The wording of Article 52(2) seems to suggest that the states are endowed *not merely with administrative power* but with the power to formulate and execute economic, social and development policies. No doubt that this power is the basis for shared/framework power covering the bulk of social and economic sphere.

The situation on education is illustrative here. In theory higher education is a federal matter while elementary and high school education fall within the jurisdiction of the states. As a result all universities are established by the federal government. However, one has to look into policy documents issued by the federal government. In one of these documents the federal government has issued a very detailed policy directive covering the whole range of education from elementary to university level. How is one then to reconcile the formal dichotomy of powers that appears in the different proclamations on the one hand and the federal policies on the other? One should note that these policy documents originate from the party leadership, they are then discussed and approved by party meetings and issued as official documents through the federal Minister of Information. In theory the policies are issued with a view to creating uniformity and building consensus and the states are allowed to adapt these policies taking into account their own specific circumstances.

The provision that empowers the states to legislate on state civil servants is also far from being exclusively a state matter art 52(2). At first sight, it appears there are two entirely separate laws: a federal law governing the federal employees and state law regulating state civil servants. Yet the federal constitution does not leave it there. In the implementation of state laws concerning the state civil service, the state is required to approximate national/federal standards. Besides, if one looks at the policies issued by the federal government, the policy blurs the formal distinction and duality of authority stipulated in the constitution. In the document there are standards that the federal government clearly spelt out as applicable to civil servants nationwide. In the field of framework legislation refers to land law. Articles 52(2) d, 55(2) a, and 51(5) stipulate in theory parallel powers between the federal government and the states. Both entities are given different aspects of the same subject matter. This may also look like parallel power. Parallel powers (one type category of shared powers) refer to one set of shared powers in which the exercise of one and the same power has been attributed to the federal government and the states. One portion of power is given to the federal government while another part of the same matter is kept with states Federal government, by virtue of Article 51(5) is empowered to enact laws for the utilization and conservation of land while the states are empowered to administer land and other natural resources in accordance with federal laws (52(2)). In theory, it appears legislation is a federal matter while the administration of land and natural resources belongs to the states. However, constitutional practice differs from theory. In the case *Biyadglegn Meles* & *et al* v. *the Amhara Regional State* 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 that stipulates that the regional government may proclaim laws on rural land and lays the general framework for them. Arts. 5 and 6 of Proc. 89/97 state some general conditions that the state law should comply with. It specifically requires the state law to comply with federal environmental policy, to respect women's rights, regulates the payment of compensation, and guarantee rights of the holder.

As a result it seems to have fallen into the category of framework legislation. This is perhaps one instance indicating that in some fields the constitution has expressly empowered the state executive to administer federal laws. 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? Interestingly enough the Ethiopian Constitution Art. 51(9) states: 'The Federal Government may, when necessary, delegate to the states powers and functions granted to it by Article 51 of this constitution.

It seems that when the HoPR decided to retroactively endorse the state law, it had doubts on its constitutionality. Yet in line with the definition of concurrent power it is possible to positively construe that the state law is valid even if enacted prior to the federal law. After all it is usually the case that federal law comes at a later stage when there is a need for securing uniformity among potential diverse state practices. Federal law then steps in to cure the undesired divergence in state law.

5.3.2 Concurrent Powers

Concurrent powers refer to powers attributed to both entities. However, one of the entities, often the states, are allowed to exercise this power until the federal government steps in to legislate on such powers. The states continue to regulate in some fields until the former occupies the field and the part of the concurrent power which has not yet been occupied by the federal government, may still remain with the states. Concurrent powers provide an element of flexibility in the distribution of power enabling the federal government to postpone the exercise of potential authority in a particular field until it becomes a matter of federal importance.

The Commerce Clause

While in other federations the regime of concurrent powers has somehow mitigated the raising of similar controversies, the situation is left open under the Ethiopian Constitution. The Constitution stipulates: 'It [federal government] shall regulate interstate and foreign commerce (art 51(2)).

And we know the borderline between interstate and intra-state commerce is one of the thorny issues in federations. No doubt the powers given to the federal government in broad terms to 'formulate and implement the country's policies, strategies and plans in respect of overall economic, social and development matters ... establish and implement national standards and basic policy criteria for public health, education, science and technology

...(art 51(2)&(3)) might slightly save or perhaps divert the channel of controversy but even then not too much because there arises again the problem of delimiting the extent of the federal power in outlining the policy issues mentioned or the standards to be set and the power of the states to fill in what is left from the federal power.

United States Supreme Court it is far from settled as to whether the commerce clause is concurrent or exclusive federal power.

The case between *United States* v. *Lopez* marks the beginning of perhaps either a shift in the position of the Court or a reaction to the over centralization of power with the federal government. At issue in *Lopez* was the constitutionality of the Gun-Free School Zone Act of 1990. This portion of the 1990 crime bill banned the possession of firearms with in 1000 feet of school grounds. The Act made it a criminal offence for any individual possessing a firearm around a school zone. A five majority of the Court held that Congress has exceeded its authority to regulate commerce among the several states.

In 2000, *United States* v. *Morrison*, the Court invoking *Lopez* again reaffirmed that Congress's authority to regulate commerce is not without limits. The Court declared void the 1994 Violence Against Women Act on the ground that it exceeded congressional activity to regulate interstate commerce.

The Indian Constitution is known for its long list of concurrent powers.

In Ethiopia, the general thinking about shared powers has been that Article 52(1) which among other things states 'all powers not given expressly to the federal government alone or *concurrently* to the federal government and the states...' is without much significance because the constitution nowhere indicates such concurrent powers. see Article 98 on the concurrent power of taxation. It is true that only in the field of taxation, under Art. 98 distinct from Arts. 51 and 52, the constitution expressly incorporates concurrent powers.

However, it is still possible to argue that even in other, non-tax fields there are concurrent powers. The Constitution has in one way or another incorporated concurrent powers, albeit not explicitly. It is only that the framers have not expressly made it as suggested by Article 52(1). A clear demarcation of powers between the federal government and states is impossible, even if desired. One can find some examples of such powers. First, it is stated, 'it [HoPR] shall enact a penal code.'[166] The states may, however, enact penal laws too on matters that are not specifically covered by the federal penal legislation. It appears that this is more of a concurrent than parallel or framework one. Because the states may enact only if the federal penal law does not exhaust the list of offences. Potentially the federal parliament may by virtue of Article 55(5) exhaust the field leaving no room for the states.

166 Art. 55(5).

But states do often include specific offences not covered by the federal penal code in every piece of legislation and as result it is not a power merely written on paper.

Conflict Between Federal and State Law

Preceding legislation passed by the states becomes null and void if it deals with the same, subject matter. But because the legislation issued by the federal government often is not exhaustive in all aspects, there is need to leave a little room for the states to enact their own supplementary legislation or save what is enacted already. This point actually distinguishes concurrent from exclusive powers.

The Ethiopian Constitution is silent as far as the thorny issue of regulating the relationship between federal and state law in general and in relation to shared powers in particular is concerned. The question of the governing principle in case of conflict between state and federal law in the Ethiopian federation has been dealt with extensively in chapter five. There are certainly two views. If one adopts the federal supremacy clause by default, then most of the principles stated in this section discussing shared powers in other federations, will hold true in Ethiopia as well. But if one adheres to the 'supremacy of nations, nationalities and peoples' literally because of the principles stated on the preamble, the pretentious aggregate nature of the federation, Articles 8 and 39, then it may be difficult to state that federal law will pre-empt state law. Perhaps the best compromise is to decide the issues on a case-by-case basis rather than subscribing to either principle on the abstract level. However, in an interesting case *Biyadglegn Meles* & *et al* v. *the Amhara National State* the CCI ruled any law issued by the states regarding the administration of land shall be of no effect if it contradicts the federal rural land administration proclamation. 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.

Two possible interpretations may arise from this case. It may be viewed as a blanket declaration both by the law and the CCI of the supremacy of federal law over inconsistent state laws or its scope of application may be limited to matters shared between the two levels. The case certainly refers to federal framework legislation but its long-term effect remains to be seen.

5.4 RESIDUAL POWERS

Residual powers represent those powers not listed or partly listed by the constitution and assigned to either unit of government. Federal constitutions must provide rules on how to deal with changes in the distribution of powers between the federal government and the states and must govern whom to entrust with new responsibilities that have come about because of changes in new circumstances. The United States, Switzerland, Germany, and

Ethiopia have preferred to leave residual powers with the states while in India such powers belong to the center.

The importance of residual powers is very much related to the scope of exclusive powers conferred upon the other unit of government. The point is that the greater the list of enumerated powers, the less significant the residual powers will be. The residual power of the states in the United States is often called the 'police power' referring to the residual prerogatives of sovereignty 'which the states had not surrendered to the federal government.

The residual power of the states has been effective in controlling excessive centralization of power. First, it prevents new powers from being assumed without changing the constitution. Secondly, the procedure to confer any new power to the federation needs not only a majority in both chambers of parliament but also a majority of cantons and of the people at a popular vote.

Under the Ethiopian Constitution-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. 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. 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. Interestingly the list ends with a semicolon rather than with a full stop and it might give the impression that some powers are missing but the Amharic version of it ends with a full stop (*arat netib*) and might not raise controversies in light of the fact that the reserve power belongs to the states. The respective state constitutions have reproduced these powers almost *verbatim*. See for instance Art. 47 of the Constitution of Oromia and Art. 47 of SNNPRS. The wording of the latter, however, is slightly different. It states: 'All powers and functions which are not given expressly to the federal government in accordance with the Constitution of the Federal Republic of Ethiopia shall be vested in the regional state.' 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? 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. A closer look at Article 52 sub 2, however, indicates that the lists of powers mentioned are routine functions of the states rather than exceptional ones. The title of Article 52 sub 2 is also indicative of the fact that the list is an illustration giving only a portion of some of the authorities of the states.

There is more to the power of the constituent states. Although there is no exact congruence between the territory of the states and the ethno-linguistic groups, every attempt has been made to make sure that the major nationalities have their own 'mother states.' The Constitution also emphasized that it is built on the consent of the nations and nationalities and hence places sovereignty with them. The nationalities are also entitled to a full measure of self-government that includes the right to establish institutions of government in the territories that they inhabit and to equitable representation in state and federal government art 39(1,2,3). The nationalities are also entitled to secede after going through some procedures and this right cannot even be suspended during a state of emergency(art 93) Some contend that the procedures(art 39(4)) for its exercise are strict and even doubt the political will to exercise it. Barbara Thomas-Woolly and Edmond Keller state: 'When EPRDF overthrew the military regime in 1991; ethnic groups that had been historically oppressed in Ethiopia were promised the right to self-determination but it soon became clear that what the EPRDF envisioned was regional autonomy for ethnically based sub-states within the context of an Ethiopian federal union. Indeed, in the absence of a federal supremacy clause it appears to have granted undivided power of sovereignty. 'The principal provisions of the new constitution taken together demonstrate a willingness to diminish powers and resources at the disposal of central government and inclusive national identity in order to enhance the authority of the constituent states.

In addition to the reserve powers other provisions of the Constitution too confer power on the states (Article 50 sub 5) and Art 11 and 13.

In India and Nigeria the major features of the state constitutions are embodied within the federal constitution. In Ethiopia, in the interest of compatibility, the federal constitution includes those fundamental requirements for member states but the states are normally left free to articulate their own constitutions. The same is the practice in the United States, Switzerland and Germany.

The federal constitution hints at the various levels of government that should exist at state level. It states that 'state governments shall be established at state and other administrative levels that they find necessary. Adequate power shall be granted to the lowest units of government to enable the people to participate directly in the administration of such units see Art 50(4). As can be gathered from the minutes of the Constitutional Assembly, there was a heated debate as to whether the federal constitution should prescribe all the hierarchies of the levels that should exist at state level. In the end a compromise was reached. On the one hand they agreed that in light of the existing diversity in size and population among the states and in order to give effect to the autonomy of the states, the setting of such details should be left to the states. On the other hand they thought it is necessary to state the fact that however diverse the position of local governments may be, they should be granted 'adequate powers.' It was clearly stated that the local governments should not merely be agents of the state governments but should have some level of autonomy.

As a result, except for the general power under Article 50(4) and with respect to judicial structure, the determination of the scope of powers and autonomy of local governments has been left to the states and several state constitutions have elaborately designed sub-state entities in their constitution. This happened particularly following the major project of state constitutional reform in 2001/2002. Prior to the reform, the decision-making process at state level was centralized.

By the virtue of Article 5(3) the units of the federation are allowed by law to determine their respective working languages and accordingly Tigray, Oromia, Afar and the Somali states have adopted their local languages as official ones at state level. The SNNPRS constitution, for instance, declares that Amharic shall be the working language of the regional state but under another section it empowers the *zones* and *special weredas* to determine their respective working languages in their own local council.

5.5 EXPLAINING THE PARADOX

Apart from the general similarities and specific differences in the form and scope of division of powers among the federations. As far as self-rule and the list of powers as provided in the text are concerned the powers of the constituent states in Ethiopia are not as meager as some would make us believe. The dominant view so far is that 'the powers of the member states are relatively meager and this has been reinforced by the regional government's fiscal dependency on federal level.' They also emphasize albeit not explicitly, that the 'centralized' nature of the federal system is inherent in the Constitution itself because *policy-making* is very much centralized. But the comparative study seems to suggest that the constituent states rather have an overwhelming amount of power at least so

far as self-rule is concerned. The states in India are in a much weaker position. They do not have their own constitutions and their legislative powers in the state list can easily be superseded by the Union. Unlike the states in Switzerland and Germany as well as India the states in Ethiopia can enact their own procedural and civil codes. Constitutional practice is not yet clear but the federal constitution in Ethiopia has also no 'necessary and proper' clause as in the United States or a comprehensive list of shared powers as in Germany. One may add the clauses on self-determination and the sovereignty of nationalities. Besides, the constitution is clear to authorize the states 'to formulate and execute social and development policies, strategies and plans of the state' within the overall federal framework. As a result, formally speaking the states are given wide powers. However, this needs qualification as for instance in the field of foreign policy and the sharing of federal power, there is actually very little to compare because the Ethiopian federal structure is designed completely with an emphasis on self-rule but not much on shared rule.

Even the argument emanating from states' fiscal dependency needs qualification. It is true that much of the revenue raising capacity as well as the most lucrative taxes belong to the federal government. Indeed, this aspect is something that one can discern across federal systems for we have stated that the fiscal regime in many federations is characterized by 'revenue concentration and expenditure decentralization.' Yet in the Ethiopian context much of the fiscal transfers from the federal government to the states have not so far been attached to any specific conditions in the way it is done in other federations. Therefore the trouble with the authors seems to arise from their failure to distinguish between constitutionally proclaimed principles with operational reality.

The paradox between generously granted constitutional powers versus a centralized federal system has to be explained by considering two categories of reasons. The first category includes the process of policy-making, the party system in general and the existing system of intergovernmental relations in particular, of which an extensive discussion is presented in chapter seven. The second group constitutes the 2001 party crisis, the Ethio-Eritrea War and the federal intervention law. These are factors, which if taken alone, might seem isolated events but if taken together seem to give the broader perspective about the general trend reinforcing the point that the explanation for the current trend of centralization has to be sought at the political rather than a constitutional level. It is interesting to note that there is as such no dispute about this trend. Yet as regards the explanation why this trend is forthcoming there seem to be two contending views. Some contend that the indicated factors do not constitute trends of centralization but the federal government is trying to fill in institutional gaps. They, for instance, place the law on federal intervention as an inherent part of Art. 93 of the federal constitution that declares about federal emergency. On the

other hand others contend that the federal government is by conduct reversing the unity-diversity combination for good. For the latter group the law on federal intervention, for instance, goes much further than what was intended by the constitution on state of emergency governing situations of intervention by the federal government, a context referring to a much wider notion than state of emergency.

It is important to keep this in mind in order to understand an ongoing debate regarding the fate of the federal system. Proponents of the view that the centralizing feature of the federal system emanates from the constitution contend that even if the ruling party's dominance is not there or even if a new party comes to power, it is not clear if it will bring much change because the state power is limited to executive and cultural power and an opposition winning in the regions may not bring much change. This author on the other hand argues that because of the confederate legal structure, which at present is under firm control of the ruling party (in a way an anomaly with the federal principle of division of power and multiple centers of decision-making) a change in the party system will probably result in a significant change in the federal outcome. It is true that if an opposition controls the political space there are many possible scenarios. It is difficult to foresee, for instance, the force that will hold the states together, particularly in case centrifugal forces dominate the political scene. There are those who argue that once the ruling party loses control of the federal system, the federal system will wither away with it. Indeed in many federations that relied more on a centralized party system than on the 'federal bargain and federal institutions' the withering away of the party has led to the withering away of the federation.

During the first phase of the Ethiopian federation, 1995-1998, the defining philosophy was that there could only be stable peace if the nations and nationalities are empowered as stipulated under the federal constitution. It was emphasized now and then that the federal system is the 'political contract' of the nationalities that brought the federation into being as a result of their free will. Diversity was promoted without limits.

The second phase (1998-2001) shows a sudden assertion of the notion of Ethiopian nationalism when the war with Eritrea broke out in May 1998. Ethiopian nationalism and patriotism was at its peak and this was to overshadow the emphasis on diversity. The need for running an efficient military apparatus and the War of aggression also contributed to re-channeling resources and manpower to the center and hence to a more centralized federalism. After the crisis in TPLF in March 2001, the dominant coalition partner of EPRDF, which had significant spill-over effects on the other coalition members and the federal as well as state governments, principally in the SNNPRS and Oromia, not only affected the autonomy of the states but also seems to have contributed to a shift in the

balance of power from the traditionally collective leadership of EPRDF (regionally based) to the federal government.

Federal Intervention in the Regions

Very recently a law has even been enacted that permits the federal government to intervene in the states. Certainly there were reported cases of (*de facto*) intervention by the federal government in the states as in the Somali and SNNPRS. In the former, the elected president of the regional government was removed by a coup and this caused an intervention. A comprehensive conference on peace and development was held to restore the state government but the elected president chose to remain out of office and was replaced. In the SNNPRS the local security and police force and state government were practically dissolved/suspended and replaced by a federal police force until the local party reorganized itself and elected a new president for the state but none of the procedures that will be discussed shortly, were followed. It was done simply through party channels. These *de facto* cases of intervention seem to be regulated now by a new legislation. The relevant law is the System for the *Intervention* of the Federal Government in the Regions, Proclamation.

Conceptually, one may raise an issue over the distinction in the terminology between *emergency* (a term employed in the federal constitution Art. 93) and *intervention*, a term used in the new proclamation. In light of the Constitution's emphasis on the 'sovereignty of nationalities,' why does the new proclamation choose intervention, a term which has implications much wider than emergency? As far as we understand it, emergency situation refers more to an extraordinary than to normal circumstances that necessitate the use of special powers in order to arrest a *crisis* situation. Intervention on the other hand may connote to federal governments interference with the states even in normal circumstances or situations not contemplated by the constitution. In general, one cannot imagine federal constitutions without some sort of intervention or emergency clause of one kind or another. In many federations, the determination of the existence and gravity of an external or internal threat to the federal way of life is in the hands of federal executive and certainly this is so in Ethiopia (Article 93). The central question in a federal context is the frequency of federal intervention, the grounds for intervention and the effects of such intervention.

The federal Constitution envisages three possibilities of federal action presumably on the autonomy of states.

1. It states that 'it [federal government] shall deploy at the request of a state administration, federal defense forces to arrest a deteriorating security situation within the requesting state when its authorities are unable to control it. According to this clause, it is not clear whether the federal government here refers to the HoPR, HoF or Council of Ministers because all three of these organs have some power to initiate federal action. Art. 3 of Proc. No.

359/2003 states 'Security situation shall be deemed to have been deteriorated where there is an activity that disturbs the peace and safety of the public and the law enforcement agency and the judiciary of the region are unable to arrest the security problems in accordance with law.' However, the proclamation (Article 5) makes it clear that it is the Prime Minister who deploys the federal police force or the defense force to the region.

2. The HoPR shall on its own initiative request a joint session of the HoF and of the HoPR to take appropriate measures when state authorities are unable to arrest violations of human rights within their jurisdiction. It shall on the basis of the joint decision of the House give directives to the state authorities concerned. This ground of intervention is distinct from the former in the sense that the HoPR may take this initiative even when there is no state request. Indeed it gives one the impression that the state administration itself could be a suspect, among other things. Again the proclamation nowhere mentions the possibilities of suspension or dissolution of state bodies as a consequence of the federal action. This ground of federal action as well is not in the list of grounds for declaring state of emergency, reinforcing further the assertion that the federal law is meant to regulate situations of intervention much wider than state of emergency. According to Proc. 359/2003 Art. 7 '[V]iolation of human rights shall be deemed to have been committed where an act is committed in a region in violation of the provisions of human rights stipulated in the constitution....and the law enforcement agency and the judiciary are unable to arrest such violations of human rights.'

3. The HoF shall order under Article 62(9) federal intervention if any state, in violation of this federal constitution endangers the constitutional order. The HoF as a supreme organ responsible for not only interpreting the constitution but also defending it (see art 9 cum. 61,62) is given power under Article 62(9). Certainly this seems to have some overlap with the declaration of the state of emergency. Under the federal constitution 'a breakdown of law and order which endangers the constitutional order and which cannot be controlled by the regular law enforcement agencies and personnel...' is a ground for declaration of a state of emergency. Art. 93(1); Art. 12 of Proc. 359/2003 states 'An activity or act carried out by the participation or consent of a regional government in violation of the Constitution or the constitutional order and in particular:

1. Armed uprising
2. Resolving conflicts between another region or nation, nationality or people of another region by resorting to non-peaceful means
3. Disturbance of peace and security of the federal government; or

4. Violations of directives issued...' by the HoPR after a joint session with HoF to a state government to stop violation of human rights as per the second ground of intervention.

It is true that not all violations of the constitution by a state might endanger the constitutional order or such endangering of the constitutional order may not necessarily constitute enough ground for declaration of a state of emergency as it may be handled by regular enforcement agencies. This is implied in the proclamation. Even if the elements that cause the federal action under the proclamation are generally called constituting matters that endanger the constitutional order apparently making it similar to the condition of a state of emergency, subsequent provisions clearly make a distinction between the role of the Federal Council of Ministers, a body in charge of federal state of emergency and the HoF, a body that orders the federal government to intervene under the proclamation. Arts. 13 and 14 of Proc. 359/2003 that give one the impression that HoF is responsible when the matter does not constitute a state of emergency but it will be the Council of Ministers that takes the action if it constitutes a federal state of emergency.

Certainly there could be an overlap between the role of the federal Council of Ministers and the HoF. The respective role of each federal organ in a crisis situation is not clearly articulated. The consequences of intervention based on the third ground are severe and might even extend to suspending the state Council and the highest executive organ of the region and replace it by Provisional Administration.

There is the problem of the objective determination of the seriousness or imminence of an external or internal danger to peace and security. The Ethiopian federal system does not seem to warrant wide application of federal intervention. It has been argued all along that the federal system focuses more on self-rule and on the notion of sovereignty of nationalities. However, the new law lays down a wide legal framework for federal action that seems to go against the tone of the federal system itself.

Chapter Six

Division of Executive Power and Intergovernmental Relations

All laws made by federal parliament within the scope of its powers designated by the Constitution apply in all the states and the two autonomous districts. The federal government has the duty to see that such laws are executed throughout in one way or the other. Indeed, this is one of the cardinal principles that distinguish a federation from a confederation.

6.1 Dual versus Executive or Functional Federalism

Executive and co-operative federalism may at times mean the same thing as aspects of intergovernmental relations but there is also some slight difference. While the system of co-ordinating policies and shared programs between the federal government and the states involve in theory both the elected and appointed officials, in parliamentary federations, it is often dominated by the executive of both governments hence the name executive federalism. While the notion of co-operative federalism may be used in both presidential and parliamentary federations, the notion of executive federalism is rarely, if ever, used in presidential federations.

Broadly speaking, federal systems enforce their laws and policies by setting up dual structures, federal and state institutions or by entrusting the state machinery with the power to enforce both federal and state laws.

In principle the Constitution seems to suggest that there are dual structures. That executive power is co-extensive with the legislative power. See art 50 (2).This seems to point to the fact that the organization of the federal executive is co-extensive with the division of legislative power. It hints that there will be parallel federal and state executive organs in charge of enforcing federal and state laws respectively. The Federal Council of Ministers is also empowered to ensure the implementation of laws and decisions adopted by the HoPR Art 77(1). With such a view Article 10 (1) b of Proclamation No. 4/1995 that defines the powers and duties of the federal executive organs stipulating the common powers and duties of federal ministries, reads: 'Each Ministry shall: in its field of activity ensure the enforcement of laws, regulations and directives of the Federal Government' and the proclamation provides fifteen Ministries. The number has been increased to eighteen by another proclamation. This also seems to back the duality in the organization of the executive hinted at by Article 50(2) of the Constitution. Constitutional practice indicates that there is a gap in enforcing federal laws. In exclusive federal matters, one observes the federal government enforcing its policies and laws directly through its agents.

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. The duality implied under Article 50(2) should, therefore, imply something beyond these few institutions to cover the whole field of other federal powers enumerated under Articles 51 and 55 of the federal Constitution.

As noted while discussing the division of powers, despite the apparent lack of express concurrent powers, the bulk of social, education, economic and health affairs are shared between the federal government and the states. Certainly there are no institutionalized meetings, for instance, between respective heads of health, education and agriculture, of the

federal government and the states. It is in these areas that the regime of co-operative federalism has been very influential in other federations.

Apart from the enforcement of federal laws through direct federal agents, there appears another pattern in the process of evolution: delegation. For instance, income tax proclamation as well as the federal police commission proclamation, for instance. 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. 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. So long as autonomy of states 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 reasons as to why a clear division of executive power of one type or another is crucial to the Ethiopian federation.

1. The Ethiopian Constitution follows the old style division of granting enumerated and limited powers to the federal government and the residue to the states. The Constitution does not provide for a comprehensive regime of concurrent powers. Under such circumstances there is a higher potential of intergovernmental conflict.
2. So far there are no formal federal-state mechanisms of intergovernmental relations except what was *de facto* known as the office of Regional Affairs (*kilil guday zerf*) within the Prime Minister's office, later formally replaced by the Ministry of Federal Affairs. Yet, the latter's competence is not only limited to 'give assistance to the Regions with particular emphasis on the less developed ones (Article 11(1),c) but its current focus is also mainly related to the supervision and co-ordination of the following executive organs: federal police commission, federal prisons administration, national urban planning institute and Addis Ababa and Dire Dawa city administrations (article 6) The most important power, which this office could play as an institution of intergovernmental co-operation equally in all the states, is missing from Proclamation Article 11 that defines its powers and duties. It was supposed to institutionalize and replace the *de facto* heavy reliance on party structure but failed to do so. The federal government heavily relies on party lines rather than on formal institutions of intergovernmental cooperation. Intergovernmental relations are important in installing the culture of negotiation between the federal government and the states, checking the trend of centralization and thereby enhancing the bargaining power of

the states. Institutionalizing intergovernmental relations could further facilitate resolving potential center-state conflicts.

3. Ethiopia has no law-making second chamber. The HoF does play a modest role in the area of fiscal transfers, one field of intergovernmental relations between the federal government and the states, but this in itself is within the process of evolution. The states as indicated elsewhere do not have control over the laws enacted by the federal government. The institutionalization of the regime of intergovernmental relations may then be one option for participating on matters shared between the federal government and the states.

6.1.1 Dual Federalism

Dual federalism is represented by the United States federation, where the allocation of executive authority is in principle considered co-extensive with the distribution of legislative responsibilities. 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. In theory, dual or layered cake federalism, as it is sometimes called, assumes little overlap or sharing of functions between the two governments.

The usual reason federal laws are enacted is that the states have proved unwilling to tackle the problem. The same political pressure that produced legislative reluctance is, therefore, likely to trigger delay in the execution of such laws. The doctrine stipulates that 'all governments which are not extremely defective in their organization must possess within themselves the means of enforcing their own laws. In order to reduce federal bureaucracy and to permit diversity some federal statutes do provide for state participation in their enforcement but they generally provide for federal intervention in case the states do not do the job.

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

6.1.2 Executive Federalism

In these federations administrative responsibility has not coincided with legislative authority. Administration for many areas of federal legislative authority is constitutionally assigned to the governments of the units.Some federations have chosen to establish many points of contact both constitutional and informal between the federal government and the states. This arrangement is based on one or more of the following factors.

1. We should note that we are speaking of a federation of constitutionally established and divided powers but overall operating under a single political union. The welfare state of the 20th century, the widening scope of governmental activity and the consequent integration of the economy clearly indicate that it is extremely difficult to divide responsibility neatly between the federal government and states even if desired. The need for flexibility rather than rigid classification of authority, therefore, contributed to the close links between the two governments.
2. The need to avoid unnecessary duplication of agencies. Where the federation is based on a more or less homogenous society (the German federal system is a clear case in point) or where there is scarcity of resources (in this regard India and other emerging federations are cases in point), some federations tend to share certain institutions such as courts and administrative services.
3. Particularly in Germany and Switzerland where the state executive is basically empowered to implement federal legislation, grants the states further discretion to adapt the federal laws to local circumstances during implementation. Often the federal government lays down considerable uniform legislation while leaving the rest to be applied by regional governments in ways that take account of varying state circumstances. In developing federations too, it may be an important factor for maintaining federal unity during the early stages of the federation.

   But there is also a limitation to this manner of enforcing federal laws. In practice the federal government directly administers through its own agencies only a few matters on its exclusive list. Quite a number of federal functions are administered through the states. The law enforcement mechanisms belong mainly to the states and therefore even if the law is federal, its implementation by and large depends on the capacity, co-operation and passion with which the states seek to enforce it. Many federal laws are diluted and remain paper tigers because of weak and indifferent administration by the states. Their application depends on the capacity and willingness of the state executive.

6.3 THE SYSTEM OF INTERGOVERNMENTAL RELATIONS IN ETHIOPIA

6.3.1 Delegation

One might suggest that the federal government can work through delegation. Indeed, this is stated under the Constitution, which states: 'the federal government may, when necessary, delegate to the states powers and functions granted to it by Article 51 of this constitution. There are important issues of interest here. First, which powers from the list of exclusive federal powers under Article 51 can be delegated to the states? One should also note that Articles 50 and 51 are general provisions not limited to legislative powers. They cover broad powers of the federal government, both legislative and executive. As a result, does

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

Apparently, the Ethiopian constitution seems to provide for downward delegation only. It is silent as to whether the states can delegate their powers to the federal government. There is no express clause permitting the states to delegate their powers to the federal government. An express clause included in the draft permitting the states to delegate some of their powers, was rejected on the basis of protecting the powers and functions of the states; such fear is, however, in theory unfounded. It is inherent in delegation that whoever has delegated power can also take it away at any moment. As a result, in the absence of express prohibition in the constitution, the states may delegate part of their powers to the federal government.

Yet, delegated power is not without problems. It raises the central issue of whether it is possible to change by legislation the basic tenet of the federal compact. On the one hand, it is possible to suggest that (restricting the argument to execution of laws) delegation is an informal way of providing a solution to specific challenges and need not necessarily be viewed as a digression from the constitution. Apart from this, if we stick to the words of the constitution, that is, a federation established on the free will of the nationalities, then the issue of downward or upward delegation becomes less relevant. In the latter case, the states as creators and holders of residual power have nothing to fear by delegating some of their powers. Hence, the fear that upward delegation might affect the autonomy of the states is not without ground. Federal practice so far indicates that the federal government delegates the states some aspects of the executive rather than legislative powers, with the exception of a few framework laws. Indeed, delegation is done on a piecemeal basis and seems to be limited to administration of federal laws in areas in which the federal government has not established its own agencies. The only comprehensive provisions on delegation we have in the constitution relate to the courts. Until very recently there were Federal High Court and Federal First Instance Courts in Addis Ababa and Dire Dawa. In all other regional states, the function of the two courts was delegated to the state Supreme Court and state high court respectively. However, dual court structure has now been established in six regional governments and the delegation continues in the three remaining states.

The federal government has found at least three ways of influencing the state governments thereby facilitating the enforcement of federal laws and programs: namely through, formerly

1. The *Kilil Guday Zerf* (Office for Regional Affairs) and presently, the Ministry of Federal Affairs which may be considered as co-operation through executive institutions;
2. Party structure and
3. The process of policy making. Whether these mechanisms are enough to substitute the formal division of executive power hinted at by the federal constitution between the federal government and the states is somewhat difficult to tell at this stage.

6.3.2 Co-operation through Executive Institutions

The political relationship between the federal government and the states is regulated by both formal structures weakly defined in the constitution and various proclamations as well as practice outside the legal framework. One such mechanism is the Ministry of Federal Affairs. The activity of the Ministry of Federal Affairs in the states is one of the semi-formalized practices that has an impact on federal-state relations. It is part of the Prime Ministers office in the federal government.

As to the impact of the now *defunct* office for Regional Affairs on intergovernmental relations, as John Young has rightly pointed out a 'two tier system' of federalism is emerging in Ethiopia. 'Although the constitution does not make such a distinction, in practice one is forced to make a distinction between the regional states of Tigray, Amhara, Oromia and SNNPRS with their relatively greater level of political and economic development on the one hand and the other four states, Gambela, Benshangul-Gumuz, Afar and Somali, otherwise known as 'emerging states,' or 'less developed states' which stand out for their lack of development and historical political marginalization on the other. While the former states, at least until recently jealously guarded their authority and also have better administrative capacity, the latter states are not yet capable of assuming the full responsibility of a state government. At least two factors explain the context of the emerging states. As peripheral states, the impact of historical legacy of isolation from the center is still felt. In relative terms, the shortage of trained personnel is acute in these regions. Infrastructures are almost absent. Secondly, a large section of the people inhabiting these states are pastoralists with no tradition of indigenous settled administration.

The initial argument for such an approach was that the Office was organized to lend a hand to states in general. In the long run, it aimed to enhance the lowland state capacity to utilize their constitutional rights to administer their own affairs. Yet later developments, according to critics, indicated that this objective was an instrument to further their dependence on the center.

EPRDF had its own *Rases* in each of the states, particularly in Afar, Benshangul-Gumuz, Gambela and Somali and through them it intervened on several policy issues in state affairs. The Office for Regional Affairs used to send *advisors* to the emerging states and their status was less formalized and without any clear legal framework. The advisors from the Ministry of Federal Affairs virtually run the regional government and hindered self-administration. The criticism is that they exceed their mandate as consultants and assistants and become more like managers that the regional government is accountable to. 'It is acknowledged that they participate in regional council meetings, reconcile differences between coalition parties in government and conduct the crucial *gim gema* session. They are responsible for developing the political position of the regional government, review appointments and dismissals.

Secondly, EPRDF has also deployed *party officials* in the regions. These are officials known as advisors monitoring and assisting the state governments. The point is that the federal government's concern over these peripheral states, as the most marginalized ones is appreciable. The issue is simply that the assistance and supervision by advisors or party officials goes too far until the ordinary person observes that the key persons running the regions in fact are not the elected regional officers but the appointees of the federal government. In the end this practice seemed to have perpetuated the regions dependency on the center. Virtually every critical political decision had to be considered by these watchdogs.

At least until March 2001 there was some difference between the states of Tigray, Amhara, Oromia and SNNPRS on the one hand and the emerging states on the other. In the former perhaps because the ruling coalition party in each of the states is believed to be the strong wing of the ruling party that runs the federal government, federal intervention was relatively less formal. In the second group of states there was close supervision earlier on by the Regional Affairs of the Prime Ministers office and presently by the Ministry of Federal Affairs. The Ministry of Federal Affairs then *de jure* replaced the Regional Affairs Office of the Prime Minister. The powers and duties of this office are rather briefly outlined as follows:

a. In co-operation with the regions, ensure that public peace and order is maintained;
b. without prejudice to the provisions of Articles 48 and 62(6) of the federal constitution, facilitate the resolution of misunderstandings arising between regions;
c. *give assistance* to the regions with particular *emphasis* on the *less developed ones*;
d. supervise and co-ordinate the executive organs, mainly, Federal Police Commission, Federal Prison Administration, National Urban Planning Institute, Addis Ababa and Dire Dawa city administrations.

The objective of providing additional support, that is, more federal impetus to the emerging states has remained the same. The new element added is a more or less coherent policy framework, a vision that hinges around capacity building of the emerging states. There was a similar mission earlier on but it focused on the traditional concept of training and infrastructure. Now capacity building is all-inclusive including change in attitude, in work ethos, guidelines, procedures and institutional capacity. He also points out that now it is intergovernmental relations rather than inter-party relations. Intergovernmental relations, assume the state party as partners and as coalitions. Implying that even if the parties that run the emerging states do not constitute members of EPRDF, his office is working with them, in the fields specified by law, and the federal government is not trying to replace them. According to Gebreab the office recognizes the state executive and the ruling party in these regions as a partner or a coalition government and influences them indirectly using the government venue rather than the party channel.

Looking at the list of powers of the new Ministry and the practice, it is the assistance, not to all the states but to the less developed states, which is still given emphasis. Its role as an instrument of intergovernmental relations between the federal government and *all the constituent states* is not explicitly stated. Its important role as an institution for supervising or co-ordinating enforcement of federal laws and programs is not clearly stated. This rather crucial role is missing in its power. As can be gathered from the proclamation, it is not broadly organized to facilitate intergovernmental relations between the center and states and its supervisory and co-ordinating role is limited to few institutions. No institutional structure has been established as far as the federal executive in the states is concerned.

In its conflict handling power (see section b above) there is certainly an overlap with what is stated under Articles 48 and 62(6) of the Constitution on the powers of the HoF. The general scope is that the HoF does the legal aspect of the conflict but the Ministry of Federal Affairs handles administrative, political and developmental affairs with the states. It facilitates political negotiations before, for instance, an issue is taken for referendum. In short, it undertakes a 'non-binding consensus building or political negotiations.' But there is nothing that prohibits the HoF from adopting the same process of dispute settlement in addition to its quasi-judicial function of constitutional interpretation and dispute settlement. Indeed, one has to state explicitly that to the extent that the HoF exercises its powers to settle disputes between states and the crucial power of 'determining the division of revenue derived from joint federal and state tax sources and the subsidies that the federal government may provide to the states it remains an important organ of intergovernmental relations.

However, a lot of skepticism surrounds the Ministry of Federal Affairs because of the bad record of its predecessor. It remains to be seen if this young institution is able to transcend the stigma associated with the *Kilil Guday Zerf* and serve as an institution of intergovernmental relations, rather than a party instrument. So far the effect of TPLF's split and the legalization of federal-state relations, albeit in a limited form, through the Ministry of Federal Affairs is not yet clear. Yet it is good to point out that federal-state relations in Ethiopia are closely linked to changes in party power. It appears that because 'EPRDF has effectively merged with the state, the crisis of the Front is in effect a crisis of the Ethiopian state. The internal split in the TPLF and the following crises in the other states show how fragile and soft the government institutions are and it is tempting to state that there cannot be but a party channel. Institutions for intergovernmental relations, separate from party channels are, therefore, not only important for day-to-day co-ordination of federal laws but are also conditions for maintaining federal stability. These institutions should be permitted to evolve as autonomous government bodies so that they will survive regardless of any party bickering.

6.3.3 Co-operation through Party Channels

Implementation of federal law is facilitated by *party channels*. This is perhaps the most pervasive scheme used by the federal government to influence state governments as well as to guarantee uniformity of policies. Perhaps the use of party channels is not unique to the Ethiopian federation. The institutional structure of most contemporary federations is, therefore, important to contain intergovernmental disputes and to integrate policies.' One such mechanism they outline is through political parties, which could be a source of harmony or disharmony.

If the officials of both sets of government are adherents of the same ideology or followers of the same leader or leaders, then they might be expected to pursue harmonious policies. But, in all federations which have a relatively free society with competing political parties, just the converse occurs. In the heat of party struggle, competing parties use the central government against the constituent governments and vice versa. The forces of diversity will not allow complete absorption to occur in a free society. In federations, there are two extreme situations with so many other options in between. 'If one homogenous political party controlled all governments, both federal and the state, there would be no occasion for intergovernmental conflict. If on the other hand, all constituent governments were controlled by one homogenous political party and the federal government by another, the degree of federal conflict would be tense. Between these two extremes lie all existing federations.

If the same party organization controls both federal and state level governments and has a centralized party structure, this might weaken the power of the regional governments in a way that undermines regional autonomy. On the other hand if a party system is genuinely decentralized or if the regional governments are run by parties that operate autonomous from the party in power at federal level, this might enhance the power of the regional governments and strengthen both their capacity to run regional affairs and genuinely represent regional interests at federal level.

Ethiopia is ruled at present by a coalition composed of several regionally based ethnic parties. At first sight it appears to be a party structure that enhances a federal division of power because the federal government appears to be run by an organization with a regional, rather than central basis of power. But practically, the EPRDF is controlling all the regional state governments in the Ethiopian federation; either directly through the member parties or indirectly through affiliated parties. In addition to the member states that are under direct control by EPRDF member parties, EPRDF has close allies and affiliated parties in the other regional states of the federation. These parties are formally autonomous from the ruling party but cannot be considered as opposition parties because of their tight links with the EPRDF. We need to note what we stated earlier in relation to these states about the role of the *Kilil Guday Zerf*. The EPRDF has been instrumental in creating the affiliated parties.

This largely centralized party structure appears to contradict the division of power that is expected to exist in a federation. The point is that the party structure in Ethiopia undermines the federal division of power and subordinates the regional governments to the federal government. It is this factor along with its impact on the process of policy-making that explains the centralizing trend in the federal system. It is also this factor that appears to explain the fact that intergovernmental conflicts are rare, perhaps absent, from most of the contemporary conflicts that challenge the federal system. It is only in 2004 that the regime of fiscal transfers was brought to the table in the HoF. As a parliamentary federal system, the party discipline combined with ‘democratic centralism seems to have great impact on how decisions are taken within the party. This is a very vague concept but implies that decisions are often reached at party level, often at the top executive level (small number of party leaders allege to have monopoly of theoretical knowledge, as ideologues, as sources) and flow directly (top-bottom, not the other way round) to the grass root party members. One is supposed to strictly execute the decision coming from this higher hierarchy. This in turn seems to be based on the idea that a party is supposed to lead, not to be led by the people A central committee leads the ruling coalition. The central committee, often through the chairman, generates specific plans of action which are the basis for the EPRDF’s five-

year plans that are implemented nationwide. The five-year plans to be implemented are adopted at federal level and become the basis for state government plans and policies.

What is apparent, therefore, is that except the difference, between the two groups of states distinguished above, which is a matter of degree, both groups of state government are under the direct control and influence of the ruling party. Even if there is no formal governmental relation between the Federal Ministry of Information and the respective State Bureaus of Information, the Federal Minister of Information is head of EPRDF's party propaganda and chairs meetings of state propaganda machinery (for the most part heads of regional bureau of information are members in such meetings) in his capacity of party member and thereby installs whatever directions necessary which the state propaganda organs have to implement.

In Ethiopia, except the party channel, there is hardly any institutionalized inter-governmental mechanism comparable to those in the European federations. There are no formal meetings on governmental level between federal ministers and state governments. Nor are there any such meetings among representatives of legislative bodies of the two governments.

One significant development along this line is the issuance of Proclamation No. 334/2003 on authentication and registration of documents. The proclamation sets up the federal office of the Notary responsible for the registration and authentication of commercial documents and declares not only that the document so authenticated is conclusive but shall also be acceptable in all states. Conversely, a document authenticated and legalized by the state governments will also be conclusive and acceptable for the federal government. This is an attempt, albeit partially, to introduce what in the United States is called the 'full faith and credit clause. This is certainly an important development in securing legal certainty at both federal-state and interstate level.

6.3.4 Co-operation through the Process of Policy-Making

The federal government has currently issued several policy documents. The documents mainly originated as party documents but were then published as federal documents and published by the Ministry of Information. Party members at federal and state level discuss them and decide to implement them in their capacity as government officers. In general the states accept the economic, social and development plans issued by the federal government. In theory they can adapt the policies to fit their own circumstances but the federal government does play a key role in influencing through national policies mainly due to the party congruence and decision-making structure and secondly, because the states lack the required expertise to bring alternative policies.

Chapter Seven

Federalism and the Adjudication of Disputes

7.1 Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HoF)

The general trend observed is that despite institutional and pragmatic challenges, the HoF has over the years evolved as a legitimate body for the settlement of disputes at least as far as issues of high political and constitutional significance are concerned. This is not, however, without implications on the role of the judiciary. While the constitution has left some grey areas for the judiciary, the new laws that define the role of the HoF and recent decisions of the HoF indicate that the judiciary has been significantly affected owing to the role of the HoF.

7.1.1. Federalism and the Adjudication of Disputes: Introductory Remarks and Context

While some observers contend that the federal system has not in any way reduced the nature and intensity of various conflicts, a closer observation seems to reveal the point that given the political atmosphere in which the country was in 1991, that is, a virtually collapsed centralized regime in which one could hardly predict what will follow shortly, the different groups have over the last decade and half shown a clear stake in the federal arrangement.

Besides, the argument that conflicts are recurring and that the federation may wither away with the ruling party is something that draws its evidences from the former failed federations of the USSR and Yugoslavia. Yet, there are ample evidences indicating that such federations were "window dressing federations" and not federations in reality. One could also make positive scenarios based on the experience from multicultural federations such as Switzerland and India. As such diversity is not a threat in itself, it becomes a fertile ground for conflict only if the system fails to provide a political solution to it in the form of resource and power sharing, the accommodation of the groups to the decision-making process and by ensuring self -rule.

7.1. 2. Constitutional Adjudication: The Role of the Tribunals

Crucially important in a federation is the presence of a body that umpires disputes concerning the constitutionality of laws in general and the division of powers in particular.

The division of power is artificial, imperfect and a generalized skeletal thing.

Federalism has served as one of the important justifications for the introduction of the system of constitutional review of legislation. Constitutionalism, the incorporation of human rights in many national constitutions and rule of law are the other justifications. The

former upholds that governmental power is limited by constitutional norms. There are, therefore, procedures and institutions established to enforce such limitations reducing the dangers of unchecked power. Through the tribunal that interprets and adjudicates constitutional issues federal systems have been able to promote legal integration. There is no exclusive claim here that federal integration is the sole function of the tribunal or the judiciary as indeed political and economic factors do play a crucial role in promoting integration. One will note that in the Preamble of the Ethiopian Constitution an express statement is made to the effect that the federal system aims at creating 'one political and economic community' and a promise of 'common destiny.' The latter, if taken seriously, has even stronger implications in the sense that if the nationalities indeed have a 'common destiny' then they have to live together, even if they dislike each other. If this ambitious plan of federal integration is to have meaning then one avenue for such integration is through the mechanism of constitutional adjudication.

In federal systems, not only is the federal constitution supreme but the federal law should also be declared supreme over contrary state law. True that the supremacy of the federal law is not without limits. The federal legislature should enact its laws and policies within the limits set by the federal constitution. Once that condition is met however, federal law breaks contrary state law. As a result of this many federal constitutions stipulate not only about the supremacy of the federal constitution but also about the supremacy of federal over state law. Two consequences follow from this: there must be an institution that enforces the supremacy clauses and there must also be an institution that takes care of the daunting task of demarcating the boundary of the powers of the federal government and the states. Federal constitutions do attempt to define the scope and powers of the two levels of government but there is bound to exist natural imprecision in the language of the constitution. Suffice it to mention here the wide meanings given to 'interstate commerce,' 'implied powers' and the 'necessary and proper' clause. Through the mechanism of constitutional adjudication then federal integration is given a more concrete meaning.

7.1.3 Differences between the Institutions: Several Practices

The (dis)trust that the states have over the judiciary, the differing commitments to natural law or legal positivism, the differing application of the notion of separation of powers, have influenced in one way or another, the nature and scope of the national institution established to review issues of constitutionality.

Many federal systems have vested this important power either in their ordinary courts or separate constitutional courts. Accordingly, these courts not only have the power to interpret the constitution, but are also and even more importantly entitled to decide on the

conformity of the laws with the constitution. The systems do not accept the 'omnipotence' of positive law, but rather subject positive law to a superior law, according to modern notions, the latter being constitutional law. Yet although constitutional review through the courts is in principle based on the principle of subjecting legislation to a higher law, it essentially has two distinct forms.

On the one hand, there is this diffused (decentralized) system also called the American-system that accords every branch of the judiciary the right to review the constitutionality of laws. In principle any court has the power to declare any law or decision of an executive body unconstitutional, if such a law or decision violates the constitution, final appeal being reserved to the federal Supreme Court. This has been the case since the famous decision of Chief Justice John Marshal of the US in *Marbury* v. *Madison* in 1803.

On the other hand, the centralized system confers the power of reviewing the constitutionality of laws to constitutional courts. Typical of which is the German Constitutional Court has a hybrid role: political and legal. Distinct from and independent of the ordinary courts, the Constitutional Court serves as a watchdog for the enforcement of the supremacy of the constitution. The Court as such does not involve itself in the ordinary settlement of disputes unless the case relates to a constitutional question. However, it does not restrict itself to constitutional issues emanating from specific cases. It can also decide differences of opinions or doubts on the compatibility of federal or state law with the Basic Law upon the request of a few public bodies.

The challenges of 'judicial activism' are less serious in Germany than in the United States. The Constitutional Court is consciously designed to play an active role in its capacity as a guardian of the Basic Law. Its 'activism' is thus often tolerated. Every Court in the United States has the power to declare unconstitutional and hence unenforceable any law, any official action and any other action by public officials that the Court deems to be in violation of the Constitution. In the area of constitutional interpretation, this raises concerns because it invalidates a law considered to be an outcome of a number of compromises between political actors in Congress. Thus there are those who contend that in exercising this important power the Courts must exercise 'self-restraint.' The Courts should remain faithful and adhere to the written constitution, only refer to the *original intent* as put by the framers, guided by strict construction of the text and give priority to political branches to act or not to act. More importantly, the Courts should not put their own personal preferences and philosophies under the pretext of interpretation. They should rather adhere to judicial precedents. On the other hand, there are those who contend that the Court should have some active role. Constitutions are, they contend, *living documents* to be interpreted

in line with present realities. Thus the proponents adhere to a more affirmative role or even aggressive role of the Court in regulating governmental laws and actions. They do not hesitate over the fact that the courts have some 'law-making' functions and hence at times prescribe policies.

7.1.4 The House of Federation: The Ethiopian Choice

The rationale for vesting the power of interpreting the constitution in the HoF, and not in the regular judiciary or a constitutional court as can be gathered from the minutes of the Constitutional Assembly emanate from two sources. One is related to the framers view of the 'nature' of the constitution in general and to the role of the nationalities in particular. The framers think that the new federal dispensation is the outcome of the 'coming together' of the nationalities. Indeed, it is clearly stipulated in the preamble and Article eight that the 'nations, nationalities and peoples are sovereign.' The Constitution is considered as the reflection of the 'free will and consent' of the nationalities. It is, in the words of the framers, 'a political contract' and therefore only the authors that are the nationalities should be the ones to be vested with the power of interpreting the constitution. To this effect, the HoF that is composed of the representatives of the various nationalities is expressly granted the power to review the constitutionality of laws and of course other essential powers as well.

The second reason is related to the first. The framers were well aware of the fact that empowering the judiciary or a constitutional court may result in unnecessary 'judicial adventurism' or what some prefer to call 'judicial activism' in which the judges would in the process of interpreting vague clauses of the constitution put their own preferences and policy choices in the first place. Thus the framers argued, this might result in hijacking the very document that contains the 'compact between the nationalities' to fit the judges' own personal philosophies. It is not difficult to understand the fears and concerns of the framers in light of the fact that the judiciary in Ethiopia has not yet won 'the hearts and minds' of the ordinary citizen. As will be noted below, the good days in which the judiciary gains prestige and respect as the third branch of the government, are yet to come. Yet one could argue in favour and against the policy choices made in the Ethiopian Constitution. Elsewhere it is argued that owing to the lack of theoretically sound basis for the institutions that interpret the constitution in many jurisdictions and taking into account the fact that in many countries including Ethiopia the prestige of the judiciary is low and that establishing deep rooted institutions for democracy to operate may take time, any constitution that claims to incorporate both constitutionalism and democracy, two of the competing values, must attempt to reflect both values in the process of constitutional adjudication. The

application of the two values to constitutional interpretation will result in establishing a tribunal composed of legal professionals and politicians, (similar to the Council of Constitutional Inquiry- CCI) a tribunal capable of rendering binding decisions on cases brought before it. A tribunal so composed will be in a theoretically sound and politically legitimate position. Such tribunal best suits the nature of the enterprise called constitutional interpretation. The judiciary is often criticized for being anti-majoritian, at odds with the democratic principle; judicial activismis also considered at odds with the principles of separation of powers for it takes away the role of other branches of governments and many consider the judiciary lacks the competence to make law. But such opinions at times go too far in the sense that judicial functions have procedurial and substantive limits. Judicial discretion is not as open as many think it to be. Besides modern constitutions stipulate many mechanisms of preventing tyranny and do not as such provide pure democracy. Thus, we speak of horizontal and vertical separation of powers, federalism, supremacy of the constitution, check and balance, human rights and so on. For the judiciary it is its impartiality and its procedurial fairness that it provides to the parties that serves its legitimate existence. For the other branches, it is democratic accountability to the electorate. More importantly, even in the area of constitutional review, the courts may have the last say, but it is only for a time. The court may modify or even reverse its former decisions. More importantly, the legislature may modify or even reverse the decision of the court, and constitutional amendement as well can reverse the decision of a court. The decision of the court may thus, be overruled by other branches of government.

Behind the policy choice of the members of the Constitutional Assembly to vest the power to interpret the constitution and to review the constitutionality of laws in the HoF, not the judiciary, has something to do with the reputation of the judiciary and ideological matters. In historic Ethiopia adjudication of cases formed part and parcel of public administration. One finds a merger of functions within the executive, the administration of justice and the executive function proper. Indeed, adjudication of cases was considered to be the principal function of the executive. For example, in Menlik's era of appointment of the ministers in 1908, the Minster of Justice was also the Chief Justice. The attempt to separate the judiciary from the executive was not that easy either. The court structure reflected until 1992 the traditional practice of combining judicial and executive functions in the person of the local chiefs and provincial governors. Under the military systems, the judiciary was contained within the executive branch. The federal supreme court was separated from the Ministry of Justice 1992.

The judiciary never had a separate existence of its own as an institution. It was subject to all kinds of pressures from the other branches. Thus, external pressure on the judiciary has deep roots and is not without some hangovers on the new federal judiciary. Administrators at state level, even today, think that it is natural to order the judge or at times even close benches at the lower level of administration. The judiciary never survived the regime it established. It was no surprise to see every new regime setting up its own version of the judiciary that suits its mission. It was never designed to be an institution as the third branch of the government in the real sense.

The judicial system in Ethiopia is under serious pressure both from what Cappelletti calls 'the consumers of law and justice, that is the citizens and the government of the society under which it operates. The judiciary's role in enforcing contracts and creating an atmosphere of stability and predictability for business thereby promoting economic development, is questioned. The judiciary, on the other hand, complains about a whole list of factors affecting its performance: salary, lack of trained judges, resources and absence of economic security, political pressure and commitment of its own judges. Added to this is the ideological challenge of the ruling party. Until recently its commitment to the judiciary, despite the constitutional provisions was far from clear. The judiciary was a suspect. It was associated with pre-democratic regimes or is considered as hostile to reform. Often top executive officials spoke about the importance of *hizbawi dagna*, 'popular judge' maybe implying one who is ideologically affiliated to the ruling party or perhaps an elected one. Only recently has the importance of an autonomous judiciary been realized. No doubt this outlook will have a bearing on the judiciary's limited role in the Ethiopian context.

The framers of the Constitution, however, recognized the fact that interpretation involves legal technicalities. The CCI has the power to investigate constitutional disputes. The investigation may result in a *prima facie* case calling for interpreting the Constitution, in which case the CCI is required to 'submit its recommendations' to the HoF or remand the case and render a 'decision' if it finds there is no need for constitutional interpretation. In the latter case, the party dissatisfied with the decision of the CCI may appeal to the HoF. Thus, it is clear that the CCI is merely an advisory body to the HoF, lacking the competence to give a binding decision. The HoF as well has been at liberty to disregard the CCI's opinions in some cases.

7.1.5 The Respective Role of the HoF and the Courts within the Constitutional Framework

The first question that comes to mind when one thinks of a law enacted by the House of Peoples' Representatives (HoPR) that defines the 'powers and responsibilities' of the HoF

itself established by the constitution to check the constitutionality of the laws of the HoPR, is whether the law itself is constitutional or not. Could the HoPR really define the powers and responsibilities of the HoF? More specifically, does the HoPR have competence to do so? Would not such a power, if it existed at all, lead to a conclusion that the HoPR may in the process limit, extend or even take away the competence of the HoF? Is not the HoF competent enough to define its responsibilities in light of the broad powers indicated in the Constitution? Experts stated that in light of the function of reviewing constitutionality of laws, the attempt to define the powers of the HoF through the HoPR is questionable. However, their opinion did not seem to have won the support of the actors.

More important, however, is the compatibility with the Constitution of the two new laws dealing with the HoF and the CCI regarding the jurisdiction of the HoF and indirectly 'stripping the jurisdiction' of the regular judiciary, a judiciary already weakened because it lacks the competence to review the constitutionality of laws. In light of the generality of the clauses of the Constitution on the respective role of these bodies, was to restrict the role of the HoF to reviewing the constitutionality of laws enacted by the legislature: federal and state; resolution of disputes among high federal organs mainly dealing with the horizontal separation of powers and umpiring federal disputes. The three important reasons for this view were as follows.

1. The Constitution does not seem to wipe out the role of the judiciary completely. If one sticks to the terms employed by the text, the relevant Article states: 'Where any federal or state *law* is contested as being unconstitutional...' and the Amharic version which according to Article 106 has the final legal authority in case there is contradiction between the English and the Amharic versions is even more explicit in stating that the term 'law' refers to laws enacted by federal and state legislative bodies. Where any Federal or State *law* is contested as being unconstitutional and such a dispute is submitted to it by any court or interested party, the Council shall consider the matter and submit it to the House of Federation for a final decision.' In this provision, the term law might look ambiguous so as to include even subordinate regulations of the executive. However, its Amharic version makes it relatively clear by specifying the point that 'laws' or *Higoch* refers to an act of the *legislature* (*Be Federalu Mengistim Hone Be Kilil Hig Awchi Akalat Ye Miwotu Higoch*) at federal and state level. Thus it was logical to argue that other subordinate regulations issued by the executive and decisions of governmental bodies other than 'laws' were left to the courts.

2. In parliamentary systems, of which Ethiopia is one, the supremacy of parliament, subject of course to the supremacy of the Constitution, requires that all other branches of

government are bound to assume that legislation enacted by parliament is constitutional and the courts are prohibited from nullifying such legislation. The presumption of constitutionality has expressly been incorporated in the new law. Thus, administrative acts and decisions of public bodies could be questioned for their constitutionality as well as for their conformity with the enactment of parliament by the regular judiciary.

3. The practice of the CCI as well hinted at this position, at least until the enactment of the laws. In the case of *Addis Ababa Taxi Drivers Union* v. *Addis Ababa City Administration* and in the case of *Biyadiglign Meles et al v. Amhara National Regional State,* the CCI ruled that remedies concerning the conformity of regulations with the enabling legislation, as well as violations of rights by the executive do not amount to reviewing constitutionality of laws and thus parties have to seek remedy from the courts.

However, the constitutional position as well as practice have been confused with the enactment of the new laws. According to the new laws 'law' (that is subject to the investigation for its constitutionality by the HoF) shall mean proclamations issued by the federal or state legislative organs, and regulations and directives issued by the federal and states government institutions and it shall also include international agreements that have been ratified by Ethiopia.' Thus by defining 'the law' too broadly to include all conceivable acts of the legislature and the executive, the drafters of the new laws that are supposed to define the role of the HoF and the CCI, have themselves apparently come up with an unconstitutional law. This is so because the federal constitution is at least clear on this point: it never intended to include regulations, directives and decisions of administrative bodies in the way the laws attempted to include. By so doing the drafters have wiped out or at least attempted to wipe out the jurisdiction of the courts: federal and state. It thus remains to be seen how this anomaly is to be settled by the HoF.

But at least in the case of Coalition for Unity and Democracy (*CUD) vs PM Meles Zenawi,* a recent case brought before the CCI requesting the latter to declare unconstitutional a directive issued by the PM following the May 2005 election crisis and its aftermath banning demonstrations in the capital for a month was entertained by the CCI and considered as constitutional although the CUD started its case and applied to the relevant Federal First Instance Court. (The Court in its brief remark on the application of the CUD rejecting the case for lack of mandate, adopted a very literal and positivist approach on the meaning of the 'law' and failed to analyze the link between the law and the Constitution. The case could have enlightened our understanding of constitutional practice better if the Court adopted a different interpretation. The HoF's position would then have been clearly tested in the case.

While the government argued that there were objective reasons for the one-month ban on demonstrations in the capital, the claim being the opposition is ready for street violence to overthrow the government on unconstitutional means and hence the directive, the opposition on its part claimed it was undertaking peaceful demonstration as provided in the Constitution and wanted to declare the directive as unconstitutional. While there are still controversies on the constitutionality of the directive and no one is able to give conclusive verdict, it is possible to argue that the PM would have been in a much defensible position if he resorted to emergency declaration through the Council of Ministers as provided under the Constitution Article 93.)

This is a very interesting case because the Federal First Instance Court to whose bench the case first appeared wilfully relinquished its constitutional mandate in its decision held on June 3, 2005 by referring the case to the CCI. This trend seems to conform to what is provided in the new laws for which we have questioned their constitutionality. This also implies that the courts are further stripped of their jurisdiction.

Horizontal Separation of Powers

On the issues of horizontal separation of powers and umpiring the federal system, the main argument justifying the power of the HoF emanated from the nature of the HoF

The American Supreme Court adjudicates concrete disputes arising from cases and controversies between parties. The object of judicial review in the United States is the vindication of the rights of a party to a case. Besides, the Supreme Court has developed self-restraining doctrines, albeit not always consistent, to minimize its active involvement in the competence of the legislative and executive branches. The Court has avoided cases brought before it by invoking the ‘political question doctrine (are questions beyond judicial examination or considered as non-justiciable.) But the borderline between what constitutes a constitutional or political case is never easy to draw. Broadly speaking such cases included matters concerning the ‘republican form of the government,’ ‘the conduct of foreign affairs,’ war power, impeachment, ‘presidential powers discretion,’ and recognition of foreign governments. The exact contours of the political question doctrine is less precise though. It appears that the doctrine has some relevance when it concerns the exercise of powers within the confines of the (horizontal) separation of powers. But the doctrine becomes less relevant, for instance, if the issue is as to whether the executive made the correct use of its executive powers because discretion is often left to the same institution and the judiciary cannot replace the executive.

At any rate, issues concerning the horizontal separation of powers often fall within the grey areas of law and politics and the settlement of such disputes truly involves political matter, which the regular judiciary may lack the competence to deal with. However, the HoF would be the most suitable candidate as it is more a political than a judicial body. It is in recognition of this fact that it is stated: 'A case requiring constitutional interpretation which may not be handled by courts may be submitted to the CCI by, at least, one-third of the members of the federal or state councils or the federal or state executive bodies. Art. 23(4) of Proc. No. 250/2001. This clause specifies the parties who have standing before the HoF as far as issues involving constitutional interpretation are concerned. Needless to say the courts cannot handle cases involving constitutional interpretation. No specific case has yet been reported under this procedure but it may be interpreted to cover two crucial aspects: horizontal separation of powers both at federal and state level as well as vertical division of powers between the federal and state governments. This appears to be so from the nature of the parties.

Respective Powers at Federal and State Level

In USA supreme court the Court argued, it is its duty to protect the authority of the states, albeit, in many cases by a majority.In Germany, decisions of the FCC on two of its important powers, namely the settlement of disputes between major political institutions and abstract review, have at times been criticized for encouraging litigation by actors in the federal system, to frustrate political projects of their opponents at another level. Losers in the political process often resort to the Court to reverse a political decision. It is important to note that most of the federal powers in Germany belong to concurrent and framework powers. The federal government extensively used these powers and the FCC on its part insisted that whatever conditions stated in the Basic Law for the exercise of concurrent and framework powers is a matter for the discretion of the federal legislature. It subscribed to the political question doctrine and in the end the states lost much of their powers.

In the Ethiopian situation, it does not seem there is a need to consider the federal issues at two levels. Nor is there any ground to trust the political process to safeguard federalism. Indeed the federal system in Ethiopia is unique, as the states have no role in the law-making process at federal level. When the Americans suggest that the political processes can provide a better alternative, it is because the federal government and the states are actively involved in the federal legislative process. The Senate is expected to check the lower house and safeguard the interests of the states. No such comparable guarantee exists in Ethiopia. The only guaranty for the nationalities appears to be the vigilant exercise of

their powers as ultimate interpreters of the constitution. At any rate federalism in its broad sense, that is, defining the respective powers of the federal government and the states as well as checking the compatibility of federal and state laws with the constitution, is one area of jurisdiction for the HoF. The issue of the political question doctrine becomes less relevant in this respect because from the outset the HoF is a political body. The debate on 'judicial activism' versus 'judicial self-restraint' is thus less relevant in the Ethiopian context. As the following cases illustrate, the HoF as a quasi-judicial/political body seems to be legitimate organ for cases that are of high political and constitutional significance.

The first controversial case concerns the *Silte* decision a case in which a certain community that were perceived to be part of the *Guraghe* ethnic group wanted to secede from the latter and set up a local government. The process involved, as required by the federal Constitution Arts 39 and 47, the local population, the regional parliament (constituted of the diverse groups) and the HoF but the respective role of these actors was never clear. The matter was finally resolved in 2000 by a referendum organized by the HoF in which large majority of the *Silte's* chose to secede and form a local government within the constituent unit. Given the complexity of the case (who is the 'self' that determines the right to self-rule at local level?) and the number of institutions involved (the two ethnic groups at local level, the state parliament composed of the various ethnic groups and the HoF), the final decision of the HoF to submit the matter to a referendum, though the issue of who should participate in the referendum is far from settled, and the fact that the final verdict was gracefully accepted by all concerned indicates the wise approach adopted by the HoF.

A second and more controversial one is the Benishangul-Gumuz case that involved the tension in the region between the indigenous groups (Berta, Gumuz, Shinasha, Komo and Mao) and the highlanders (Amhara, Oromo and Tigray nationalities). Candidates from Amhara, Oromo and Tigray nationalities for the 2000 election for the regional council were prohibited on the basis that they were not able to speak any one of the five languages namely Berta, Gumuz, Shinasha, Komo and Mao. Particularly the Berta insisted that the candidates should not be allowed to run for office if none of them are versed in Berta language. It accordingly petitioned the Election Board and the latter decided to bar them from running as candidates stating that they were not able to speak the Berta language. The Amharas, Oromos and Tigrayans, most of them transferred to the region during the *Derg's* resettlement program (constituting some forty seven per cent of the population in the region), complained to the HoF against the decision of the Electoral Board on *Yekatit* 10, 1992 E.C. (February 2000). The applicants argued that the decision of the Board violated their constitutional right to be elected granted to every citizen without any discrimination

and asked the House to quash it as it contravenes the supremacy clause of the federal constitution (Article 9).

The CCI gave its opinion to the HoF admitting that the application raises constitutional interpretation questions. The expert opinion constitutes majority and a dissenting one. The issues formulated were: as to whether the law (The law in question is the Proclamation to make the Electoral Law of Ethiopia conform with the Constitution of the Federal Democratic Republic of Ethiopia) which sets the conditions for candidature, one of which is knowledge of the vernacular of the state, is in violation of the constitution or not? And as to whether the decision of the Electoral Board based on such law is constitutional or not.

The majority, after considering the relevant law and the Constitution (Article 38(1) of the federal constitution states 'every Ethiopian national, without any discrimination based on colour, race, nation, nationality, sex, language, religion, political or other opinion or other status has the following rights:

a. to take part in the conduct of public affairs, directly and through freely chosen representatives,

b. on the attainment of 18 years of age to vote in accordance with law,

c. to vote and to be elected at periodic election to any office at any level of governments.

While Article 38 of proclamation 111/1995 stating the criteria on candidacy states

Any person registered as an elector shall be eligible for candidature where he is versed in the vernacular of the national region of his intended candidature and the Amharic version states) rather briefly opined that because the proclamation stated knowledge of the local language as a condition for candidacy, it violated the constitutional provision on the right to take part in conducting public offices as well as to be elected.

The minority view is more elaborate and is mainly based on the constitutional argument that the issue has to be seen in light of the letter and spirit of the whole constitutional text rather than on a single provision and it needs balancing between two or more competing constitutional values. The minority acknowledged that there is an express clause on the right to elect and to be elected as well as the fact that the Constitution does not allow discrimination on the basis of language. However, it articulated that in this case there is no discrimination on the basis of language and considered the decision of the Board, not in violation of the Constitution.

It stated that the proclamation does not discriminate on the basis of language. In much the same way as in the Oromia, Amhara or Tigray regional states, that is constituent states in

which the regional official language is the language of one of the dominant nationalities, anyone who is not versed in the regional government's official language cannot run for office as a candidate. By the same analogy, anyone who does not speak any of the local vernacular languages in Benishangul-Gumuz, whatever his or her nationality may be, cannot run for office and the minority insisted that this cannot be considered a violation of the Constitution on grounds of discrimination. The minority focused on the peculiarity of the Ethiopian federal system and its emphasis on the sovereignty of nationalities and the fact that language constitutes one essential attribute of identity.

The HoF considered both opinions but rendered a different decision which was more in line with the opinion of the minority than with that of the majority. In a nutshell the HOF upheld the law as constitutional but declared the decision of the Board as unconstitutional and hence of no effect with prospective effect. It articulated that Article 38 of the proclamation is not in violation of Article 38 of the Constitution. It also underscored that whoever wants to run as a candidate is required to know the working language of the *regional state, and not one of the local vernaculars* It emphasized that no doubt if the candidate is to speak for the people he/she claims to represent in parliament or to introduce his/her aims and programs to the electorate, he/she is required to know the regional official language. By virtue of the proclamation, the candidate is required to know the official language of the *region* and to that extent the proclamation does not contradict the principles of the Constitution. On the other hand, the House found the Board's interpretation of the proclamation to mean a candidate should be versed in any of the indigenous languages, particularly the Berta language, one of the five languages spoken in the region that is not the official language of the regional state, unconstitutional and declared it null with prospective effect. The regional Council has adopted Amharic as the official language.

Comments on the HoF Decisions

The CCI majority emphasized the constitutional provision of the right of the citizen to elect and to be elected and the principle of non-discrimination stipulated in the same text. According to the majority it does not matter whether the candidate who is elected in the regional council speaks or understands the local vernacular. The candidate has the right to be elected and cannot be prohibited because he/she does not speak the language. This misses the fundamental virtue of not only the Ethiopian Constitution, which is apparently based on the free will of nationalities, but also the values of federalism, unity in diversity.

The minority opinion, even though it emphasized the importance of investigating the whole text and the fact that the nationalities are considered as the building bricks of the federation, was not specific enough as in the decision of the HoF to emphasize the point

that what is required under the proclamation is the candidate's knowledge of the working language of the regional state, and not of any of the local vernaculars. But in doing so the minority have touched upon one of the thorny issues in the federal system to which neither the majority nor the HoF was able to provide an answer. Could one really argue with a lot of emphasis that a candidate cannot run for office as long as she/he cannot understand even one of the local languages? Would it be possible to give an affirmative answer to this question under the constitution or should these multi-ethnic regions be subject to a different treatment: they do not have their own regional governments and because many ethnic groups are living there they had to adopt Amaharic for communication and because of this highlanders are not required to know any of the local vernaculars. This raises the central issue of the dilemma in the federal system on the one hand declaring the equality of states and nationalities whereas on the other hand only some nationalities have their own constituent states. This dilemma is clear under Article 46, which recognizes only nine members of the federation, while in fact there are more than eighty ethnic groups and secondly there is the dilemma we are noting in this section: ethnic versus multicultural federation. Those who do not have their own constituent states cannot impose the language requirement on the candidate as is the case in other regional states, for example Amhara, Somali, Oromia and Tigray.

There are two options here. One may be tempted to state that if in the states of Amhara, Oromia, Afar, Tigray and Somali knowing a local language is a requirement to run for public office, there is no reason to deny multi-ethnic regions the same right. Because they do not have their own constituent state, they should not be subjected to different treatment. Otherwise a clear constitutional asymmetry is going to evolve between those nationalities that have their own 'mother states' and those that do not. Or should we simply reiterate that after all the Constitution has made that clear by recognizing only nine constituent states with its own implications?

A related argument can be deduced from the federal Constitution. As several sections of the Constitution indicate, at least formally speaking, the Ethiopian Constitution is closer to a confederation than a federation. It emphasizes the sovereignty of nationalities, it grants nationalities the right to self-determination, secession included; there is no federal supremacy clause unlike many other federal constitutions. It appears that the nationalities are considered as building bricks as if they preceded the federation. All this taken together seems to indicate that at the time of the federal bargain the forces of diversity prevailed over the forces of unity whereas in many working federations one finds a balance in which forces of unity slightly prevail over the forces of diversity. If this argument is pushed

further then it may imply that the Constitution has taken a position as far as the tension between collective versus individual rights is concerned, in favor of the former. If so, the decision of the Electoral Board, however absurd it may be in creating 'small islands' everywhere, forcing every citizen to find out where his 'mother state' is, could be justified. This is, however, contrary to the political and economic integration envisaged by the federal Constitution. In the Preamble it is stated 'We, the nations, nationalities and peoples of Ethiopia: strongly committed, to *building a political community* founded on the rule of law.... Convinced that to live *as one economic community.* Another argument against the minority could be deduced from the Constitution. By outlining only nine member states it seems to have defined what constitutes majority and minority nationalities. One can then conclude that the language test under Article 38 of the proclamation is only applicable to those states defined under Articles 46 and 47 and not to other states.

Despite the above mentioned limitations, the decision on this case is perhaps one of the most celebrated decisions of the HoF that attempted to strike a balance between the concerns of the different groups.

The third case concerns the border dispute between Oromia and the Somali regional state. The two regional states share more than 1000 km border area. In the border areas inhabited by nomadic people, the tension between communities over grazing land and water predates the present federal set up. But with the introduction of the state restructuring after 1991, mobility was somehow restricted which intensified resource competition. It was finally resolved by a referendum organized by the HoF. Because of its sensitivity and magnitude, the HoF entered into extensive dialogue with the communities involved, the two regional governments and finally reached at an amicable settlement.

The three cases indicate the point that the HoF is an appropriate body for issues in the grey area between law and politics. Yet the HoF's jurisdiction needs to be confined to cases that have a high political and constitutional significance.

Concrete Review and Individual Complaints

Two other areas of jurisdiction for the HoF include the concrete review and individual complaints. In case of concrete review, the regular judiciary, if it comes across a case the disposition of which requires the interpretation of the constitution or the checking of the compatibility of the law at issue with the constitution, must refer the constitutionality issue to the HoF. The reference to the FCC or the HoF could be made by the court on its own initiative or on the application of parties. There is thus, a split of function between the regular court that decides on the merits of the case and the HoF that decides the conformity of the legislation with the constitution without going into the merits of the case. This is

distinct from the American courts in which in principle any court decides the constitutionality of the law in the process of deciding the merit of the case. The monopoly power of the HoF in many parliamentary federations is justified by the respect for the legislature. Not every court should be allowed to disregard the will of parliament.

An interesting issue in this respect concerns the question when the court is bound to refer the matter to the HoF. Is it enough for the court to refer the constitutionality issue so long as an objection to this effect is raised by one of the parties or should the court wait until there is some doubt on the law's constitutionality or should the court convince itself beyond doubt that the law is unconstitutional? This is crucial because if the court has to establish for itself that there is a *prima facie* case of unconstitutionality, before referring the matter, then the court is in a way reviewing, albeit not conclusively, the constitutionality of the law. It is only that it cannot repeal or declare the law unconstitutional. Apart from this, if mere objection by a party leads to a reference of the case to the HoF then the jurisdiction of the court could practically be hampered for trivial reasons. It is in recognition of this fact that the law stipulates: 'The Court handling the case shall submit it to the CCI *only if it believes* that there is a need for constitutional interpretation in deciding the case.'

Constitutional complaints is stipulated under the new law in Ethiopia. 'Any person who alleges that his fundamental rights and freedoms have been violated by the final decision of any government institution or official may present his case to the CCI for constitutional interpretation.' This is significant in the sense that the constitution was silent on constitutional complaints. Article 23(1) of Proc. 250/ 2001. This procedure has both subjective and objective purposes. It was introduced to serve as a form of legal protection to the individual once certain procedures for its exercise are complied with. It is an extraordinary remedy available to the individual for protecting the individual's basic rights and in that sense it is there to render a legal remedy to an individual against any law, directive or final decision of any branch of the government, including the judiciary. On the other hand, it also has an objective function. The decision might clarify a general constitutional issue or might preserve the legal system in general. In the latter case even if the complaint is withdrawn the HOF may continue to render its decisions because it is of general interest to the legal system.

The relevance of the complaint procedure is not yet familiar practice in Ethiopia. Nor is the distinction between objective and subjective purposes of the complaint well understood. In one case (before the issuance of the new law), the CCI rendered a decision that gave the impression that this procedure has only a subjective purpose. The real parties in dispute were husband and wife involved in a divorce case. A *Sharia* Court already decided the case

but the wife who was not happy with the outcome of the case took the matter to the Federal First Instance Court, to reverse the decision of the *Sharia* Court. The husband, on the other hand, applied to the Islamic Affairs Supreme Council requesting this body to intervene on behalf of the Muslim community in general in finding out whether the regular judiciary has the competence to review decisions of religious courts. The alleged unconstitutionality is related to the fact that the *Sharia* Court has already rendered a binding decision to the parties. The Supreme Council applied to the CCI on the matter. The issue before the CCI was a resolution of the question whether or not the ordinary courts (at whatever level) have a constitutional mandate to review the decisions of the *Sharia* Courts pursuant to Articles 34(5) and 78(5) of the Ethiopian Constitution. The CCI sadly dismissed the case on the ground that the parties to the dispute, not the Supreme Council, have the standing to refer the matter to the CCI. Yet, the CCI's position is subject to criticism. Although the decision of the CCI or the HoF in the end would have an implication for the parties in dispute, the case mainly sought an abstract or general remedy from the CCI. The Supreme Council was as representative of the Muslim community seeking to define the scope of legal pluralism tolerated by the Constitution. It was an attempt as such to define the role of religious and traditional institutions within the general constitutional framework.

It is important to mention that the procedure of constitutional complaint is subject to rigorous scrutiny before the HoF admits the application. The new law in Ethiopia stipulates similar requirements. Not only is exhaustion of remedies in the relevant government institution required but the applicant is also required to have a final decision, that is an adjudication that has been exhausted and against which no appeal lies along the same path way. These requirements, rigorous as they might appear, try to sift out only the most relevant ones preventing the excessive flow of cases to the HoF.

Conclusion

As illustrated in the cases, the HoF has played an important role in the adjudication of constitutional matters particularly those cases that are of high political significance. So far, there has been one ruling party at federal and state level and the HoF's impartiality has not been brought to test. A more challenging issue to the HoF however is the fact that it is composed of important figures coming from the regions. While this may positively contribute on the HoF's ability to serve as a forum for addressing regional concerns, it may at the same time serve as an obstacle because the HoF is in a way becoming a part time House. The Constitution (Article 83) imposes a duty on the HoF to decide cases *within thirty* days of receipt of opinion from the CCI, while it is *actually* holding its regular session once in six months. Under such circumstances and with the increase in the number

of intergovernmental conflicts, the House certainly will be an inefficient institution. In relation to the jurisdiction of courts, the new laws and the recent case seem to leave no room for the judiciary as far as adjudication of constitutional matters is concerned. It is, however, the contention of this author that the new laws need to be challenged for their constitutionality as it was not the intention of the framer's of the Constitution to deny jurisdiction to the judiciary from all constitutional matters.

7.2 ORGANIZATION OF THE JUDICIARY IN A FEDERAL SYSTEM

There is a question as to whether the division of power inherent in federalism applies for judicial power to the extent of requiring each order of government to have its own court system.

1. State courts subject to review by the Supreme Court are sufficient to protect the interest of the federal government. Lower federal courts are perceived as unnecessary, expensive and likely an intrusion on the autonomy of the state governments. According to this view, State courts are believed to be competent for the work required so long as appeal is guaranteed to a higher federal tribunal. This seems to be the trend in Germany, Switzerland and India.

2. Federal courts like federal executive agents are desired to effectively implement the power of the federal government. If one takes the federal principle of division of power strictly, not only are legislative and executive functions divided between the federal government and the states, but judicial authority too is divided. This would lead to a dual set of courts: federal courts applying and interpreting federal laws and another set of state courts applying and interpreting the laws of each state. That seems to be the case with the United States and Ethiopia. There is a fear that state courts might not fully enforce and implement federal policies. This view remains skeptical about the competence of state courts. There is some distrust in state courts in adjudicating federal laws. Besides there is the need for maintaining uniformity in the interpretation of federal laws. However, the existence of dual court structure among other things creates difficulties for litigants by the existence of two separate court hierarchies, each with limited jurisdiction.

The United States follows the dual court system of courts. The Constitution provides that the judicial power shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. As a result, two types of federal court are established: the constitutional courts and the legislative courts. Legislative courts, compared to the constitutional courts, are quasi-judicial in the sense that they are close to the administration. They are creations of Congress under Art. I to apply federal law and to

adjudicate federal claims. Appeal is always guaranteed from these courts to the constitutional courts. The legislative courts also render advisory opinions.

Germany introduces a judicial hierarchy. All judicial power not given to federal courts is reserved to the states.

The federal constitutional court is the highest court of review for constitutional cases. Germany's integrated appeals system in which cases begin in a state court and end in a federal appellate court causes few problems because almost all statutory law is federal law. Contrary to the view in the United States that considers appeal as an insecure remedy for possible state hostility to federal legislation, Germans do not appear to view the absence of lower federal courts as a threat to the supremacy of federal law.

Federal appellate review in Germany promotes uniformity even in areas outside the legislative authority of the federation. Thus although the great preponderance of legislative authority in Germany is federal, the executive and judicial powers of the federation are significantly narrower. The federation may neither enforce nor expound every law it may constitutionally enact.

The Swiss judiciary is also organized in a more similar fashion to Germany. The statutes of the federal government need not be applied by special federal agencies and federal courts. They have to be executed by cantonal agencies and enforced by cantonal courts. The law is an indivisible unity. Therefore one cannot have competing federal and state court systems. Thus cantons do execute and implement federal laws with cantonal courts and cantonal agencies.

The supreme federal tribunal does not, however, have judicial review over federal legislation. It is an appeal court against all cantonal law but not against federal law. It stands as a highest court of appeal over the cantonal courts. This function is held to be its most important power because in the absence of all inferior federal courts, the uniformity of laws could not otherwise be assured. The federal tribunal is not only a court of appeal, it has original jurisdiction and some power of judicial review.

The Indian constitution sets up a federal judiciary consisting only of the Supreme Court without any inferior courts in the federal judicial system. Unlike the United States, there is a single integrated system of courts for the union as well as the states that enforce and interpret both the Union and state laws and at the head of the entire system stands the Supreme Court of India. Below the Supreme Court stand the high courts of the different states and under the high courts there is a hierarchy of other courts which are referred to in the constitution as subordinate courts: courts subordinate to and under the control of the high courts.

In short, the same system of courts headed by the Supreme Court administers both the union and state laws as are applicable to the cases coming up for adjudication.

The Ethiopian Constitution states that, supreme federal judicial authority is vested in the federal Supreme Court and reserves for the HoPR to decide by a two-third-majority vote to establish inferior federal courts as it deems necessary, nationwide or in some parts of the country. There is only one federal Supreme Court with nation wide jurisdiction and until very recently, the federal High Court and First Instance Courts were limited to Addis Ababa and Dire Dawa. As far as the organization of the inferior federal courts in the states is concerned the constitution declares that the jurisdiction of the Federal High Court and of the First Instance Courts are delegated to state courts. Art. 78(2). As recorded in the Minutes of the Constitutional Assembly, one of the reasons for limiting the setting up of federal courts to Addis Ababa and Dire Dawa and to delegate the function of the federal courts to state courts in all other regions, until recently was related to budget and human resource constraint. Otherwise the members have emphasized that the judiciary too should be organized on a dual basis and state courts should have the final say on state matters. At the early stage certainly the setting up of a dual court structure would have been expensive and difficult to staff with qualified judges. Certainly there would also be confusion over jurisdiction for litigants. By virtue of this delegation the state Supreme Court exercises, in addition to its state jurisdiction, the jurisdiction of the federal High Court and the state high courts exercise, in addition to their state jurisdiction, the jurisdiction of the federal First Instance Court. In order to guarantee the right of appeal of the parties to the case, decisions rendered by a state high court exercising the jurisdiction of the federal First Instance Court are appealed to the state supreme court. While decisions rendered by a state supreme court on federal matters are appealed to the federal Supreme Court.

With the recent decision of parliament to establish inferior federal courts a full-fledged dual court structure is on its way, at least in five regional states. As a result there are inferior federal courts in some states while the delegated power seems to continue in three other states namely, Oromia, Amhara and Tigray, adding to the point noted in chapter five that some level of asymmetry exists in reality among the constituent states. See art 80(2), (4), (5), (6).

As far as the state courts are concerned, from the provisions of the Constitution one finds that the judicial structure consists of the state first instance courts at the lowest level, also called *wereda* courts, above which we have the intermediate zone/high court and at the highest level we have the state supreme court. As a result the Ethiopian judicial system theoretically speaking is organized on a dual basis in which there are two parallel court

systems, the federal courts and the state courts with their own independent structures and administrations. However, until the enactment of the new laws the operation of the federal and state courts was an integrated one. However, it appears that the delegated function of state courts has brought some inadequacies in the enforcement of federal laws.

Shared Judicial Power

Ethiopia seems to follow dual structure of courts. But this parallel system does not necessarily imply that each set of courts exercises jurisdiction that is completely exclusive of the other.

There are two views as far as the Ethiopian court structure of shared judicial power is concerned. On the one hand there are those who hold that the dual court structure is strictly taken both under the constitution and the proclamations issued 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. Proc. 25/96; Proc. 254/2001; Proc. 321/2003. One indication of this is the fact that Proclamation 25/96 has not openly provided for the existence of shared judicial powers. The other view, which this author holds, holds that despite the law's silence there still remains a concurrent judicial power. For instance, labor cases are mentioned nowhere in the proclamation as federal cases but we know for certain from Article 55(3) of the Constitution that it is a federal law matter. The commercial code too is a federal law by virtue of Article 55(4) of the Constitution and the same holds true for the penal code (Article 55(5)). We know also for certain that the state courts do adjudicate criminal cases in the regular discharge of judicial duties, *not in their delegated powers.* Several interviews held with federal as well as state court judges in January 2004 reveal that particularly on criminal cases the state courts enforce the penal code, otherwise a federal law, as if it is a state matter. No question of jurisdiction has so far been raised. None of the judges were even aware of the fact that the entire penal code falls within federal jurisdiction. The fact that the federal Supreme Court does also review state cases when it discovers errors of law also suggests the existence of shared judicial powers. As a result despite the apparent parallel existence of courts, like other powers, there are shared judicial powers.

It is clear that 'respecting and enforcing' fundamental rights and freedoms by the judiciary is meaningless, unless the judiciary in one way or another is involved in interpreting the scope and limitation of those rights and freedoms which it is bound to enforce. In this respect, contrary to popular thinking, the federal and state courts are not prohibited from interpreting the constitution. One need only mention incidentally that the United States

Supreme Court had to labor a lot to enforce the fundamental rights and freedoms throughout the federal system because it lacked such constitutional authority and its inclusion in Ethiopia was meant to avoid such mishaps. This adds to the view that that there is shared judicial power although the final say as far as constitutional interpretation of parliamentary legislation is concerned, is reserved to the HoF.

It is obvious, therefore, that there has been no uniformity among federations in organizing their judiciary. A dual judiciary would seem to be the logical corollary of the dual polity in federations but as indicated it is not strictly followed. Even in the United States the method of organizing courts in federations, therefore, indicates some variation. What is common to all is that either there is a safeguard clause granting the federal government the power to establish federal courts or the right of appeal to a federal tribunal from state courts is guaranteed where matters affecting the law of the federal government are at issue.

7.3 JURISDICTION

In US-the Supreme Court has two kinds of jurisdiction namely appellate and original and in the exercise of appellate jurisdiction the court is the highest tribunal in the republic although it exercises it as a matter of discretion. Its original jurisdiction is constitutionally specified.

As is well-known, the primary task of the Supreme Court lies in the realm of appellate jurisdiction. Here, with its power to declare laws and acts of the executive unconstitutional, it serves as final arbiter in the interpretation of the constitution. It provides the authoritative and uniform interpretation of the law of the land.

The Indian constitution has set up a federal judiciary consisting only of the Supreme Court without any inferior courts in the federal judicial system. The Supreme Court has three kinds of jurisdiction, original, appellate and advisory.

The Supreme Court in its original jurisdiction adjudicates purely federal disputes or intergovernmental disputes.

1. The appellate jurisdiction of the Supreme Court is described as follows: An appeal shall lie to the Supreme Court from any judgment, decree or final order of a high court in the territory of India, whether in civil, criminal or other proceedings if the high court certifies that the case involves a substantial question of law as to the interpretation of the constitution.
2. In addition to the constitutional matters one can appeal from the decisions of the high court even in civil proceedings if it involves a substantial question of law, though of course only if the high court certifies it.

3. In criminal matters appeal is allowed from the decision of the high court in exceptional circumstances for instance when the high court reverses the decision of the lower court that acquits a suspect from life imprisonment or death.
4. The Supreme Court also has important powers of review regarding decisions of tribunals other than the regular judiciary.
5. The Supreme Court also exercises advisory jurisdiction.

Unlike the United States Supreme Court whose appellate jurisdiction is confined to cases arising from constitutional issues, federal laws or treaties, the Indian Supreme Court is the highest court of appeal concerning civil and criminal cases apart from cases relating to the interpretation of the constitution. The decisions rendered by the Supreme Court are binding on all the authorities throughout the Republic of India.

The Ethiopian judicial system, compared to other federations, stands constrained in its jurisdiction. Even within the limited powers conferred by the Constitution, several internal as well as external factors seem to be at play to maintain the judiciary's low profile. Judicial powers are being taken away from the regular judiciary to special other tribunals whose constitutional status remains controversial. In Ethiopia, despite the constitutional clause under Article 78(4) stipulating that 'special or *ad hoc* courts which take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions and which do not follow legally prescribed procedures shall not be established,' there are controversial tribunals introduced from time to time by the federal legislature and they do seem to dismantle the courts jurisdiction. The clause of prohibition is understandable in light of the terrible experience under the military. While this was the background, recent developments seem to cast some doubt on the workability of this principle. Slowly, important powers are being taken away from the regular judiciary to special tribunals within the various ministerial offices. See for instance Proc. 97/98 that entitles the banks to sell the property of defaulting debtors without going to the courts. Arts. 77 and 78 of Proc. No 286/2002 permit the Inland Revenue Authority to confiscate the property of defaulting tax payers without going to courts. Of the several semi-judicial tribunals, the Tax Appeal Commission, the Administrative Tribunal for Civil Servants, the labor courts, Re-enactment of Urban Lands Lease holding Proclamation (Articles 17 and 18) allow appeal to the regular judiciary only if there is a *basic error of law*. However, many of the government offices administered by board stipulate their decisions to be final.

The point is often made in relation to delay of cases in the courts. It is also alleged that many suspects die in jail before they see the gates of the court. Some have been released right away when the court gives its verdict because they have been in jail for a period beyond the court's sentence. More importantly, the delay is affecting business transactions. Businessmen and women cannot rely on the rule of law and decisions of courts because no one knows how long a case is going to take. Consequently, Civil Service Reform in general and justice reform in particular is top of the agenda for the government. At present, the federal Government is undertaking a major civil service reform program, which in one way includes judicial reform. Unfortunately, the reform concerning the justice system is in the hands of many institutions. The Ethiopian Justice and Legal System Research Institute, the Ministry of Justice and the Ministry of Capacity Building as well as the federal Supreme Court are involved in the process in one-way or another. Consequently, problems of duplication and lack of co-ordination among the various offices and executive interference are bound to occur. There is confusion as well as overlapping of parallel and simultaneous justice sector reform programs and it is highly probable that the judiciary will be influenced and affected by justice reform programs administered and directed by an executive branch. Besides, centralized approach to justice reform in Ethiopia like all other issues, raises additional concerns. In a country that has adopted a dual court structure, the holistic approach to the reform needs to take into account regional disparity and local constraints.

Yet, one may wonder if taking away the judiciary's constitutional power is going to help the institution in the long run. The point here is not that such semi-judicial bodies are unimportant. Comparative study indicates that such semi-judicial bodies exist and they do play an important role along with the regular judiciary. Nevertheless, it is difficult to consider them courts in the proper sense of the term and yet they decide questions affecting the rights of citizens and their decisions are binding upon them. Indeed, it is true that not all cases and controversies go to the regular judiciary and because of the technicality involved or the wish to reduce the caseload of the judiciary, their relevance might not be questionable.

Thus, comparative study suggests two alternatives.

1. While the tribunals are unavoidable they should either be autonomous or else the highest judicial organ as in the supreme court should exercise judicial power on specific grounds. The trouble in Ethiopia is that such tribunals are neither autonomous nor subject to review at a higher level.

2. Although the judiciary arguably has power to interpret the constitution, it has no power of reviewing the constitutionality of laws and this power has been expressly granted to the HoF.
3. The judicial branch's power of reviewing decisions of several other tribunals is far from clear and the Court has not yet established it beyond doubt.

   Most federal laws establishing these tribunals do not allow appeals even by way of last resort to the federal courts. Worst of all Proclamation No. 25/96 which is supposed to define federal and state judicial powers has left so many things unresolved and the federal courts can review by way of appeal matters granted to states as regards exclusive federal matters, but are not allowed to review the bulk of shared judicial powers. A state supreme court decision on a federal matter, not exclusive, could be final and binding without resort to the federal Supreme Court except by way of cassation. See art 79(1), 37 (1), 80(1).

   The vaguely stated principle of federal and state matter under the constitution is somehow defined under the proclamation that establishes federal courts. As per this proclamation the *common* jurisdiction of federal courts is stipulated as follows: federal courts shall have jurisdiction over, firstly, 'cases arising under the Constitution, federal laws and international treaties. Secondly, over *parties* specified in federal laws and those enumerated under Article 5. The federal courts also have jurisdiction over *places* specified in the constitution or in federal laws. Article 3 sub 3 specifies all cases arising in Addis Ababa and Dire Dawa fall into this category.

   Despite the lack of definition of what constitutes a federal matter 'we can presume that all cases that arise or claims that are based on federal law may be called a federal matter and the rest may be categorized as state matter. Yet this rules out the possibility of *shared* judicial power. If we look at other provisions of the proclamation that define the respective original, civil and criminal jurisdiction of the federal Supreme Court, federal High Court and federal First Instance Courts, the phrase 'federal laws' is given a very wide definition under Article 2(3) of Proclamation 25/96 as 'laws of the federal government include all previous laws in force which are not inconsistent with the constitution and relating to matters that fall within the competence of the federal government as specified in the constitution.' Accordingly, all laws enacted by virtue of Article 55 of the federal Constitution by the HoPR are federal laws. Besides all other laws enacted by previous regimes that are not repealed or inconsistent and so long as they fall within the competence of the federal government, are also by virtue of Article 2(3) of Proclamation No. 25/96 federal laws. As a result, the penal law remains federal law. The labor code as well as the commercial code are also federal laws. While this is the general clue as to what constitutes

federal law, the proclamation that defines the civil and criminal jurisdiction of federal courts lists *only a fraction* of the offences or cases to be adjudicated by federal courts. In any case, one cannot safely conclude that the proclamation exhaustively enumerated the jurisdiction of federal courts and as noted, we know for certain that state courts do adjudicate cases arising from federal laws in their competence as state courts, not in their delegated function.

The question then is whether what is defined under Proclamation No. 25/96 is only *exclusive* federal jurisdiction and as to whether there is a shared/concurrent judicial power between federal and state courts? If so, do state courts have jurisdiction to try federal cases as a result of this concurrent jurisdiction and can those cases be appealed before the federal Supreme Court. One author has stated 'state courts not only adjudicate on matters that arise under state law but also on cases that arise under federal laws.' Those federal cases not mentioned by Proclamation 25/96 belong to 'exclusive state jurisdiction because a federal matter by virtue of this proclamation is narrowly defined. Matters not specifically mentioned under the proclamation as falling under the federal court jurisdiction are presumed to fall under exclusive state jurisdiction. The rest of the federal laws, which are not enumerated, are then understood to be within the jurisdiction of state courts. The point, however, is that it is difficult to think federal courts are prohibited from adjudicating what is inherently their subject matter. Not every case arising from federal law, as the Constitution suggests, is within the jurisdiction of federal courts. While what is stated in the proclamation constitutes exclusive federal powers, the balance rightly is adjudicated by the state courts as they do exercise shared powers but not as exclusive state powers. The notion of exclusive state power rules out what is inherent jurisdiction of federal courts. Hence the better view is to consider the bulk of federal cases adjudicated by state courts as shared, not as exclusive state matter and what is defined by Proclamation 25/96 is the exclusive federal matter.

If we agree that what is defined in Proclamation 25/96 is only exclusive federal matter, then the next question is who adjudicates all other cases arising from federal laws and on what capacity. The question in our case then is whether the state courts in doing so undertake a delegated function, or is it a shared jurisdiction as suggested above? The constitutional provision adds to the confusion in this regard.

The Constitution delegates to state supreme courts and state high courts the function of federal High Court and federal First Instance Court respectively. That is, the Constitution speaks of delegation until the HoPR decides to set up lower federal courts across the country, implying the revocable position of the delegated power.

The Amharic version, however, is less explicit implying a given authority, not necessarily a delegated one. *Gudayu be zih Akuhan Kaltewesene ye federal Keftegnana ye Megemeria Dereja Fird betoch siltan le Kilil firdbetoch tesettewal*. The notion of delegation is missing. On the other hand Article 79(7) speaks of concurrent power rather than a delegated one, and the same term is employed under Article 80 which outlines rather more the concept stipulated under Article 78(2).

Despite the apparent confusion in the use of terms delegated or concurrent power, The delegated function of state courts is restricted to exclusive federal matters rather than to shared federal powers. Until such time as the HoPR establishes federal courts throughout, state courts have delegated power to adjudicate exclusive federal cases as defined by the proclamation. But state courts have concurrent/shared, not delegated power over other federal matters not mentioned under the proclamation. As far as shared power is concerned they do not need any delegation. The proclamation has not exhaustively listed all federal matters and whatever is not included in the proclamation belongs to state courts and in doing so they exercise shared judicial power with federal courts.

The trouble once again, however, is that a decision of a state supreme court on such shared, not delegated powers, as a matter of *practice* cannot be appealed before the federal Supreme Court and the latter does not seem to have realized that it is divested from reviewing all federal cases arising from federal laws. The appellate power of the federal Supreme Court is explicitly stated under Article 80(6) 'decision rendered by a state Supreme Court on federal matters are appealable to the federal Supreme Court' and appeal cases from state courts exercising *delegated* federal jurisdiction to a higher court in the hierarchy are stipulated under Article 80 (4) and (5). The anomaly is that the federal Supreme Court by way of *cassation* does review even cases arising from state laws, a much wider power not enumerated expressly under Art. 80 of the constitution. Yet it does not exercise appeal power on shared judicial power. A homicide case decided by the state Supreme Court that is a federal case cannot be brought before federal Supreme Court by way of appeal but only by way of cassation after proving a basic error of law.

There is then a bit of confusion between what is stated under the Constitution, the proclamation and state court practice. The way out seems to argue that the delegated function of state courts in adjudicating federal cases is related to exclusive federal matters as defined by Proclamation 25/96 in which appeal to the federal Supreme Court is expressly permitted. The proclamation does not exhaustively define federal matters and even if defined the state courts continue to adjudicate federal matters. These powers should be

viewed as part of the shared judicial power between federal and state courts and because on federal matters, not limited to exclusive federal ones, the federal Supreme Court has the highest judicial power (Article 80 sub 1), appeal should be allowed when there are grounds of appeal. Note that the Supreme Court's appellate power is not restricted to exclusive federal matters. It is quite difficult to understand why the Supreme Court's power is restricted in practice only to *Cassation,* in all cases other than exclusive federal matters.

The federal Supreme Court a final appellate judicial authority over federal matters. Art 80(6) However, first, the final appellate jurisdiction of the federal Supreme Court has been limited to federal cases that are originally decided by state Supreme Courts in their appellate (delegated) jurisdiction in variation of state high court decisions. That is, the federal Supreme Court is excluded from reviewing appeal federal matters that were originally decided by state high courts and affirmed by state supreme courts. The federal Supreme Court as a matter of practice has also no power to review federal matters decided by state courts in the exercise of shared judicial powers. The only way for the federal Supreme Court is the power of cassation when it discovers a basic error of law. Yet, such power of cassation is not limited to federal matters. As indicated below, it even extends to cases arising from state matters, so long as there is a fundamental error of law. Here one notices the fundamental contradiction: the federal Supreme Court trying to compensate its supposed to be power through the cassation clause.

The Power of Cassation

Unlike other federal constitutions the Ethiopian Constitution indeed seems to take the principle of dual court structure seriously. See art 80 (1),(2). For cassation the final decision must also contain an error of law that is 'basic.' This is a very vague ground. Some consider a case to have contained a basic error of law if there exists a wrong construction in a provision of law with a likely outcome of reversing the decision of the court which was final. The federal Supreme Court considers an error as basic if there is a decision without any legal justification; without comprehending the spirit of a given rule; in violation of a clear provision of law or of a legal principle; applying irrelevant law; misinterpreting a legal rule; framing an issue which the pleadings or oral arguments of the parties have not raised; failing to consider an issue which the pleadings or oral arguments of the parties have raised; awarding a greater amount to a party than he was legally entitled to; failing to award part of the amount a party was legally entitled; giving an order unwarranted by the main decision; lacking jurisdiction of the subject matter of the dispute and in almost all cases emphasized

that such error would finally have the potential to reverse the outcome of the decision.

In this regard it appears, as far as state matters are concerned there is no appeal from state courts to federal courts. However, the assertion that state matters end within each respective state is not without difficulties. The federal Supreme Court has found ways and means of reviewing state Supreme Court decisions even when the case does not involve *federal law*. The appeal power of the federal courts is limited to only exclusive federal cases. Which means that even the bulk of the federal cases, shared powers as this author calls them, end in the state courts. In a very contradictory fashion, however, the federal Supreme Court reviews by way of cassation, cases decided by the state Supreme Court that one could hardly categorize as federal cases, if it discovers a basic error of law.

Could one consider the cassation cases on ordinary civil and criminal cases, which should have been dealt with by the state courts, as falling within the ambit of Article 80 of the federal Constitution? Should it not be limited to federal laws and cases with a view to guaranteeing uniformity of interpretation of federal laws? The relevant provisions state 'notwithstanding the provision of sub-article 1 and 2 of the article:

A. the federal Supreme Court has a power of cassation over *any final court decision* containing a basic error of law;
B. the state Supreme Court has power of cassation over any final court decision on *state matters* which contain a basic error of law. See art 80(3)

If one considers the wording of A and B above, in the latter, the power of cassation is explicitly stated on state matters, in the former it does not limit the power of cassation of the federal Supreme Court. It does not specify the federal Supreme Court's cassation power to federal matters. The introductory paragraph of Article 80 sub 3 and the omission seem to suggest that although appeal from a state Supreme Court on state matters is not allowed as matter of right, the federal Supreme Court can review state Supreme Court decisions by way of cassation. The minutes of the Constitutional Assembly suggest that the federal Supreme Court has the power of cassation not only over federal matters but also on state matters and even more interestingly the federal Supreme Court reviews state matters in which the state Supreme Court has rendered a final decision by way of cassation. Furthermore, a study indicated that in the years between 1996-1998, 1,121 cases came from the state Supreme Courts to the federal Supreme Court for cassation and this constituted fifty per cent of the workload of the cassation division of the federal Supreme Court. The cases by and large relate to possessory actions with respect to immovables; titles related to immovables; filiations and adoption; division of matrimonial property and breach of

contract. These are undoubtedly matters that fall within the jurisdiction of state courts. It is also surprising that the jurisdiction of the cassation division of the federal Supreme Court has never been challenged on the ground of lack of jurisdiction over state matters.

There is a contrary view that holds that the federal Supreme Court cannot review even in cassation state matters as it takes away the jurisdiction of the state supreme court. In short, practice should not justify the wrong interpretation of the law. Ethiopia has adopted a dual court structure and the practice distorts the structural set-up of the courts. This approach forces one to interpret 'any court' under Article 80 as any federal court or any other court rendering a final decision on federal matters. By the same logic Article 10(3) of Proclamation 25/96 also needs qualification and hence be limited to the delegated function of the state courts. Furthermore, opening up the process endlessly increases legal uncertainty, as the winner has to wait until the losing party gives up. Execution of judgment then has to wait for a long period of time.

A more convincing argument for this view could perhaps be made from the principle of federalism. When a matter is assigned to belong to a state jurisdiction it is based on the view that the matter is of local rather than of national importance. It is because it is felt that the case allows for regional variation as opposed to uniformity. If so, the practice of the federal Supreme Court to review state cases, that is matters intended to end within the jurisdiction of the state because they are of local importance, under its cassation power, is contradictory to the federal idea. The current practice of the federal Supreme Court, however, indicates that the federal Supreme Court does review any state matter so long as it is convinced that there is a basic error of law involved. The ambiguity at constitutional level and this contradictory trend is further reinforced by another proclamation that stipulates the power of cassation of the federal Supreme Court over 'final decisions of the regional Supreme Court rendered as a regular division or in its appellate jurisdiction.' There is still a question whether this is warranted in view of the position taken under Article 80(3) but the Supreme Court is using this power to guarantee a uniform interpretation of laws across the states. As can be seen from the experience of other federal Supreme Courts there is a need for guaranteeing uniformity regarding some cases and that function can only be guaranteed through the federal Supreme Court. However, as noted previously, the function of guaranteeing uniformity is often limited to federal laws, and not to state laws. This important qualification is missing in the Ethiopian situation but the Supreme Court has somehow found a way out to discharge this role, extending its scope beyond what is desired. That is to say, the power of cassation of the federal Supreme Court which should have been limited to only federal matters goes further to incorporate even

state matters. Otherwise the Ethiopian Supreme Court stands to be the weakest in terms of jurisdiction, except for cassation power. It can interpret the constitution but cannot declare the law unconstitutional. It is also not the highest appellate court comparable to the ones in the Indian or European federations as its powers are limited to exclusive federal cases.

Chapter Eight

Summary, Conclusions and Recommendations

8.1 THE CENTRAL ISSUES ADDRESSED

The main question addressed in this study was

- how best to accommodate the various ethno-linguistic groups in Ethiopia and to describe
- how the existing federal system has fared in this regard,
- how best to restructure the constituent states with a view to establishing a more viable federal system.
- whether the federal system as it exists in form is optimal but also its limitations in practice.
- How are the legislative and executive powers between the federal and state governments divided and what does this suggest on the centralization trend that was prevalent in the last decade?
- Is the centralization tendency something that emanates from the Constitution or is it something that evolved from the political practice?
- whether the federal system provides sufficient means for guaranteeing shared functions to the constituent units? In this regard what is the role of second chambers in legitimating federal government and the process of policy-making? A related matter is whether the federal system is entrenched with relevant institutions for enforcing federal laws and policies through out its territory?

8.2 FINDINGS

Chapter One sketched the historical background and development of Ethiopia's political system. we concluded that the main challenge for the Ethiopian state centers around its ability to craft a state that is united but that at the same time recognizes diversity. While at the same time imposing a limit on both, makes it attractive for Ethiopia.

Given Ethiopia's long existence as a *de facto* federal system, taking into account the fact that the Ethiopian state was in crisis for most of the 20th century mainly because of the concentration of power and resources at the center, only multicultural federalism remains as a defensible option to hold Ethiopia together. Federalism not only permits the existence of multiple identities under a single political union but also transcends the fixation with the nation-state and its limits in dealing with diversity.

REFERENCES

In Chapter Two explored the various elements of federal systems and of federalism. We found that a federation must comprise at least two orders of government, a constitutional division of powers. A supreme written constitution which cannot be amended unilaterally by one of the orders of government, an institution for umpiring the federation and federal units in their relation, processes and institutions to facilitate intergovernmental collaboration in those areas where governmental responsibilities are shared or overlap, and representation of state interests in the federal policy-making process.

Chapter Three studied the role and function of second chamber in federations. We found that the failing of the Ethiopian Constitution in establishing a legislative second chamber, but only a non-legislative chamber to represent the states, runs the risk of concentration of power at the center, to the exclusion of the states, The Constitution fails to ensure the constituent units' proper place in the institutions of power sharing as well as in the process of policy-making at federal level and by doing so it betrays the federal idea significantly.

Chapter Four is devoted to the context of multicultural federations but with a focus on Ethiopia.

Nigeria seems to have preferred to break down the dominant ethnic groups into several sub-units. So far the balance between the north and the south, the limits on the application of the federal character as well as the dominant role of the military hindered its success. India, while featuring centralized federalism, has over the years moderated its impact because of the dynamic in the party system, the pluralistic approach towards language and the state reorganization. The study of Swiss federalism as well illustrates a number of favorable factors for religious and linguistic integration. Designed from the very beginning the path of a multicultural federation with peaceful co-existence of its diversities. We concluded that for a multicultural federation to be stable it needs to create a multicultural state in which there is political integration of different religious and language groups without destroying particular identities, but also the institutions for power sharing do matter in integrating diversity into the political process.

Chapter Four- Ethiopian federal system, among which the unicameral legislature, the right of state formation and secession for nations and nationalities, which are the abstract (instead of historical) fundamental entities, the presence of 'mother states' for some of them and the problems this leads to, particularly for ethnic minorities within the states (witness the cases of Gambela, Benishangul-Gumuz and Harar), all of which is acerbated by resource constraints. We concluded that these specificities have tended to reinforce centrifugal, rather than centripetal aspects of the federal form of government.

Chapter five concerns the division of legislative powers within the federation. It highlights the Constitution's emphasis of self-rule rather than shared rule.

Chapter Six studied the division of executive powers, while paying particular attention to forms of executive co-operation.

Chapter seven is mainly about the institution for adjudicating conflicts

8.3 OVERALL CONCLUSIONS

8.3.1 The Accommodation of Diversity

1. Multicultural federalism is a measure in the right direction to the extent that it attempts to integrate historically marginalized groups and establishes constituent units whose boundaries coincide with at least some of the major nationalities. Such a measure localized conflicts.

2. However, the federal system has some structural limitations. Its main limitation lies in the overemphasis on self-rule and the corresponding lack of institutions for power sharing In some of the multi-ethnic constituent states genuine power sharing among the diverse and contending groups and a regional government that is acceptable to all the groups is the only viable solution to bring stability to these regions. So far the attempt by the federal government has been limited to shifting its alliance from one group to the other without bringing an acceptable solution to all the groups.

4. A consequence of the strict application of the nationalities right to self-determination.

Recommendations

- Address the issue of local tyranny the establishment of second chambers at *constituent units level* that take care of the interests of local minorities a lower house that represents the interests of every citizen on the other, is vital.
- To balance between the rights of the citizen and of minorities the strengthening of the federal and state institutions in charge of enforcing human rights is also a prerequisite. This is the way to enhance interstate mobility of labor and capital and the way to facilitate federal integration. This way federalism becomes not only a means for accommodation of linguistic and cultural diversity but also a means for forging unity from diversity.

8.3.2 Reorganizing the Constituent Units: Three Options

The issue of structuring the constituent groups is crucial. There are two basic options and a third combining the first two.

1. To grant 'mother states' to the nationalities
2. To use the historic provinces as a basis for restructuring the constituent units.

Remarks

1. The essential attributes of the existing diversity and with a view to ensuring self-rule is a point that is worth emphasizing. Addressing the 'question of nationalities' is thus a step in the right direction. Yet seen from the angle of comparative law as well as from the Ethiopian context itself, this is only a part of and not the complete solution to the problem. Territorial federalism of the American type that assumes a homogenous society is incompatible with the context of Ethiopia.

Recommendations

- National self-determination as a solution to the nationality question, while it might deal with the question of diversity, needs to be taken not separately but along with the political and economic factors that the instrumentalists have rightly emphasized (see Chapters One, Five and Seven).
- Restructuring of the constituent units, while the wishes of the people should as well be at the forefront, should be with the objective of bringing administrative convenience, political symmetry and minimizing the threat to the center, for it is the goal of federalism to forge unity in diversity short of secession.
- The reorganization of constituent units should also take into account factors that cut across the boundaries of the constituent units. It is possible to provide nationalities with institutional avenues at local, regional and federal level, different levels of decision-making that make the nationalities to 'politically consume their diversities.' This will enable not only the translation of diversity into the political process but also to break through the boundary of 'the mother states.'

2. Somewhere in between the two options (the use of historic provinces as a basis for restructuring the constituent units versus the granting of 'mother states' to the nationalities), there is an emerging third position in the internal debate, which is inclined to consider the granting of 'mother states' only to those nationalities that have been mobilized and fought for it while applying a different criterion for the other regional states. This was partly the essence of the asymmetry. The federal system in practice is asymmetric in many respects. The constitutional principle 'Member states ... [of the Federation] ... shall have equal rights and powers' is compromised to a considerable extent in relation to some of the member states. The fiscal competence of the states, the court structure, their representation in the second chamber, the political implications of Articles 46/47 of the Constitution (constituent states for some and not for all), the system of intergovernmental relations and the way federal laws and policies are enforced in the states (extensively discussed in chapter seven) are clear evidence of an already existing political asymmetry.

Recommendation

•The option to introduce as a transitory measure an asymmetric federal system in order to address problems of institutional competence caused by resource constraints, deserves serious consideration.

8.3.3 Power Sharing

1. An overall assessment of Ethiopia's federal structure suggests that it emphasizes more self-rule than shared-rule. This is manifested in a number of ways and in light of the constitution's commitment to national self-determination, once again, we need to note that not only should the two be brought into balance but the federal system should also be counterbalanced by hammering on the institutions for power sharing. The granting of 'mother states' may be important in terms of concrete recognition to diversity but the recognition and promotion of diversity is a halfway solution to the problem. What is important is the *political expression of diversity at an aggregate level*. In other words, providing concrete political solutions to the claims of the diverse groups which go beyond a mere promotion of linguistic and cultural diversity.

Power sharing is perhaps the key area of intervention to break the crisis. One general pattern discernable throughout the emergence of the modern state and that still seems to prevail is the problem of fixation in the Ethiopian discourse. Genuine power sharing remains the only alternative available to end the 'zero sum game,' to enhance the legitimacy of the government and to transform the culture of exclusion to a culture of inclusion.

Recommendations

- The Federal system in Ethiopia lacks sufficient institutional mechanisms for guaranteeing shared functions to the constituent units. The emphasis on self-rule should be complemented by at least: shared policy-making at the center, in the civil service, in the executive and the judiciary.
- A legislative second chamber (HoF) at federal level, perhaps with some veto powers on key issues which affect the interest of the states is called for.

2. The division of executive powers and executive co-operation.

Once one accepts the point that one aspect of the distinction between confederation and federation is the fact that in the latter, the federal government has direct authority and the institutional mechanisms to enforce its laws and policies, the lack of constitutionally entrenched institutional avenues available in Ethiopia must lead to the conclusion that formally speaking the federal government seems to be very weak. In practice, however, the federal government has found several ways of influencing the state governments.

From the internal split in the TPLF and its effect on the ruling party and government institutions, it is easy to observe that party channels cannot suffice. Formal mechanisms for intergovernmental relations, separate from the party structure are, therefore, key conditions for the stability of the federation.

Recommendations

- Institutional mechanisms for intergovernmental relations should be permitted to evolve in the form of autonomous government bodies which will survive regardless of party bickering.
- It is also important to revise the establishing law that sets up the Ministry of Federal Affairs with a view to broadening its functions covering the whole federal territory.
- In the short run, the executive federalism is to be preferred. Under circumstances of lack of resources and trained manpower, one must minimize the unnecessary duplication of agencies and resources by sharing certain institutions such as administrative services and courts. This arrangement has also some other advantages: state machinery might adapt federal laws and policies to local circumstances during enforcement, and because of the difficulty in demarcating federal and state powers this arrangement provides room for flexibility, and may thus be an important factor for maintaining federal unity during the early stages of the federation.
- But where states are themselves unable to take care of their own affairs, let alone enforce federal matters (e.g. Afar, Somali and Gambela) due to a chronic lack of resources and manpower, it may have to be the *federation* which executes federal laws and policies. In other constituent states, one has to work out the responsibility of both governments, i.e. the level of supervision by the center, finance and conditions for intervention, if necessary.
- In the long run, however, the dual system with its co-operative complement is better. This is for the following reasons:
- States do not influence much of the federal decision-making process, therefore they might not be co-operative in implementing it. It is difficult to trust the state agents under such circumstances.
- The efficiency of federal law and policy depends on the state administration and carries with it the risk that the laws and federal programs may remain merely paper tigers. As a result federal programs could be frustrated.
- The presence of a federal structure parallel to the state machinery provides a second alternative for the citizen to look for amidst the linguistic and religious diversities prevalent in the states. Due to the existence of shared powers, if one of the institutions fails to address complaints, one may resort to the other.

- The need for uniformity in some fields and affairs is another good reason.
- A dual executive structure is believed to reinforce the autonomy of the legislative body. It assures the government of the authority to implement and enforce its own legislation, which might otherwise prove meaningless.

8.3.4 The Paradox between Constitutional Form and Federal Practice

We have found a paradox between generously granted constitutional powers for the states versus a centralized federal system in operation. The centralizing tendency was illustrated along two lines, firstly the process of policy-making, the party system in general and the existing system of intergovernmental relations in particular, and secondly the 2001 party crisis, the Ethio-Eritrea War and the federal intervention law, which only seemingly are isolated incidents. The centralization trend in Ethiopia has to be sought at a political rather than a constitutional level, although there are certain possibilities for centralizing tendencies, for instance with regard to fiscal resources which are concentrated at the federal level (see section 3.5 in Chapter Three). This trend is certainly one of the crucial challenges to the evolution of autonomous constituent units.

8.4 EPILOGUE: IS THERE A FUTURE FOR MULTICULTURAL FEDERALISM IN ETHIOPIA?

Because of the confederate legal structure, which until the present has been under the firm control of the ruling party (in a way an anomaly with the federal principle of division of power and multiple centers of decision-making), a change in the party system may result in a significant change in the federal outcome. It is true that if an opposition controls (parts of) the political space there are many possible scenarios.

There are those who argue that once the ruling party loses control of the federal system, the federal system will wither away with it.

Since the May 2005 election, the accommodation of diversity is no longer limited to the accommodation of nationalities but should also encompass the emerging political diversity.

This diversity, apart from the ruling coalition, roughly consists of a coalition of forces which are pro-center but perhaps with some decentralizing features on the one hand, and federalist forces with some policy alternatives distinct from that of the ruling party, on the other. While the possibility of such pro-center forces dominating both federal and state governments cannot be ruled out in the near future, the emergence of pro-center coalition parties seem to be rather reinforcing claims of ardent ethno-nationalist and pro-federal forces in response. In line with this, the centralizing tendency that was prevalent within the ruling party is now strongly challenged by its own coalition partners who have controlled the constituent units.

The ruling party is no longer the one and only real force it used to be after the previous two elections (1995 and 2000). In the two previous terms, the democratization process was more or less a formal exercise as the opposition parties, for one reason or another, were missing through out.

This time however, despite the gloomy post election crisis and the lack of tolerance and accommodation among the political elite on both sides of the political spectrum, in some sense, the May 2005 election and its outcomes seem to have taken Ethiopian politics one important step forward. Post election political developments led to polarization of opinions including those who were considered to be objective observers for long. Leading among Western scholars that have fallen into this trap include Christopher Clapham who in his recent piece openly took pro-opposition stand urging the International Community to accelerate the Transition

In some sense, the May 2005 election and its outcomes seem to have taken Ethiopian politics one important step forward. As already mentioned, for the first time in its entire history significant numbers of opposition party members have joined both the federal and regional parliament. At federal level their size has increased from 12 to 173 (31.8 percent). Except the set back in Addis Ababa the new political environment some how seems to have transformed members of the opposition from insignificance to a formidable force at federal and state level with some potential impact in the decision making process.

Seen from comparative perspective, the post election crisis is not without some parallels in history. Pro-center forces seem to be attempting to reverse the emerging federal process.

One great obstacle in the operation of the federal system and that is often reflected on both sides of the political spectrum (that is the ruling party and the opposition) partly the result of deep rooted authoritarian tendency but partly the result of what one may call the "Ethiopian factor" is the *militant political culture.* That stands in sharp contrast to the *federal political culture*. While in the latter, parties and major actors are expected to work together towards the achievement of their common goals respecting their differences. It is simply a sad situation of "you think my way or you will be eliminated."

The crucial difficulty of the absence of strong institutions for enforcing federal laws and policies will make itself felt. The relevant institutions will have to work on the basis of the rule of law, more than on the basis of a common party ideology.

The new situation also makes mediating and adjudicating institutions which until recently have not been established – such as the Human Rights Commission and the Ombudsman – or whose role has remained modest – such as the House of Federation and Council of Constitutional Inquiry – all the more important.

REFERENCES

The relevance of multicultural federalism, the basis for restructuring the constituent units, some degree of asymmetric federalism, at least in the short run, striking some balance between centripetal and centrifugal forces and accordingly establish institutions that reflect such a negotiated outcome, seems a precondition for a stable federal system.

Summing up, it is submitted that Ethiopia's choice for multicultural/national federalism hinges on many factors.

1. the existence of a *political will* to operate in a politically diverse atmosphere is vital given the lack of a dominant majority, on the one hand and the ethno-linguistic and emerging political diversity, on the other. In other words the culture of respect and open accommodation of political and identity differences is an important infrastructure of federalism. It is a sign of commitment and demonstration of respect to others.
2. while ensuring self-rule to the nationalities is a step in the right direction, this measure needs to be complemented by institutional arrangements that give effect to power sharing schemes to the various actors at federal, regional and local levels. Equally important is the strengthening of the several institutions particularly, the respect for the autonomy of the regions, second chambers at federal and regional state level as well as the mediating and dispute handling institutions is vital for ensuring the rule of law.
3. The protection of minorities in the constituent units free movement of labor and capital is a matter of necessity, if one is to give effect to the notion of 'building one political and economic community' stipulated in the constitution.
4. The negotiated settlement at a constitutional level among the political forces on at least some of the contentious issues is a matter that will significantly contribute towards federal stability.