Chapter one

Federalism in General

What is Federalism?

1. The conventional view with regard to federalism is that it is a form of noncentralized mode of organizing a polity. Thus it is said that “federal polities are characteristically non-centralized.” It refers to a "union of separate states in which power is divided and shared between a strong union government and strong state governments." Inherent in the federal idea is thus the idea of "shared rule and self-rule." Moreover, federalism presumes the existence of at least two layers (tiers) of government in a polity, namely, that of the Federal (General, also Union) government and of the State (Local, also Provincial, or even Cantonal-- in the case of Switzerland) governments.
2. The idea of shared rule and self rule in federalism is advantageous in many respects. Kincaid argues that federalism, as it is practised in the United States, has "solved the fundamental problem of human governance and liberty." He goes on to state that:
    - federalism aspires to maximize the democratic and economic advantages of both small and large republics by minimizing the anarchistic temptations of small republics to fight each other and the monopolistic temptations of large republics to become tyrannical.
    - Thus it is evident that federalism intensifies democracy by creating an atmosphere of popular participation at, at least, two levels.
    - Further, federalism helps preserve the particularities of smaller republics in a big polity by first *protecting them from potential degeneration into non-existence and by, secondly, breaking the imperialistic hegemony of larger republics*.
    - the potential for pluralism, and better local liberty and consequent better legal and even political penetration in federalism can hardly be denied.
    - It is important to note at this juncture that while federalism is an important instrument to accommodate local differences and the quest for local/provincial autonomy in a large polity, it is not only large polities that need it. Small nations, too, might want to adopt federal arrangements for various reasons one among which is diffusion of power across the land so that central tyranny is avoided.

Variants

The word ‘federalism’ comes from the Latin, *foedus*, meaning "covenant”/treaty/agreement. Hence, the covenantal roots of American federalism which is considered as an example of a prototype of federations. Traditionally therefore, federalism, being essentially a covenant or a **treaty**, is a solemn agreement among smaller polities to form a larger perpetual polity. It is from this covenantal idea intrinsic to federalism that Daniel Elazar develops his thesis of various forms of organizing governments on the federal line. He thus identifies four major forms of state organization that could roughly be called "federal", namely: a) Federation; b) confederation; c) federacy; and d) associated statehood. A brief explanation of each is in order.

Federation, is a kind of government which "establishes a common general government in which to form a polity, and constituent units which both govern themselves and share a common constitutional government of the whole." It is the form of government in which "powers are delegated to [the general government] by the people of all the units. Its dissolution can only come about through the consent of all or a majority of its constituent units." It is a system in which "the general government has direct access to every citizen and supremacy in those areas in which it is granted authority."

Moreover, *Federation*, which is the prototype of a federal political system, "is the form of government invented by the founding fathers of the United States in the constitution of 1789." Archetypal examples of modern federations are the US, Switzerland and Canada. For Elazar, federations are those which are formed through aggregation/**coming together** rather than devolution/**holding together**. Consent of the unit is also inherent to (convenantal) federation.

This notion of federation can be more clearly understood when it is contrasted to the other forms of organizing states on the federal line such as confederation and federacy.

Confederation is a system in which "the constituent units form a union but **retain** most sovereign and constituent powers." Thus in a confederation the constituent units "establish and maintain continuous control over the general government which must work through them to reach the citizenry." Moreover, "the secession of individual units may be possible by prior constitutional agreement without general consent." As can be noted from the foregoing, while the general government has direct power over citizens of the states in a federation, such is not the case in a confederation. In the latter case, the constituent unit's government serves as a medium between

the citizens and the general government. In addition, in a confederation, the units have a prearranged right of secession preserved for them from the very beginning. Thus, in confederation, unilateral withdrawal from the "Union" is possible. This is perhaps because in confederations, the units preserve their sovereignty. The Greek *Achean League,* and the ***United*** provinces of the *Netherlands* are mentioned as classic examples of confederations, while the *European Union* is taken as the best modern example. It is important to note here that confederations, to the extent they allow secession, mark less permanent commitment to form a "more perfect union" which is the essence of covenantal federalism.

Federacy is "an asymmetrical relationship between a federated state and a large federate power, providing for potential union on the basis of the federated state maintaining greater internal autonomy by foregoing certain forms of participation in the governance of the federate power." It is thus a transitional step to union. Notable also is the imbalance between the units, i.e., between "the federated state" (which usually might not have had a prior experience as a viable state) and the (larger) "federate power". While federacy is similar to federations in the sense that both have potential for subsequent unity, it does not seek to preserve the identity of the constituent units, thereby always leaving sufficient space for self-rule-which is the essence of federations. It is significant to note that while federations might facilitate homogeneity among the citizens in the constituent units, it does not necessarily and usually lead to a unity that obliterates the constituent units. Federacy, however, might lead to subsequent obliteration of the autonomy of the federated state. Elazar and Friedrich mention Puerto Rico as a federacy (to the US), although it is noted that the term frequently used for this kind of arrangement in the US is "commonwealth."

Associated statehood is also an asymmetrical relationship in which the "federated state is less bound to the federate power, and the constitution which binds them usually has provisions for the severance of ties between the two under certain specified conditions." This arrangement "is similar to federation."

That is to say, just in the same way confederation differs from federation because it allows secession from the union, associated statehood differs from federacy because it allows breaking of ties from the federate power. Thus, one can say that associated statehood is a loose a federacy as confederation is a loose federation.

The foregoing are the four major forms of organizing polities on a federal basis, but other quasi-federal arrangements also exist. Unions (like the UK); leagues, condominiums (Andorra with

France and Spain); constitutional regionalization (e.g. Italy); and constitutional home rule (like Japan) are mentioned by Elazar as forms of quasi-federal arrangements.

Federalism as a Mode of Organizing a Polity

From among the three basic ways of the emergence of polities, namely *conquest* (or force), *organic development* (or accidental evolution), and *covenant* (or reflection and choice), federalism is akin to covenant (or reflection). That is to say, federalism is different from a form of government established by use of force which usually culminates in "hierarchically organized regimes ruled in an authoritarian manner." It is thus different from a system in which there is a "power pyramid" in which "the conqueror (is) on top, his agents in the middle, and the people underneath the entire structure."As such, federalism seems to be at odds with centralist authoritarianism.

Federalism is also seen as distinct from organic evolution which: involves the development of political life from its beginning in families, tribes, and villages to large polities in such a way that institutions, constitutional relationships, and power alignments emerge in response to the interaction between past precedent and changing circumstances with a minimum of deliberate constitutional choice.

Being largely a product of historical accidents, organic evolution results in oligarchic regimes with a predilection to be on the top of the power pyramid or at the center. It thus might create a center-periphery tension with the regime ending to be at the center and at the top. Interestingly, in similitude to conquest, this form of state "creation," also tends to be hierarchical which is not necessarily the case in federalism. Federalism, being a product of "reflection and choice", is unlike *conquest* and *evolution.* Elazar states that "polities whose origins are covenantal reflect the exercise of constitutional choice and broad-based participation in constitutional design." Such polities are "essentially federal in character"- in spite of their structure-i.e., "each polity in a matrix compounded of equal confederates who come together freely and retain their respective integrities even as they are bound in a common whole." Moreover, "such polities are republican by definition."

Most, characteristically, federalism is a system in which decisions are made after deliberate negotiation. It is the element of negotiation inherent in federalism that attracts societies that even

"ail" from "natural" diversities such as culture religion, ethnicity, etc, to federalism. Such societies that are divided on "transgenerational religious, cultural, ethnic, or ideological" lines (also called consociational polities) venture to adopt non-territorial federations which are jointly governed by coalitions of the leaders of each group.86 Such trends leaning towards non-territorial federations which is necessitated by "reassertions of ethnic and regional identities, now worldwide in scope," have given rise to various paces of federalism, while also ushering in what is called "the federalist revolution." A post-modern federalism, "a federalism that is not simply based upon territorial boundaries but recognizes the existence of long enduring peoples as well,"88 is suggested for the purpose of handling pluralism of recent years.

That federalism is congenial to pluralism is too obvious to argue. That pluralism safeguards liberty is the basic federal argument. But the manner of institutionalizing pluralism constitutionally determines the durability of federal arrangements. Thus, pluralism rooted in individual liberty and choice is more convenient to sustain in federal arrangements than those rooted in primordial ties. The latter forms of pluralism sustain themselves by making it difficult for integration to happen. In the context of such rigid form of pluralism (such as the ones evoked by multi-ethnicity), federal principles are said to work if they can "combine kinship (the basis of ethnicity), and consent (the basis of democratic government) into politically viable, constitutionally protected, arrangements involving territorial and non-territorial polities." In such circumstances, federalism both maintains and contains pluralism." “The virtue of federalism,"

Elazar asserted, "not only lies in its utility in maintaining pluralism but also in simultaneously containing it."

Comparative studies of federalism indicate that federalism can best be maintained in societies where: a) there are strong civil societies that help limit government; b) sovereignty is broken thereby allowing for division and sharing of powers between the general (federal) government and local (state) governments, also leaving room for continuous vibrant intergovernmental relations; c) territoriality is the basis of state formation, although at times it might need to be "augmented by ... consociationalism or … other forms of nonterritorial power sharing"; d) there is a total or uniform federalism that is evenly spread over the entire polity created by the federalism thereby disallowing different patterns of behavior to be displayed by the federal government vis-à-vis the different constituent units. (In other words, there should be no special

empowerment of some constituent units as against others or no special restriction of the power of one as against the other.); e) there is a political culture that is supportive of, or congenial to, federalism; f) a will to federate exists; g) there is a broad-based consent obtained usually through negotiations, renegotiations and compromises; h) there is "balance between cooperation and competition" in intergovernmental relations, i.e., where there is a degree of cooperation that engenders dual and cooperative federalism, and yet sufficient room is left for the states to make their own decisions and exercise their "freedom to say "no" to the federal government decisions; and i) where there is an efficient system of separation of powers among the organs of the federal government. In sum, therefore, civil societies, broken sovereignty, territoriality, uniformity, supportive political culture, the will to federate, mass consent, balanced intergovernmental cooperation and competition, and a system of separation of powers can be viewed as factors that make management of federalism easy in a polity.

Nonetheless, federalism is not universally accepted without any opposition.

There are oppositions that come from two directions. According to Daniel Elazar, the forces that oppose federalism are forces of centralization and of fragmentation. Those who oppose federalism on behalf of centralization tend to be totalitarian with consolidationist trends while those who oppose it on behalf of fragmentation are ethno-nationalist movements seeking secession. From among the two, "ethnic nationalism is probably the strongest force against federalism." Yet contemporary problems of ethnic conflict seem to have brought about a drift into ethnic federations as a situation. But can ethnic nationalism be handled through a federation? The answer from commentators is often skeptical. Being egocentric, Elazar maintains, ethnic nationalism is at odds with the principle of federalism. In federalism, consent is the basis of division and sharing of power, not "language, religion, national myths," as is the case in ethnic nationalism. As the elements emphasized in ethnic nationalism are those which breed cleavages among people, a multiethnic federal system (Elazar seems to suggest), can succeed only if the basis of state formation is anything other than ethnicity. Thus, ethnic configurations and state borders should not be coterminous if ethnic federalism is to succeed. Federalism, for Elazar, is "formulated through covenanting or consent of publics of individuals," and in contrast, "ethnic nationalism tends to subordinate all free government to its uncompromising position." Furthermore, federalism is "a democratic middle way requiring negotiation and compromise. All

aspects of society fostering uncompromising positions [such as ethnic nationalism's] make federalism more difficult, if not impossible."

Nonetheless, one can hardly fail to notice the following features of federalism (which have all been hinted at directly or indirectly in the discussion above): allocation of power between federal and state governments; representation at the center; and territoriality. Other commentators see yet other features of federalism such as its importance "as a form of empowerment", i.e., its capability to create "opportunities for regional voices to be heard; and to create regional political elites where they previously did not exist," and to "establish more civil service jobs for local regional groupings."Thus, federalism, being a form of empowerment, creates "more opportunities for negotiating the territorial distribution of power and more representative institutions. Smith further notes that innovation is also an aspect of federalism. This means that federalism lets the states exercise creative politics in meeting local needs thereby serving, in a sense, as "a social laboratory." As such, federalism might be a helpful tool to be used against legitimacy crisis. To this list, one can add the following features as basic to one's description of federalism, namely, the existence of: at least two orders (tiers, or spheres) of government; a written constitution which is legitimate, supreme, rigid, and adjudicable by an impartial body; allocation of legislative powers to states with some genuine autonomy for each order; equal or equitable representation of the constituent units at the center often in an upper house; an umpire and/or procedure (e.g. courts, referendum, or upper house) to rule on constitutional disputes between governments; and a set of processes and institutions for facilitating or conducting relations between governments.

The above mentioned features of federalism also imply some of the values inherent in federalism such as lessening tyranny especially of the executive, being responsive to local public needs, and encouraging innovation. These values of federalism however should not blind one to some of its drawbacks, among which are: complexity and overlapping of state structures, redundancy, potential of local tyranny, and its potential as incentive for secessionist movements.

Federalism not only has drawbacks but also involves ever changing challenges that it has to deal with. Post-cold war times, for example, have presented federalism with three major challenges to confront, namely: a) the challenge of majoritarianism in multi-ethnic societies, b) the challenge of globalization; and c) the challenge of sub-state nationalism. In other words, federalism, being

a territorial and non-majoritarian mode of organizing a polity, is exposed to the criticism of majoritarian democracy especially in ethnically pluralized societies.

Moreover, because of globalization i.e., "the internationalization of capital, the greater mobility of labor, the growth of continental trading blocs," has made the role of the national (and even local) governments grow less and less in intensity or importance. Further, because of contemporary reemergence of local (or sub-state) nationalism, federalism, as a consensual mode of organizing a polity, is facing the challenge of identifying a workable basis of state formation.

It is important to recall from our earlier discussion that ethnic nationalism is one of the movements against federalism. So far, federalism's meaning, aspects, values, factors for and against and the challenges posed to it are discussed. This discussion is hoped to have a bearing on the analysis of federalism in Ethiopia later.

Origins and Waves

Depending on how they came to be, federations are often classified into two major categories and a third which is a hybrid of those. These are: (a) comingtogether (or better known as those formed through aggregation or integration of pre-existing states); (b) holding-together (or famously known as those formed through devolution of a previously centralized system of power in a unitary country); or (c) a combination of these two (in case where polities are reconstituted through a double - flanked process of devolving an old centralized polity while being re-associated with another polity—which used to be a separate polity-- or a unit that went to a temporary independence from the old unitary polity at the beginning of the devolutionary process.) George Anderson identifies some six “waves” of federation namely: (1) classical federations (18th and 19th century federations such as USA, Switzerland); (2) post-colonial federations (e.g. India, Nigeria, etc); (3) post-communist federations; 4) postconflict federations (e.g. Iraq); (5) new federations (e.g. Belgium, Spain, etc); and 6) transnational federations (e.g. EU)

Types: A Taxonomy of Federations

Federations can also be viewed as falling in one or the other of the following categories either: a. *based on origin*: Aggregative, Devolutionary; Coming together, Holding together; b. *based on operation*: dual or cooperative (integrated or interlocked); or parallel or administrative/executive;

c. *based on the mode of state formation*: territorial/personal; administrative/ethno-linguistic (or multi-national). In practice, federal systems' operational success depends on the kind of inter-governmental relations that exists in a polity. Thus a federation may be characterized as: (a) dual/co-operative; (b) legislative/executive; (c) parallel/integrated.

Division of Powers in Federations: Approaches

Division of powers between the federal, the state, and local governments is the hallmark of federal systems. Dispersion of power territorially is (by setting up at least two tiers of government and dividing, often, the legislative but also the judicial and executive powers between them) is one of the key features of federalism. Powers can be allocated to each tier as follows: Federal Powers,

State Powers, and Concurrent (alias joint, or shared) powers. The constitutional method used to divide the powers might follow one of the following techniques, namely:

a) Explicitly enumerate distinctly federal, state, and concurrent powers and leave the rest (i.e., the residual powers) to the states—as it is the case, for instance, in the USA; or Explicitly enumerate state powers (without enumerating the federal powers) and reserve the rest (i.e., the residual powers) to the federal government—as it is the case for example in Canada.

When enumerating some powers as either "federal" or "state" and grant it to them explicitly, we also grant them other powers which are either *implicit* in, or *necessary* to exercise, the explicitly granted powers. Implicit and necessary powers come to be visible in the process of exercising the explicitly granted powers.

Chapter Two

Choosing Federalism: *Origins of federations*

Federations have arisen in very different circumstances, each being the unique result of choices by political leaders and larger historical forces. Federalism has been chosen to bring together formerly separate units into a new country, or to rearrange a previously unitary country, and even as a product of both processes together.

Every federation is unique. Few generalizations can safely be made about how and why federations are created and evolve. However, in every case of federalization, political leaders have constitutionalized two tiers of government as a way to realize and reconcile their respective goals while minimizing violence—or in some cases in order to end it.

Today there are 192 countries in the United Nations, and approximately 28 are federal. Most countries did not exist within their current boundaries a century ago and only a handful did so two centuries ago. Each country has its own story regarding its origins and its territorial and political evolution. These stories involve wars and revolutions, dynastic marriages, colonial empires, international treaties, and peaceful democratic processes.

Federations have emerged within these larger processes of country formation and evolution in a variety of ways:

• In some cases, **coming together** was central to the emergence of a new, federal country. Previously separate units—independent states or colonies—concluded that they had enough common interest and shared identity to join together in a federal arrangement. Why federal? **Because a federal structure permitted each unit to preserve some of its autonomy while pooling other aspects in the new community.**

• In other cases, the country may have originally been created with a unitary and highly centralized (often authoritarian and undemocratic) structure. The eventual choice of federalism was in response to democratic political pressures for **devolution** because of the country's multiple languages, religions or ethnicities, and, perhaps, major economic differences between

regions. In some countries, the regions pressing for autonomy may have been distinct political entities in the past.

• In yet other cases, these two processes combined. Canada emerged from the creation of Ontario and Quebec out of a previously unitary regime and from the addition of new provinces. India too combined these two processes.

Historic waves of federalism

Federations have been formed in a series of historical waves over the last two centuries.

The first wave, from the late eighteenth to the early twentieth centuries, saw the **creation of new countries with formerly independent units coming together in a federal form**. Switzerland and the United States initially came together as confederations: the American experiment with confederation lasted for only eight years, from 1781 to 1789, when the 13 states addressed a weakness at the centre by forming the first modern federation; the Swiss confederation evolved over more than five centuries, but after a brief civil war it adopted, in 1848, a federal constitution modeled on the American example. Germany's first federal constitution emerged in 1871 as a successor to loose confederal arrangements. While Canada was initially formed in 1867 out of the coming together of three colonies in British North America (and in due course expanded by the addition of others), its federal bargain included splitting the largest of these into two provinces—so its origins were both in coming together and devolution. The six colonies in Australia came together as a federation in 1901.

In Latin America, four federations emerged in the nineteenth and early twentieth centuries. They all won independence following Napoleon's conquest of Spain, but then had checkered constitutional histories with periods of dictatorship and civil unrest. Their federal constitutions emerged over time, sometimes after earlier experiments with both federal and unitary regimes. In the last 20 years, the transition to genuine democracy in Argentina, Brazil and Mexico has brought real life to their federal constitutional arrangements. Venezuela is now highly centralized.

The post-war break-up of the European empires saw the creation of various **post-colonial federations**, as well as some failed attempts. India, Pakistan, Malaysia, and Nigeria have endured as federal systems. The efforts by the departing colonial powers to bring together formerly separate colonies into new federal countries were not a success in the West Indies,

Central Africa, French West Africa, and East Africa, nor were attempts to introduce federal arrangements in Indonesia, Mali, and Uganda. The very small federations of Belau, Comoros, Micronesia, and St. Kitts and Nevis did emerge from decolonization.

The next significant wave came with **new federations emerging from the collapse of communism**. The communist Soviet Union, Czechoslovakia, and Yugoslavia all had nominally federal constitutions, but were in reality centrally controlled one-party regimes.
However, as they democratized, their federal structures took on real political significance. With little experience of democracy and the tremendous stresses of transition, all these federations failed. However, Russia, which itself had been a federation within the old structures of the Soviet Union, did emerge as a post-communist federation. And Bosnia-Hersegovina emerged out of Yugoslavia with a federal structure, though it remains under a strong measure of international tutelage. About the same time, **new federations were emerging from unitary states**. Belgium is the clearest example, formally adopting a federal constitution in 1993. As Spain democratized after Franco, it devolved significant powers to its autonomous regions and became effectively federal. South Africa also adopted an essentially federal structure (along German lines), when it democratized after the end of apartheid. Other countries—Italy, Indonesia, Peru, UK—moved towards substantial devolution to regional governments, but they are not yet fully federal. Both Bolivia and the Philippines have debated adopting federalism.

The most difficult cases have been the **new federations emerging from post-conflict situations**. Under the Dayton Accord, Bosnia-Herzegovina was established as a federal regime; however, it has remained under a kind of international supervision. Ethiopia, which had never been democratic, adopted federalism after the fall of the Mengistu regime, as did Sudan as part of a comprehensive peace accord that ended its long civil war with the South. The Congo's new constitution, under which it recently conducted the first nation-wide elections, is effectively federal. Iraq's voters ratified a federal constitution in 2005, but its implementation is proving to be very challenging.
All of these situations remain difficult. In other cases, such as Sri Lanka and Cyprus, efforts to find a federal formula to end conflict and division have failed so far. Nepal is currently looking at the possibility of federalism, following the end of its civil war.

The last case that should be mentioned in the history of federalism is the European Union. The EU is a unique political institution, perhaps more confederal than federal, but it has a number of federal features, and there is a continuing debate amongst Europeans about whether to move more fully in a federal direction. In any case, the EU experiment remains highly relevant for students of federalism.

Evolution of federations

All federations evolve over time. Some have gone through major formal constitutional changes, while others have changed significantly despite largely stable constitutions. Factors such as the creation of new constituent units, urbanization, major demographic and economic shifts, new technologies, major global and domestic political developments, and the experience of democracy have been critical in shaping federal experiences.

The oldest federation, the United States, has had the same constitution for over 200 years and has made only 27 amendments to it. India has made 94 amendments to its constitution in 60 years. Brazil has had seven constitutions since independence, Mexico six, and Venezuela 26.

Some federations have maintained constitutional continuity, while others have had legal breaks because of revolutions or military regimes.

As will be noted, in many federations the number and character of constituent units have changed dramatically over time. Whatever the extent of formal constitutional changes, every federation has changed over time, often in ways that would have surprised the founders. The United States and Australia were to be decentralized federations, but have become centralized, while Canada, which was to be centralized, evolved in the opposite direction.

In all long-established federations, transportation and communications technologies have shrunk distances and shaped the development of politically conscious communities within them. As well, parts of a country that in the early history of the federation may not have existed or have counted for little—the west of the United States and Canada, the interior and north of Brazil—have assumed greater weight over time.

Suitability of federalism

Federalism is not always best, and there is no best version of federalism.

Federalism seems particularly suited to democracies with very large populations or territories or with highly diverse populations that are regionally concentrated. Over time, federalism requires a significant part of the population to have a sense of identity with the whole country, as well as lively and engaged political communities at the regional level.

Federalism is suitable for some countries, not all. Federalism is a democratic form of government, rooted in constitutionalism and the rule of law. It can be a sham in non-democratic countries, though there have been cases of partial democracy or liberalization where federal structures had some real life.

Federalism and Democracy

The **Soviet Union**, **Yugoslavia** and **Czechoslovakia** were not true federations during the period of Communist rule, even though they had federal constitutions. All real power was centralized in the Communist Party. The situation was more complex in Latin America: **Brazil** and **Argentina** had periods of military rule at the centre, but sometimes allowed relatively free elections within their states or provinces (particularly during transition from military rule; in Brazil, the states played a key role in designing the constitution to end such rule). In **Mexico**, the Institutional Revolutionary Party (PRI) largely controlled elections for many years, but over time its grip loosened, particularly in certain states. **Nigeria** and **Pakistan** have had similar experiences of intermittent military rule and federal democracy. Thus, some undemocratic federations are clearly for show, but in others their federal structure might have some reality.

Moreover, in all these countries, federal constitutional arrangements came to have real significance during the transition to democracy as previously subservient constituent units were empowered. In the formerly communist countries, the federal structure played a role in their break-up.

It is no accident that all democracies with populations much larger than 100 million people are federal (Japan and Indonesia are the largest non-federal democracies, but both are regionalized) and all continental-sized democracies are federal. There seems to be a limit to the size of population or territory that a single, popularly elected government can manage effectively. As well, highly diverse democracies, especially those with distinct, regionally concentrated

populations, typically have pressures to give these populations their own governments for certain purposes. Thus federalism is increasingly proving to be attractive to some formerly unitary countries, as well as to developing or transitional countries that are seeking a viable form of democracy.

Of course, federal democracies, like unitary democracies, require certain cultural and other characteristics, including respect for the rule of law and minority rights and an element of shared identity. Judgments can be wrong about where democracy can survive. There are many more democracies today than twenty or forty years ago. Sixty years ago, many doubted that India could hold together as a peaceful democracy, but it has. Moreover, India's success in surviving as a democracy was actually dependent on its adopting federalism.

However, a number of federations have failed, especially early in their existence. Most had had little experience of democracy, little history as a shared country, and a weak sense of common identity. The post-communist and some post-colonial federations failed because of the stresses of democracy as well as other factors, such as extreme imbalance of constituent units or fatally weak central governments. Local or regional identities were stronger than any larger national identity and were seen as inconsistent with or opposed to such an identity. Failure took the form of break-up or secession (or even expulsion in the case of Singapore's leaving Malaysia).

Chapter Three

Federalism's importance, variety and common futures

Federalism is increasingly important in the world.

• Twenty-eight countries, home to over 40 per cent of the world's people, either call themselves federal or are generally considered to be federal.

• Almost all democracies with very large areas or very large populations are federal.

• With democratization, Argentina, Brazil, and Mexico are becoming increasingly federal.

• Belgium, Ethiopia, and Spain are formerly unitary countries that have become federal.

• Federalism has been adopted in post-conflict environments in Bosnia, the Democratic Republic of Congo, Iraq, Sudan, and South Africa, and is being considered in Sri Lanka and Nepal.

• The European Union has a number of federal characteristics.

Federalism's variety

Federalism comes in many varieties and contexts

Federations differ greatly in their social and economic composition and their institutions. They include very large and very small countries, rich and poor countries, countries that have very homogenous and very diverse populations. Some federations are long-standing democracies, while others have more recent and troubled histories of democracy.

Federal structures—the internal institutional arrangements—vary greatly. Federations can have as few as two territorial units or more than 80. Some federations are highly centralized, concentrating power in the central government, while others are decentralized, with extensive autonomy and discretion allocated to constituent units. Some have quite clear divisions of powers between the central and the territorial governments, while others have widely overlapping powers. Some have prime ministers and parliamentary governments; others have presidents and congressional institutions. They may have proportional representation or plurality electoral laws. They may have only two political parties, or several. Some federations are stable and harmonious, while others are unstable and divided. All of these factors affect the functioning and success of different federal regimes. No one model would be appropriate in all circumstances. The capacity for variety is one of federalism's strengths.

Federalism's common characteristics

Despite many differences, a few common characteristics distinguish federal systems from other kinds of government.

The following characteristics are usually thought to make a system of government federal:

• **At least two orders of government,** one for the whole country and the other for the regions. Each government has a direct electoral relationship with its citizens. The regions have many names: we shall refer to them as the 'constituent units' of the federation.

• **A written constitution** some parts of which cannot be amended by the federal government alone. Major amendments affecting the constituent units commonly require substantial consent from them as well as from the central government.

• A constitution that formally allocates legislative, including fiscal, powers to the two orders of government

- **Some genuine autonomy for each order**. However, federations differ greatly in the way and extent to which they define distinct powers for the two orders.

• Usually some special arrangements, notably in **upper houses**, for the representation of the constituent units in key central institutions to provide for regional input in central decision-making, often with greater weight given to smaller units than their population would otherwise merit.

• An **umpire** or procedure (usually involving **courts**, but sometimes referendums or an upper house) to rule on constitutional disputes between governments.

• A set of processes and institutions for facilitating or conducting **relations between governments**.

If there is an **essence of federalism**, it is that there are **two constitutionally established orders of government with some genuine autonomy from each other, and the governments at each level are primarily accountable to their respective electorates.**

The more specific design features of each federation reflect local institutional traditions, and the desired level and kind of autonomy sought. Normally, federalism requires democracy and the rule of law because non-democratic regimes usually do not permit genuine autonomy for constituent units.

Federalism and devolved government

In confederal systems, the central government is a legal creation of the constituent units. In unitary systems, any regional governments are legal creations of the central institutions. In federal systems, each order of government has an autonomous constitutional existence. Some unitary countries are more decentralized in practice than some federations.

The two oldest federations, the United States and Switzerland, started as confederations. Typically these regimes proved weak and unstable. It is debatable whether there are any real confederations in the modern world. The European Union is a unique political creation with both confederal and federal features. Benelux is a confederal arrangement of a limited kind, as it CARICOM in the Caribbean. The United Arab Emirates calls itself a federation, but has many confederal features.

Most countries have a unitary system of government. Often they have regional administrative structures with no elected government. In other cases, they can have constituent units (often called provinces or regions) with independently elected governments and substantial responsibilities, but such governments derive all their powers from the central government or legislature, which could, in principle, take them back. However, in many cases it is hard to imagine such a political reversal, so some unitary countries can have strong similarities to federations.

In fact, some unitary countries have devolved more substantial powers to their constituent units than have some federations. So federations are usually, but not always, more decentralized in practice than unitary regimes.

Chapter Four

Division of Powers in Federations

Models for assigning legal powers

There are two broadly different approaches to distributing powers within federations: the dualist and integrated models. Many countries have elements of both. The dualist model typically assigns different jurisdictions to each order of government, which then delivers and administers its own programs. The integrated model provides for many shared competences and the constituent-unit governments often administer centrally legislated programs or laws.

Under the dualist, or classical, model of federalism, constitutional jurisdiction over different subjects is usually assigned exclusively to one order of government. In this model, each order of government normally delivers programs in its area of responsibility, using its civil service and departments; the federal government's departments are thus present throughout the country.

In practice, the dualist model does not achieve a neat separation of powers because so many issues have regional, national, and even international dimensions and many different responsibilities of governments are themselves intertwined.

• In all dualist constitutions there are some shared or **concurrent powers** in which both orders of government can make laws. Canada and Belgium have few concurrent powers, while Australia has very extensive concurrency. Where powers are concurrent, federal law is generally, but not always, paramount, meaning it prevails in cases of conflict.

• In addition, there can be **de facto concurrency** when both orders of government have different powers that bear on a question: this is **a kind of shared power** and typically it does not involve paramountcy. For example, in old constitutions, the environment is not usually a head of power, but both orders of government may have different legal powers that permit them to regulate the environmental impacts of a major infrastructure project, so it can proceed only if they both agree Under the integrated (or interlocking) model of federalism, exemplified by Germany, some subject matters are exclusively assigned to one order of government (e.g., defence to the federal government), but most subject matters are concurrent, where the central government sets framework legislation that the constituent units can complement (but not contravene) with their own legislation. As well, the governments of the constituent units deliver programs in these concurrent areas. Thus the central government has a small civil service in the regions, largely

limited to its areas of exclusive competence. This model is also sometimes called administrative federalism because the principal powers of the constituent units are administrative. A great challenge in this model is restricting the detail of central policy making so as to leave room for decisions and laws at the level of constituent units. The German model also provides for joint decision making in these areas of concurrency, in that federal laws must be approved by a majority vote of the representatives of the *Länder* in the Bundesrat; South Africa has adopted aspects of this model.

Canada, Brazil, and the United States are examples of largely dualist federations; Germany, Austria, South Africa, and Spain follow the interlocking model. India and Switzerland have strong features of both. Australia is largely dualist in administrative arrangements, but has so many areas of concurrency that it has some strongly interlocking features. No federation is purely of one form.

These considerations of legal powers need to be combined with the financial arrangements in a federation. The next chapter will show that the control and distribution of revenues is central to the real distribution of powers in federation.

Legal sources of powers

Normally, the distribution of legislative and fiscal powers is set out in the constitution. In some federations, the powers of individual constituent-unit governments can be substantially determined through bilateral agreements with the federal government. Some federations permit the delegation of legislative responsibility between orders of government while others do not.

All federations have provisions in their constitution dealing with the allocation of powers between the central and constituent-unit governments. Constitutions differ enormously in the level of detail and approach. For example, the United States Constitution has only 18 headings for the powers of the federal government and most of these are actually concurrent with federal paramountcy; all other powers (residual powers) lie with the states. The Indian Constitution, by contrast, has three long lists: the union list has 97 headings, the concurrent list, 47, and the state list, 66. The Spanish Constitution lists competences that may be assigned to the autonomous communities, but this is done legally through statutes of autonomy for each community, and these statutes can vary.

In many federations, interpretations by the courts and evolving practice has shifted the real division of powers significantly away from the intent of the constitution's drafters, making the federation more or less centralized than was first envisaged. This is probably most true of the older, less detailed constitutions.

Varied federal distributions of powers

While there are important commonalities between federations regarding which powers are allocated to which order of government, there are also significant differences.

Federal constitutions have been written over the last 230 years in widely different contexts. More recent constitutions reflect lessons from the experiences, good and bad, of earlier constitutions. It is not surprising, therefore, that there is great variation in the approaches taken to the distribution of powers among federations. A few powers are almost always assigned to the federal government and others almost always to the constituent-unit governments, but, for many powers, we have a pattern of tendencies, strong or weak, frequently with outliers.

Sometimes there is no clear pattern.

In practice, the precise allocation of powers within any federation is a complex matter that reflects not just the text of the constitution, but also court decisions and other developments.

Patterns in the Distribution of Some Powers within Federations

The following indicates tendencies regarding the allocations of powers across most federations. 'Concurrent' means both orders can make laws in a defined area, usually with federal paramouncty. 'Joint' means the two orders make some concurrent decisions together. 'Shared' means each order has some different legal powers in the broad area and decisions are made independently.

- Currency: always federal
- Defense: always federal, sometimes constituent-unit (CU)
- Treaty implementation: almost always federal, sometimes CU
- External trade: usually federal, occasionally concurrent, joint or shared
- Interstate trade: usually federal, occasionally concurrent, joint or shared
- Intrastate trade: usually CU, sometimes concurrent
- Major physical infrastructure: usually federal, sometimes concurrent, joint or shared or CU

- Primary/Secondary education: usually CU, occasionally concurrent, rarely federal
- Post-secondary education and research: no clear pattern
- Income security: mix of federal, concurrent, joint, and shared
- Pensions: either concurrent, joint, shared, or federal
- Health care: usually CU, sometimes concurrent, joint, or shared
- Mineral resources: no clear pattern
- Agriculture: no clear pattern
- Environment: usually concurrent or joint, rarely CU
- Municipal affairs*: usually CU, occasionally joint or shared
- Court system*: usually joint or concurrent, occasionally federal, rarely CU
- Criminal law: no clear pattern
- Police: usually shared, occasionally concurrent or joint, rarely federal or CU
- Customs/excise taxes: almost always federal, sometimes concurrent
- Corporate and personal taxes: usually joint, shared or concurrent, sometimes federal

*** Supreme and Constitutional courts are almost always established in the constitution and are thus not a head of power.**

In some federations, municipal, or local governments are also constitutionally established, though the federal or CU governments may have some powers over them.

Constitutions differ not just in the assignment of powers, but also in their specificity. Even the most complete listing can overlook something, so constitutions must assign residual powers specifying which order of government gets any power that is not mentioned. Typically, residual powers go to the federal government in federations that emerged from previously unitary regimes and to the constituent-unit governments in federations that brought previously separate units together. Residual-power clauses can be important, notably in constitutions such as that of the US, where the federal powers are defined (in a short list) and residual powers are the sole source of constituent-unit powers. However, courts have tended to give broad interpretations to specified powers, whether federal or constituent unit, so the effect of residual power clauses has been less than envisaged by constitutional drafters.

Criteria for distributing powers

There is no simple formula for determining the appropriate allocation of powers between orders of government.

While there are some patterns in the allocations of powers within federations, there is also great variety. The European Union has a continuing debate on which powers to allocate to Brussels or to leave with the member states. In this regard, Europeans have developed the concept of subsidiarity, a principle that the central government should take on powers only when it is necessary to achieve an objective and when it adds value in comparison to what the governments of the constituent units could achieve on their own. While helpful, the principle has proven elusive in practice. It is notable that the European Union has not empowered Brussels in the areas of defence and foreign policy, which are the classic central powers of federations. Inevitably, each country has its own debates around the allocation of powers. Decisions will reflect questions of efficiency and effectiveness, but also, critically, views of what are shared objectives across the federation.

Asymmetry in the distribution of powers

Federations usually allocate the same powers to all of the constituent-unit governments. However, in some federations, some constituent units receive more powers than others. Constitutional asymmetry is usually limited because major asymmetry poses challenges in the management of a federation. There can also be more pragmatic forms of asymmetry.

The term ‘asymmetry’ is applied to many aspects of difference between the constituent units of federations: asymmetrical political weight,asymmetrical group or language rights and status, and asymmetrical powers. Each of these poses different issues. Clearly, different constituent units have different political weights because of their population, wealth, or strategic position; some federations try to limit this by giving extra weight to the representation of smaller units within central institutions. Special and distinct provisions regarding group, linguistic, or religious rights within particular constituent units are a frequent feature in very diverse federations.

Asymmetrical distributions of power between constituent units in a federation are unusual. This is particularly true of constitutionally established asymmetries. Flexibility of this kind can

address demands coming from a particular region for a decentralization of a power or powers that the constituent units elsewhere may not consider a priority.

However, special treatment for one constituent unit can create pressure for the same treatment for the others. As well, if the powers that are devolved asymmetrically are very important, or go to a very large constituent unit, this can create pressure to limit the weight of representatives from that unit in the central government's decision making on these subjects. In practice, most constitutional asymmetries of powers in federations are of relatively secondary powers or special arrangements for very small and recognizably distinct constituent units. (This is different from the lesser legal status of territories or tribal areas and of national capitals in some federations.) A number of federations do have non-constitutional arrangements that permit some asymmetry in the administrative or policy responsibilities of constituent units.

Dealing with conflicts over powers

Federations can deal with conflicts over the distribution of powers by using the courts, emergency powers, constitutional amendments, political compromise, and elections.

The classic way to resolve differences over how to interpret the division of powers is by reference to the courts, though a few federations have more political processes such as referendums and upper houses. Many federations also have special provisions—the most extreme being emergency powers—that permit the federal government in certain circumstances, notably emergencies, to suspend the normal authority of the government in a constituent unit.

Very often, the conflict is not over the legal interpretation of what the powers are, but over what the respective powers or roles of the two orders should be. Such disputes must be addressed politically. The governments can negotiate to try to reach an agreement on how to operate within the existing constitution. Or they may agree to amend the constitution, which in most federations requires a special majority (and not always the consent of the constituent-unit governments).

Where governments cannot agree, they (or the different political parties) can take their respective cases to the population during elections to seek support for their views.

Chapter Five

Money and Fiscal Powers (Fiscal Federalism)

The importance of money **Arrangements around the raising, sharing, and spending of money are critically important, both politically and economically, for the functioning of federal systems.**

The truism that money matters applies as much in federal systems as it does in life generally.

First, arrangements around who determines and collects taxes and other revenues and who spends them, how, and on what are fundamental to the real division of powers in a federal system. They can significantly alter the apparent legislative powers of the two orders of government.

In particular, central governments often use their very strong fiscal powers to influence or control constituent-unit governments in various ways.

Second, the ways in which money is raised and spent can significantly affect the economic health of a federation.

• **Tax and spending incentives** affect the efficiency and performance of the economy. They can be used by constituent units to try to attract businesses and citizens to locate and invest within their boundaries. While some tax and spending competition can be healthy, it can also be costly in attracting economic activity to inefficient locations and causing a loss or misuse of revenues.

• **Revenue raising** (taxes, charges, debt, and issuance of money) **and spending** by governments affects the total level of activity in the economy whether policies are expansionary or contractionary. Some federations have had major problems managing coherent fiscal and monetary policies, with serious bouts of inflation and exaggerated economic cycles of boom or bust.

Fiscal and monetary powers are important both economically and in their larger impact on the roles of the two orders of government.

Assignment of revenue powers

There are principles for the effective assignment of revenue-raising powers between governments in federations. In practice, however, there is great variation, largely because

the constitutional arrangements, histories of revenue raising, and political cultures of countries can be so different.

Many economists argue that a federation should minimize the extent to which constituent units use tax competition to influence companies and individuals to locate in a particular area. This suggests constituent units (and local governments) should have limited control over mobile taxpayers and tax bases (such as corporate and personal income tax and sales taxes). Instead, they should be given power over property taxes because property does not move. In practice, the mobility of taxpayers or taxable activity depends on cultural factors (are citizens very attached to living in their constituent unit?), on distance (is it easy to work or shop in another jurisdiction?), on geographic endowment (natural resources) and on technology (new technologies offer new locational choices).

At the same time, some economists favor fairly extensive tax competition (along with other kinds of competition in public policies) because they believe it can promote better policies: it is a potential advantage of federalism. Some economists argue that constituent units should have the right to vary the rates of personal and corporate taxes, but that it is economically efficient to have one (federally or jointly decided) structure for these taxes. There is no one answer about the best allocation of tax powers within federations. Too much competition between jurisdictions over taxes on mobile factors can lead to a downward spiral of tax rates, with a loss of revenues from some tax bases and a need to focus taxes more on other tax bases. But some competition can be positive.

There are other considerations about how best to assign tax and revenue powers:

• There are advantages to making governments **accountable** for the money they spend, and it is usually argued that they will be more accountable to their electors if they have to raise most of their revenues themselves.

• There are also **equity** considerations related to whether poorer constituent units should be expected to have a greater tax effort, lower services, or transfers to assist them.

• There can be **administrative advantages** to centralizing certain kinds of revenue collection, even if the revenue base belongs to constituent units. Some federations are rich in natural resources, which can provide large revenues or rents, especially from oil, gas, diamonds, and some metals. Such resources are typically very unevenly distributed between constituent units, causing tension within the federation. In some cases, the central government owns these

resources; in others, it is the constituent-unit governments (or, rarely, private landowners): in either case, there can be debates about who collects what revenues from natural resources, how resource revenues should be distributed, and how much the distribution of resource revenues should affect the distribution of other revenues.

Chapter Six

Political Institutions of the Central Government

Importance and variety of central institutions

The political institutions—legislative, executive, administrative, and partisan—at the centre of a federation help define and shape the character of the federation. The institutional arrangements within the constituent units and the central government are usually of the same type.

Central governments in federations are made up of formal and informal institutions and practices, which, in turn, strongly affect the nature and functioning not just of the central government but of the whole federation. Such institutions can:

• be parliamentary or presidential in form;

• give considerable weight to regional or special group representation;

• use majoritarian or proportional electoral systems;

• feature one dominant political party, two alternating parties, or multiple parties of very different sizes; and,

• have a partisan, political culture of winner-takes-all, or one of consensus with broadly based governments and decision making.

In order to maintain their legitimacy and effectiveness, central governments should meet their constitutional responsibilities, foster national unity, develop national identity, protect rights and minorities, and promote the healthy functioning of the federation. In practice, their success, or even their commitment to these goals, can depend heavily on the choice of institutional arrangements and practices.

Parliamentary, presidential, and mixed regimes

Both parliamentary and presidential-congressional regimes, as well as mixed variants, demonstrate great variety in terms of their actual functioning. In practice, either can result in a concentration of power within the executive branches or a dispersal of power in which

both the executives and the legislatures play significant independent roles. In the former case, intergovernmental relations are characterized by executive federalism.

Federations can have parliamentary, presidential-congressional, or mixed institutions in both orders of government. In parliamentary regimes, the cabinet (executive) is largely drawn from the legislature and must keep the confidence of the lower house to stay in office. In presidential regimes, the president is elected by the population, and the president names the cabinet (perhaps with some measure of legislative ratification). Neither the president nor the cabinet requires the confidence of the legislature to remain in office. There are important variations on these models in Russia, South Africa, and Switzerland.

The presidential-congressional model is based on a separation of powers between the executive and the legislature, while the parliamentary model integrates the two. Parliamentary systems produce very strong executives when one party controls a majority in the legislature and the cabinet can be assured that its legislative proposals are adopted. Even when there are coalition governments, party leaders in cabinet can have substantial control over their members in parliament. Presidential systems can have much weaker executives because the president's party may not control the congress—and even if it does, party members may be much more independent than they typically are in parliamentary regimes.

In practice, either system can produce executives that are strong and largely in control of the legislature, or weak and heavily dependent upon it. The actual situation will depend on constitutional rules (e.g., powers of the executive vs. those of the legislature) as well as the state of the party system. Some constitutions give the executive (notably a president) exceptional powers, e.g., to issue decrees, relative to the legislature. In competitive politics, the party system is central. If the governing party is dominant, it can control both branches of government, while if it is weak, it can require the cooperation of other parties: thus executives can be strong or weak in either presidential or parliamentary regimes.

Design of Legislative and Executive Institutions in Some Federations

The **United States, Argentina, Brazil, Mexico, Venezuela**, and **Nigeria** all have presidential regimes (Nigeria previously had a parliamentary regime), but they differ substantially. Argentina and Venezuela have exceptionally strong presidents compared to the others. **Australia, Austria, Belgium, Canada, Germany, India, Malaysia**, and **Spain** have parliamentary institutions.

South Africa has a mixed regime, under which the president is elected by the parliament as both head of state and of government, and does not sit in parliament. **Russia** also has a mixed regime, in which the president is elected by the population, but the government needs the confidence of the parliament.**Switzerland** has a seven-member executive elected by the parliament, which then serves independently of parliamentary confidence for its term; the executive represents all major parties.

In federations with strong executives, the executive branch tends to dominate relations between the central government and the constituent-unit governments—leading to what is known as executive federalism.

Strongly Concentrated Power within the Central Governments of Some Federations

Argentina and **Venezuela** are sometimes called hyper-presidential because the president controls so many levers. In Argentina, the president has extensive authority to issue legislative decrees and to direct fiscal transfers to the provinces. In federations with strong one-party dominance of both the central and constituent-unit governments **(South Africa, Ethiopia, India** for a period after independence, **Mexico** under the Institutional Revolutionary Party or PRI), key decisions tend to be made within the governing party, whether the system is parliamentary, presidential, or mixed, and the formal institutions largely execute the party leaders' decisions. **Russia** increasingly has one dominant party at both levels and an exceptionally powerful president. **Malaysia** has strong one-party dominance at the centre, with an opposition party controlling only one state.

Upper houses and territorial representation

The central legislatures of federations usually have some balancing of representation by population with representation by constituent units. This federal dimension of representation is usually embodied in upper houses, but it can be present in lower houses as well. The method for selecting members of the upper house and the powers of the upper house differs greatly among federations, with important consequences for the functioning of federations.

Many countries, federal and non-federal, have two houses in their legislatures. In federations, these two houses

• are always constituted on different representative principles, with the upper house usually using a formula based on constituent units and the lower house allocating membership closer to representation by population;
• are elected or named in different ways; and,
• can have quite similar or very distinct powers.

There is no consistent pattern across federations on these matters.

However, in parliamentary regimes, the lower house is usually the confidence chamber that determines who forms the government.

Principles of representation

Almost all federations have an upper house whose membership is in some way representative of the constituent units. The prevalence of such upper houses in federations is associated with the idea that both the population and the constituent units are part of what makes a federation, and both dimensions need to be reflected in the central institutions.

Representation in the upper house is frequently based on equal representation for each constituent unit, but many federations have allocations that take into account differences in population (e.g., big units getting two or three times the number of representatives of small units). A few federations elect some upper-house members as representatives of constituent units and other as representatives of one or more alternative constituencies (a national list; a non-geographic community).

Where they are elected directly, members of upper houses usually have longer terms than members of the lower house, and their electoral district is often the whole constituent unit, while lower-house members come from smaller districts. This gives a different political character to elected members in the two houses. In some federations, members of the upper house are indirectly elected by the legislature of the constituent unit (or, in a few, by a combination of direct and indirect election).

Directly, and even indirectly, elected upper houses usually play a relatively small role in representing the interests and views of the governments of the constituent units.

The upper house that plays the most distinctive federal role is probably the Bundesrat in Germany, which is not elected: *Länder* delegations are named by their governments and

officially led by their minister-presidents. Legislation that affects the *Länder* (now about 40 percent of all legislation) must be approved by the Bundesrat, which means that the central government needs a weighted majority of these governments to pass such acts. The Bundesrat is thus central to intergovernmental relations. The unique, interlocking nature of German federalism has given both orders of government a huge stake in who controls other governments, with consequent interlocking of federal and land parties.

Finally, in many federations, there are also provisions that give extra weight to representation from smaller constituent units in the lower house. These can guarantee a minimum (or even a maximum) number of representatives in the lower house. Typically, such extra weighting for smaller units occurs much less in lower houses than in upper houses, but it can be significant, with Brazil being the most dramatic example. Whether in upper or lower houses, elected members typically vote more along party than regional lines: the advantage to smaller units of their extra representation in legislatures is that it can help tip the balance of votes towards parties they favour.

Representation in Lower and Upper Houses in Some Federations

Argentina, Australia, Brazil, Nigeria, Mexico, Russia, South Africa, Switzerland, and the **United States**, all have an equal number of members in their upper house from each full constituent unit. **Austria, Belgium, Canada, Ethiopia, Germany**, and **India** have unequal representation by constituent units, with weight given to population differences. **Spain** represents all mainland provinces equally, but varies representation of autonomous communities (states) by population. **Mexico** gives all states equal representation, but elects one-quarter of senators nationally by proportional representation.

Most federations elect members of their upper house directly, but a number (Austria, Belgium, India, Spain) elect all or some indirectly. The Russian and South African upper houses have representatives named by both the executives and the legislatures in the constituent units. Germany's *Länder* governments appoint delegations to the Bundesrat.

In Switzerland and Ethiopia, constituent-unit legislatures decide how to select their members of the national upper house.

Powers of upper houses

There is no consistent pattern in the powers assigned to upper houses in federations. In some federations, they have both all the powers of the lower house and special additional powers; for example, over treaties, declarations of war, and high appointments.

At the other extreme, some upper houses are little more than revisionary chambers, with limited powers to amend or delay some legislation (and possibly subject to an override by the lower house).

The range of arrangements includes those affecting the scope of an upper house's powers (types of legislation and government action it can affect) and the strength of these powers (veto, delay, right to force a joint sitting of both houses to resolve a deadlock—which favours the more numerous lower house). Some upper houses are designed to play a role in federal matters, such as legislation affecting the constituent units or specified minorities or rights. While almost all federations have some kind of upper house (Venezuela does not), many of these have quite minor powers or weak legitimacy because of how they are selected.

Political parties

Political parties are basic to the functioning of federations. The character of parties and of the party system reflects political cleavages within the population and partisan history, but is also significantly shaped by electoral laws and constitutional arrangements.

Federations vary in having one dominant party, two or more major, or many parties. Usually parties operating at the federal level are linked to parties within the constituent units, but there are exceptions.

Political parties and electoral laws in federal systems, while not usually part of the constitution, play a critical role in determining how a written constitution operates in practice. As well, political parties can change much more quickly than a written constitution. The functioning and character of some federations have changed quite dramatically as the political party system has evolved, even though the constitution may be unchanged. This has been particularly true in countries that shift from a dominant party—such as Congress in India or the PRI in Mexico—to a more pluralistic and competitive system of parties.

The two main variants of electoral regimes are proportional representation on the one hand and majoritarian or plurality regimes on the other. There are also mixed regimes.

• **Proportional representation** (PR) regimes tend to be based on relatively large, multi-member electoral districts in which voters choose between party lists, but there are many variations. A key issue in such regimes is the minimum threshold or share of the vote that is needed to elect a representative. In some cases, this is a defined share of the national vote (e.g., five per cent). In other cases, it is simply a result of the number of representatives being elected from a district: the more representatives, the smaller the proportion of the vote necessary to get elected.

• **Majoritarian or plurality regimes** tend to be based on one-member electoral districts where the candidate with the largest vote (a plurality) is the winner. In some cases, the top two candidates meet in a second round of voting to determine the winner.

• **Mixed regimes** elect some members in a majoritarian way from single-member constituencies, and others on the basis of votes cast for the parties. The effect on overall representation in the legislature is usually dominated by the rules of proportionality.

Historically, federations with common-law and British constitutional antecedents have tended to have majoritarian electoral laws, while continental and civil-law federations have opted for PR regimes, but there are numerous exceptions. As well, direct elections of presidents must be done by some variation of a majoritarian regime, even if PR is used in the legislature. Some federations use different electoral rules for the lower and upper houses, when both are directly elected.

It is usually said that PR regimes lead to more splintered party systems than do majoritarian regimes, but this depends a great deal on precise rules (such as the height of the minimum threshold) and on the characteristics of the voter base supporting different parties. Thus some federations with PR have only two or three significant parties.

However, it is rare in a PR regime for one party to win enough votes to have a majority in the legislature, so parliamentary federations with PR typically have multi-party coalition governments. Majoritarian regimes frequently make it possible for a party with substantially less than a majority of the vote to win a majority of seats.

Thus parliamentary federations with majoritarian electoral laws more often have one-party government (though the party in power may change with some regularity). While majoritarian electoral systems generally give parties with larger vote shares a disproportionately large number of seats, much depends on the regional distribution of votes.

Smaller parties that are regionally concentrated can also benefit from majoritarian systems. In such federations as India and Canada, regionally based parties sometimes have a much larger share of seats than of votes, thus raising the importance of regional (or local ethnic, religious, or language) demands on the national stage.

A critical issue in a federation is the electoral base of the various political parties. Such parties can have strong or weak links to class, religion, ethnicity, or region; they can be narrowly or broadly based.

Typically, the challenge of managing a federation is greater if regionally based parties are very strong.

Chapter Seven

The Legal Pillars of Federalism

The constitutional basis of federalism

Effective federal governance must be based on a written constitution and the rule of law. The constitution sets the basic framework and principles of the federation. A constitution can be symbolically important in fostering unity or discord within the country.

Constitutions vary greatly in their length, specificity, and accessibility.

Written constitutions are essential in federations to establish the framework within which each order of government operates. At a minimum, the constitution must establish certain key institutions and allocations of responsibility within the federal system.

Federal constitutions vary enormously. The older federations usually have much shorter constitutions than those created since the middle of the twentieth century. These older constitutions were written before modern government and often are silent or elliptical on current major responsibilities of government, such as environmental management.

Moreover, their allocation of powers can rely heavily on a few basic principles (e.g., residual powers, national interest, trade and commerce) whose interpretation may have evolved very differently from the original intentions of the constitution's authors. Shorter constitutions tend to be more flexible than those with very detailed lists of powers for the different orders of government.

There is a large measure of choice as to what is put into a constitution or left to ordinary laws. This can lead to major debates because advocates can seek to constitutionalize provisions to give them symbolic recognition, or the extra protection of constitutional protection, or both. Constitutional provisions around the definition of the country, the recognition of minority nationalities, language rights, and religion can be very important in dividing or uniting a population around the constitution. In more recent constitutions, there are often long sections on social and economic rights. Ideally, there should be broad consensus around constitutional provisions because it is the 'basic law': this is the reason for special thresholds for constitutional amendment.

Constitutional arbitration

Two independent orders of government in a federation create a need for a constitutional arbiter to resolve conflicts over their respective constitutional competencies. This role is usually assigned to the courts.

A federal constitution must provide a method for resolving possible conflicts over the legal powers of the two orders of government. A citizen or company can obey only one of two contradictory laws. Legal conflicts can arise in different ways:

• When both orders of government have concurrent legal authority over a subject, the laws of one order must prevail in cases of conflict; thus constitutions indicate which order has paramountcy. Normally the central government's laws are paramount, but there are exceptions
(e.g., provincial laws on pensions prevail in Canada).

• Both orders may pass laws that conflict, and defend their respective laws as deriving from distinct powers. For example, the central government might have a power over internal trade, while the constituentunit governments have the power over property, and they pass conflicting laws relating to these two areas. In such a case, resolving the conflict requires determining which power—internal trade or property—is the more relevant.

• Sometimes there is no actual conflict between two laws, but a government or private interest objects to a law passed by another government on the grounds that the law exceeds its legal jurisdiction.

• Sometimes, the objection is on the grounds that the law contravenes a constitutionally established right.

A strong, autonomous judiciary is crucial for the rule of law. Within most federations, the judiciary, in particular the highest or constitutional court, has the ultimate authority for resolving constitutional disputes.

Resolving such disputes can put a high court in the sometimes difficult position of rejecting an action or law that a powerful government considers important.

At least two federations do not give all aspects of final arbitration on the constitution to their high court. The Swiss federation, which is based on the concept that ultimate sovereignty rests **with the people, decides on the validity of contested federal (not cantonal) laws by referendum.**

In Ethiopia, the House of the Federation, elected by the state legislatures, has final authority, subject to legal advice from judges.

Emergency and special non-federal powers

In some federations, the central government or its executive can override normal constitutional arrangements in special circumstances, such as emergencies. While justified in limited circumstances, such powers can be abused to circumvent the spirit of constitutional government. The political evolution of some federations has constrained the use of such powers or rendered them obsolete.

Some federations have been deemed quasi-federal because their central governments have extraordinary powers to intervene in the jurisdiction of constituent units. These can take the form of an emergency power, in which the central government may suspend the government in a constituent unit. They can be a general directive power, or a power of suspension, or of disallowance. In each case, there is a question of what constitutional techniques might constrain the central government's use of such powers: the courts might have a role in judging the emergency, or the use of the power may require the consent of legislators— though this can have limited effectiveness if the head of government's allies control the legislature; South Africa's constitution is probably the most developed in specifying protections. Over time, originally quasi-federal countries, such as Canada and India, have evolved away from the use of such powers. However, they have been used extensively to weaken some federations, such as Argentina.

Examples of Emergency and Override Powers in Some Federations

Constitutionally, the **Canadian** central government can disallow provincial legislation before it is enacted and declare any work or undertaking to be federal, but in practice these powers are obsolete. In **India**, a state government can be removed and replaced by President's rule. While this power was intended for emergencies or a breakdown of constitutional government, it was used for partisan purposes and is now subject to greater discipline by the courts and India's political culture. Under **Nigeria's** new constitution, the president may declare an emergency in a state and suspend its government for a period, which has happened once. In **Russia**, the president has broad powers to declare a state of emergency in a part of the country and to suspend acts by the federal units that contravene the constitution, federal law, treaties, or the rights and freedoms

of the human being. **Argentina** has seen over 175 federal interventions in provincial affairs, including the removal of governments, but the courts have declined to rule on this matter, which they deem to be political. **Pakistan's** federal government can name provincial governors, approve the dissolution of a provincial assembly by the governor, appoint caretaker provincial governments, and provide directions to a province. The **South African** constitution permits the central government to issue directives to a province or directly assume a provincial responsibility when the province is in breach of its legal or constitutional obligations; but to be continued, such actions are submitted to the upper house and require its approval and periodic review.

Constitutional amendment

Federal constitutions have special procedures and majorities for their amendment, often requiring some measure of consent by the legislatures or populations of constituent units. Consequently, constitutions can be difficult to amend and alternatives to formal constitutional change are frequently sought to adapt federations to changing circumstances.

Democracies usually have special procedures and majorities for constitutional amendment. This is particularly true in federations, where the federal principle leads to a role for constituent units in constitutional amendment, especially in coming-together federations as opposed to formerly unitary federations. Federations often give constituent units an absolute veto over certain matters affecting them directly, notably changes in their boundaries or merger with another unit. ***Federations vary greatly in how much consent is necessary to change the powers of all constituent units: this can range from not much more than a majority to virtual unanimity.***

Consent for constitutional amendments usually involves legislatures and executives, but there can also be a requirement for a majority or special majority in a referendum vote. As well, constituent units may have a smaller or no role in relation to amendments that do not affect them directly. Constituent units are usually free to amend their own constitutions, where changes are within the permitted bounds of the federal constitution.

Amendment rules have often made constitutions difficult to change and the politics of constitutional amendment can prove very divisive.

As a consequence, federations frequently look for alternatives to constitutional amendment.

Examples of Constitutional Amendment in Some Federations

The **United States** Constitution requires approval of two-thirds of members in both national houses and of three-quarters of states. **Brazil** requires 60 per cent in both houses, but, given the dominance of senators from small states, this is a high threshold. **Spain** requires special majorities within the two houses but no role for the autonomous communities. **Austria** normally requires only a special majority in the lower house or a national majority in a referendum. **Belgium**, though not centralized, has an elaborate procedure culminating in a need for a two thirds majority in both houses (thus in effect requiring substantial consent from both major communities). **Russia** normally requires supermajorities in both houses and two-thirds of subjects of the federation. **South Africa** requires special majorities in the lower house plus the consent of six of the nine provinces for amendments affecting them. **Australia** requires double majorities of those voting in a national referendum on changes to the federal constitution: a national majority plus majorities in four of the six states.

Some federations have different amendment rules for different sections of their constitution: thus **Canada** has at least five rules, with some issues requiring unanimous consent. Likewise

India has different rules for different sections: the unusual noninvolvement of states in changes to state boundaries was deliberately chosen in the expectation that early adjustments to state boundaries would have to be made.

Rights in federal constitutions

Many federal constitutions have provisions relating to rights that can be invoked in relation to laws or actions of governments. Rights can be political, legal, social, linguistic, or economic. They can be important as political symbols. They can apply equally throughout the federation or be specific to a constituent unit or a population. The interpretation of rights is a central role for courts in many federations.

While federations are based on an allocation of powers to the two orders of government, these powers are typically constrained by provisions regarding rights that are set out in a constitution. Thus legislative authority over criminal law may be constrained by various legal rights, while that over education may be constrained by the constitutional right of certain populations to

education or schools in their own language or religion. Such constitutional entrenchment of rights can be an important part of a federal deal or agreement because it provides certain protections when powers are transferred to the central government or to constituent-unit governments when the federation is created.

Protections for minority rights can be especially important in this regard. Constitutions are major symbols in defining a country, and rights provisions can be particularly important with the public. Minority rights provisions in particular can be a source of pride and unity or of discord within a country. Many rights provisions apply equally to all orders of government in a federation, but others, notably minority rights, might be quite different in different jurisdictions. As well, some constituent units have their own constitutions with rights provisions that may differ from those in the national constitution.

There is tremendous variety in the kinds of rights written into constitutions as well as the way they are expressed. The classic rights are political (freedom of speech, assembly, press, and religion) and legal (protection against arbitrary arrest and detention, due process of law).

They may be economic (property). Some federal constitutions also entrench particular rights regarding specified languages or religions (language of government, denominational schools). Some constitutions also protect equality rights (against discrimination on whatever basis). Some have ambitious statements of economic and social rights (to employment, schooling), which may be viewed more as goals than enforceable rights because of the limited means of government, especially in poor countries.

Court interpretations of rights provisions can have very broad implications for the functioning of a federation. Older constitutions usually have more concise and classic lists of rights, while newer constitutions (or those recently amended) have longer lists that cover not just classic rights but also various rights important to key groups.

Role and character of the courts

Given the importance of judicial interpretation of the constitution, the legitimacy of the courts is a key issue. It will be affected by how judges are named and the role courts assume. There are frequent debates about the appropriate role for the judiciary because

judges are not accountable to the population. Judicial procedures for dispute resolution need to be balanced by political procedures as well.

Most federations have procedures for ensuring that candidates for judgeships (especially high courts) are screened for professional competence.

Some, notably presidential regimes, require judicial nominations to be reviewed by at least one house of the legislature. Some consult the constituent units on such nominations and even require their consent. In a number of federations, there is a formal or informal allocation of places on the high court to judges from specified constituent units, languages, or legal backgrounds (where the country has more than one judicial system). Finally, judicial independence is normally protected by strong tenure—making it very difficult to remove a judge during his or her term. Good salaries can make judges less susceptible to bribes.

There is always some dimension of political choice in naming judges, so that the balance of a court can be influenced by the political views and preferences of those selecting the judges. Alternation of parties in government tends to produce more balanced courts, as do procedures to ensure high professional competence. No high court is immune from charges of bias, so it is important that it have a stock of credibility and legitimacy when dealing with controversial cases. While some federations are very successful in this, in others, the independence or competence of the courts is regarded as weak—even as heavily influenced by the executive or susceptible to bribes. However courts are established, a judicial system can be stressed in dealing with very divisive cases. The political fights over abortion and civil rights in the United States have both played out heavily through the courts. In India, frustrated citizens are making increasing appeals to the courts on issues such as air pollution and the monkey population in Delhi, issues that involve as much policy as legal content.

Sometimes a court can make costly rulings on such issues without having the responsibility to implement them.

In some federations, the courts' role on certain matters is limited because disputes are assigned to another body (e.g., the water commission in India), or major agreements are political, not legal (e.g., federal-provincial agreements in Canada), or governments are required to solve disputes, even over the constitution, through political procedures before recourse to the courts (e.g., South Africa).

Chapter Eight

Intergovernmental Relations and Politics

Interdependence and interaction

All federations have considerable interdependence between governments. How politicians, civil servants, citizens, and other stakeholders try to influence outcomes in jurisdictions other than their own goes to the heart of each federation's political life.

Interdependence is inevitable and significant in all federations. It is particularly marked in federations where the constituent-unit governments deliver many federally legislated programs or laws, where there is extensive concurrency or joint responsibility in many areas, and where the constituent units depend heavily on conditional financing from the central government.

Federations can deal with this interdependence through formal, even constitutionalized, mechanisms, or ad hoc and informal arrangements.

Heads of governments and ministers can dominate, or legislatures can play an important role. Political parties can be important. There can be highly differing levels of consultation, coordination, and cooperation, and this will vary, not only between federations and subjects, but also between controversial policy issues and more routine administration.

All federations have some measure of cooperation and conflict. On controversial issues, the central government can try to influence constituent governments through its financial or legal powers, while the latter may withhold their consent if that is legally possible. Both can try to win public support to advance their goals.

Upper houses in intergovernmental relations

Upper houses have often been seen as federal houses, in that their composition in some way reflects regional factors. In practice, few are important in intergovernmental relations. However, they can influence the relative weight of constituent units within central institutions, especially when the upper house has significant powers and its composition favours small constituent units.

Upper houses that are indirectly elected (by constituent-unit legislatures) typically play a relatively minor role in intergovernmental relations (as opposed to other matters) because they send representatives of both government and opposition parties (though the former will usually represent their government's views). Where members of the upper house are elected directly by the population, they tend to vote more along party than regional lines and to be quite independent of their constituent-unit governments. Of course, sometimes, party leaders at one level can influence the election of certain candidates at the other level, and then use them to pursue intergovernmental goals. As well, some government leaders have patronage powers that can influence members of another legislature. Even so, most upper houses play a limited role in intergovernmental relations as such. Where they may have a greater federal impact is in federations that give small constituent units equal representation or disproportionate weight in the upper house, and the upper house has significant powers. This situation can favour smaller units in central decision making.

Institutions and processes

Federations use various institutions and processes for intergovernmental relations. These can be formal or even constitutional, but often they are informal. Most federations manage intergovernmental relations through many kinds of political and legal instruments.

The main focus of intergovernmental relations is always vertical relations between the central government and the constituent units. Horizontal relations between constituent units tend to be less important and developed, with the focus often on regional cooperation between some constituent units. In some federations (Switzerland, Canada), the constituent units have mechanisms to promote the development of common positions in dealing with the central government, but this can be difficult where interests diverge.

Most federations are characterized by a dense network of relationships between governments: between heads of government, ministers, other elected officials, senior civil servants, policy advisors, and local administrators. At the highest level, in most central and constituent-unit governments, both the head of government and certain key ministers are deeply involved.

• Heads of government usually have an office for intergovernmental relations close to them (in the cabinet office or interior ministry, often with a responsible minister). Many federations have

regular meetings between heads of government, which can be useful in resolving issues and developing relationships.

• Finance ministers always play a major role in fiscal federalism and other economic issues. Their ministries usually have a special staff for this function. Frequently, links between finance officials are highly developed.

• Other ministers, at both levels, will be engaged depending on their interests.

Coercive versus consultative federalism

In some federations, the central government is quite dominant and can be coercive in relations with the constituent units. In others, there is more equality and a greater emphasis on consultation and negotiated agreements. While all federations combine some measure of cooperation and conflict between governments, the political climate of intergovernmental relations in federations differs greatly.

In some federations, the central government has strong legislative powers (such as concurrency) over the constituent units or a strong spending power, so it can be quite unilateral legislatively, or use conditional grants to induce constituent units to comply. Constituent units may try to use intergovernmental relations to limit these powers, but their success will depend on their ability to rally political support. The United States has many features of coercive federalism, and, given the relative absence of intergovernmental institutions, states rely heavily on lobbying within Congress to promote their interests. Some very highly centralized federations, such as Malaysia, have little structured intergovernmental dialogue because the constituent units are so weak.

In other federations, the central government is more constrained and must adopt a consultative and cooperative approach. Usually this reflects important political assets of the constituent-unit governments (powers, patronage, finances) and perhaps strong regional cleavages in the country (Canada, India). In some cases (Germany, Switzerland, South Africa), there is a culture of cooperation, which may even be a constitutional principle, though Germany shows how such a culture can be frayed by partisan conflict. Canada, Australia, India, Mexico, and Brazil tend to have quite conflictual politics, rooted in the functioning of their institutions and characteristics of their societies, but in all cases there are issues where both orders of government see a common interest in reaching agreement.

Chapter Nine

Unity and Diversity

Challenge of unity

Unity is a key issue or challenge in many federations, particularly those with major divisions of identity along class, linguistic, ethnic, religious, and other lines. A major unity challenge can exist in both federal and non-federal regimes. In some cases, the challenge takes the form of a separatist movement.

We have seen that federations are extremely varied in their institutions and social make-up.

• Some are relatively **homogenous** and citizens share a strong and dominant sense of a national identity. In these federations, unity is not a major issue and the social forces in the federation often create pressures for further centralization.

• Others are very **diverse** and citizens identify with very distinct groups, which have conflicting views or objectives. In some cases, members of a particular group may see their identity as incompatible with the national identity, thus creating tensions around the issue of national unity. This is especially true where such a distinct population is regionally concentrated.

The Irish movement for Home Rule in nineteenth-century Britain, the long civil war in South Sudan, the Basque insurgency under Franco in Spain, and the current insurgency of Tamil rebels in Sri Lanka are all examples of major unity challenges in unitary countries. The United States, Nigeria, and Pakistan during their civil wars, and Canada, faced with a separatist movement in Quebec, are all examples of federations facing unity challenges. While the risk of separatism is often associated with federalism, historically, separatist movements have been prevalent in many unitary countries as well.

Repressing diversity

Major unity challenges can be met with repression, exclusion, and assimilationist policies, but these often worsen the problem and risk leading to violence.

Some governments, especially undemocratic ones, respond to challenges to unity by trying to assimilate distinct sub-populations into the mainstream or to repress their political liberties. While, historically, some assimilationist policies have succeeded in integrating a minority into the larger population (e.g., in adopting the majority language) such policies risk creating strong resentments and a sense of alienation. Some groups, notably immigrants, may accept

assimilationist policies, e.g., into a majority language, which would be resisted by long-established groups within a country. If a group targeted by repressive policies becomes deeply alienated and sees little prospect of peaceful resolution, it can turn to violence.

Embracing diversity

Democracies, including federations, facing a unity challenge can promote a positive political nationality that citizens feel is compatible with their other important identities within a climate of tolerance and accommodation. Embracing diversity as a national value can enhance unity.

The long-term unity of a democracy requires that a substantial majority of its citizens have a sense of national identity and attachment to the country. This is least likely when an important group within the population believes that the national identity conflicts with its strongly felt regional, ethnic, religious, or linguistic identity—for example, because the population is seriously under-represented in government, its religion is discriminated against, or its language is not respected or permitted to be used.

Frequently the challenge of unity involves not only addressing the concerns of minority groups, but also promoting a political culture of tolerance and accommodation within the minority and majority communities.

Some majorities have defined their country in terms that reflect only themselves, to the exclusion of minority communities. At a minimum, a more positive culture promotes tolerance and accommodation of differences, but it will be even more effective if there is a collective embrace of diversity as part of the national character, with symbols and policies that resonate with the different streams in the society. India, Nigeria, Ethiopia, Canada, Switzerland, and South Africa are all examples of federations whose approach to promoting unity involves the embrace of diversity. Success in developing such a culture can be difficult if politicians or leaders within various communities (majority and minority) try to stir up strongly hostile feelings and fears between groups. A dominant majority, such as a religious or linguistic group, may be reluctant to give up its historic privileges. Yugoslavia is a tragic example. Positive leadership can be vital, as the examples of Mandela, Gandhi, and Nehru show.

A balanced approach to diversity

The embrace of diversity requires a balanced approach of 'building out' and 'building in'. Building out involves accommodating the demand for regional government. Building in involves ensuring that key minorities are integrated into the symbols, institutions, and policies of the central government as well as through other constitutional provisions.

Creating or strengthening regional governments controlled by local populations can empower a regional population to make decisions that are important to it. It also permits such populations to see their particular character reflected in local governmental institutions. These are central characteristics of a federal accommodation and culture that permits national and regional political communities to coexist in harmony.

At the same time, a policy of empowering constituent governments to the exclusion of accommodating key regional minorities within central institutions risks accelerating the dynamic of disintegration in a country.

If key identity groups do not see themselves properly reflected in central institutions, there is little likelihood they will maintain or increase their sense of national identity and more likelihood that they will support ever more devolution—or secession.

Building out: devolution

Building out involves creating or empowering regionally defined constituent units to respond to the demands of a territorially concentrated population, and is at the heart of federal arrangements. However, there are practical issues: within an established federation, it can be difficult to create new units; regional boundaries rarely enclose a very homogenous population, so there can be significant minorities within regions; there may be a limit to how many regional units can realistically be created; some populations with a strong sense of distinct identity may be geographically dispersed; and strongly asymmetric arrangements can be hard to sustain.

The stability of many federations, notably very diverse ones, such as India, Canada, and Switzerland has depended on their devolved, federal form of government. However, once a federation takes shape, constitutional rules can make it difficult to redraw boundaries to create new constituent units. India is the most notable exception: it has redrawn the map of its states and periodically creates new states.

Switzerland created the new canton of Jura after an elaborate referendum procedure. Nigeria's state boundaries were dramatically redrawn by military regimes using non-constitutional procedures.

As well, some federations, such as India, Nigeria, and Ethiopia, have far more language groups and ethnicities than they have constituent units: it is not practical to imagine that all small groups can have their own constituent unit (though some Indian states have sub-units within constituent units that have distinct majority populations.)

Furthermore, populations do not live in tidy geographic parcels, so even constituent units that are home to a distinct population may not contain all of that population in the country; as well, they usually have one or more significant minorities within their constituent unit.

Finally, some quite distinct ethnic, linguistic, or religious groups may be so widely dispersed that there is no prospect of their being the largest population within a constituent unit. Thus, the creation of constituent units can be part of a response to diversity, but it cannot be the whole answer.

In some cases, one part of a federation favours much more devolution than the other parts, which raises the possibility of asymmetricarrangements. However, these can be difficult to sustain if they entail significantly different constitutional powers for constituent units, especially when the unit receiving special powers is relatively large.

Building in: a representative centre

Building in promotes unity by enhancing the recognition and role of key populations within the institutions of the central government and by providing protection for minorities.

A balanced approach to a unity challenge normally includes measures for building in, to ensure that a key population with a distinct identity feels properly recognized and represented in the country's central institutions and broader constitutional provisions. A balanced approach could include

• **defining the country or national community** with both nationally accepted symbols (rights, flag, etc.) and appropriate inclusion of the symbols, history, religion, and language of key populations (and not defining the country in terms of the majority population only);

• **promoting certain national programs** (e.g., a common market, a national health system, a national pension scheme) that are widely viewed as uniting, national projects of mutual benefit;

• **ensuring that key populations are properly represented and empowered in central institutions**: formal or informal practices can ensure a representative composition of the government, the civil service, the military; in extreme cases, (e.g., post-conflict) there may be negotiated power sharing within the government between the key communities;

• protecting minorities within the constituent units: federations often have different majorities and minorities at the national and constituent-unit level; protecting minorities within the units (language, religion, school rights, civil service, etc.) can be part of a balance of rights and protections in the whole federation.

Language policy is often very sensitive. One of the great advantages of federalism in linguistically diverse countries is that it permits different languages to predominate in different areas (building out), but it must also address the language concerns of minorities at the national and constituent-unit levels (building in). In practice, language policy is often highly complex with many special arrangements. In some federations (India, Nigeria, Malaysia, Ethiopia), in addition to provision for local languages, a non-indigenous language might be adopted as a major link language because it is seen as more neutral (English, for example, also has the advantage of being a major international language).

Pakistan has adopted Urdu, the language of a small minority, as the official language, though English and Punjabi remain very important; and Indonesia, which is not a federation, also chose to make a small minority language the official language, Indonesian. Majorities can be resentful of the need to accommodate minority languages, just as minorities can be insistent on accommodation. Each country must find its own equilibrium. Often (Canada, India,

Switzerland, Ethiopia), some language rights at both the central and constituent-unit levels are protected in the federal constitution. In other cases, such rights are primarily matters of law or practice and are left to each order of government. The philosophy underlying language policies differs across federations: some emphasize the rights of individuals wherever they are; others tie language rights to particular locations (or to tiers of government).

Aspects of Language Policy in Some Federations

India has 40 languages with more than one million speakers and 18 constitutional languages: Hindi (mother tongue of 18 per cent and spoken by over 40 per cent) is the leading indigenous language; English is important as a link language. States may choose which constitutional language is official and provide services in official or other languages. **Nigeria** has three important indigenous languages that are official, but at least 450 others; English is the principal language of government and education, though local languages can be used; some rights of citizens, e.g., in the courts, are based on a language that is understood, not preferred. **South Africa** has two European languages and nine significant indigenous languages, no one of which is spoken by more than a quarter of the population. English is the dominant language, though local languages are encouraged for oral use in the local administration and in some teaching. In **Switzerland** has three official languages and one national language at the federal level, with 19 unilingual and three bilingual cantons and one trilingual canton: in unilingual cantons, all public services and education are in the local language only. **Belgium**, too, emphasizes territorial language rights, with the Dutch-and French-speaking communities and regions providing services in their language only; Brussels and the federal government are bilingual. **Canada** is officially bilingual federally and in New Brunswick, with other provinces providing various rights for minorities: rights to federal services in the language of choice exist 'where numbers warrant'. Canadian law includes language requirements for labeling packages sold in commerce. In **Spain**, Castilian is the unique national language that 'all Spaniards have the duty to know and use'; it is the mother tongue of three-quarters of the population. There are seven languages of 'nationalities', the largest of which, Catalan, is the first language of 60 per cent of Catalans.
Catalan, Basque, Galician, and Valencian are the only languages of 'nationalities' that can be co-official with Spanish in their respective autonomous communities, with varying rights and duties.

Unity post-conflict

Creating unity in post-conflict environments poses special challenges. Federalism may be part of a peace plan or strategy.

Most long-established federations emerged peacefully. Switzerland is something of an exception: it became a federation after a brief conflict amongst cantons of the previous confederation. A number of federations have experienced periods of internal violence: the civil wars over

secession in the United States and Nigeria; the Mexican revolution; various Argentine conflicts; insurgency in Spain's Basque country.

Societies are usually deeply divided after such conflicts and it can take a long time for politics to normalize, but, in all the countries mentioned, the issue of secession is either resolved or much reduced.

In recent years, there have been various experiments introducing federal arrangements as part of peace plans after conflicts: Bosnia-Herzegovina, Sudan, the Democratic Republic of the Congo, and Iraq have all adopted federal institutions or committed to them, but the implementation has been difficult and the situations remain fragile. Federalism is currently being considered in Nepal after the end of a Maoist insurgency and as a possible solution to the conflict in Sri Lanka. While there is logic to federal arrangements in such cases, the challenge is to achieve the level of trust or mutual accommodation needed to permit political institutions to function with some degree of stability.

Federalism and secession

There is no standard constitutional approach to dealing with the possibility of secession. Many federal constitutions exclude the possibility, but there are exceptions. Developing democratic procedures for secession poses significant issues.

Many federations have constitutional provisions asserting the eternal unity of the country or precluding the possibility of secession. The United States (an 'indestructible union'), Mexico, Brazil, Nigeria, India, and Spain are examples. (Spain also prohibits autonomous communities from holding referendums on secession.) In other cases, such as Australia, Germany, and Switzerland, the constitution is silent on the issue. Sudan provides for the possibility of a referendum on the independence of Southern Sudan after the ten-year, interim period of the peace agreement, during which there are power-sharing and federal arrangements.

International law sees the right of secession as legitimate only in cases of severe abuse of the human rights of a population and of decolonization.

The international community is normally hostile to secession because it can destabilize international relations. In Africa, where political boundaries cut across so many ethnicities, a right to secession could undermine the whole state structure of the continent. Despite this, there

have been cases of secession or dissolution of countries in recent decades, including the USSR, Yugoslavia, Czechoslovakia, Pakistan, and Malaysia (actually the expulsion of Singapore).

The right to secession poses a dilemma for democratic federations. Such a right can lead to its own tensions in that it questions the solidarity of the national community and can risk regional blackmail. Federations are based on the notion that citizens belong both to the national and to their regional (constituent-unit) communities. Over time, many decisions, commitments, and compromises can be made that give all parts of the country a moral investment in its continuance. Against this, a clear majority in favour of secession poses a critical issue for a federation. Canada's Supreme Court ruled that, in a province, a clear majority voting on a clear question in favour of secession would give the province a right to pursue secession through negotiations, with no conclusions predetermined by law. The negotiations would need to reconcile the rights of two legitimate majorities and their ultimate conclusion would be political. Thus the court found something less than a right to secede, but gave moral weight to a clear vote for secession. In 2006, Montenegro seceded from Yugoslavia, having met the threshold of a 55 per cent vote in favour, which had been agreed to in advance.

Chapter eleven

Ethiopian federalism

Federalism in Ethiopia: Past

The historic Ethiopian state was a unitarist state making the least effort to institutionalize federalism or other forms of decentralization. The commitment to *the ideal of a strong unitary state* had anathematized federalism as a step to the dismemberment of the country. The country was seen as *too united* or *too delicate* to accommodate such an arrangement.

The Ethiopian state constituting the territories that comprise today's

Ethiopia was largely a creation of a century ago. The 1931 Constitution, the first written constitution which was promulgated only decades after the completion of the process of Empire-building, did not make any reference to federalism. True to its goal of unification and modernization of the country under an Emperor, it could envisage only a unitary state. The Italian occupation of 1935-41 disrupted the constitutional development.

In 1952, Eritrea was federated to Ethiopia by a Federal Act of the United Nations. Two traits most describe the Ethio-Eritrean Federation: 1) that it was more of an international compromise than an internal 'convenant'; and 2) that it is, as most commentators called it, a marriage between unequals. Bairu Tafla put his finger on this point when he said that the Federation had "two inherent problems" that led to its subsequent failure:

[I]t was imposed from outside and was tolerated by both Eritrea and Ethiopia on the basis that ‘half a loaf is better than nothing’. It was also a marriage between two incompatible beings-the giant and the dwarf, the strong and the weak, the rich and the poor, the autocratic and the democratic.

So delicately constructed was the Ethio-Eritrean federation that it could lapse only for about a decade. The Ethiopian political tradition of the time, being autocratic and centralist, was not accommodative of the pluralism inherent in federalism. Indeed, in Ethiopia "[t]he rulers

obviously confused administrative plurality with disintegration and anarchy." Unity was equated with uniformity.

In reaction to the grip of tough centralism, ethno-nationalist groups mounted opposition against the PDRE regime until it collapsed in 1991 leaving the political space for ethno-nationalist groups who, for a while, appeared to take decentralization seriously. The Transitional Charter was the first legal document to institutionalize decentralization. Being a product of compromise among ethno-nationalist movements, it emphasized "nations, nationalities, and peoples" (roughly ethnic groups) as the units serving as the basis for decentralization.

Proclamation no. 7/1992 made this ethnic-based decentralization more articulate and real. The 14 self-governing regions were mainly ethnic in their making although almost none were entirely homogenous. Based on this proclamation,

National, Regional (then the equivalents of what are now called States) and

Local Governments were formed and an incipient form of self-government was made apparent. Nonetheless, it was only after the promulgation of the FDRE Constitution that federalism as such was formally institutionalized in Ethiopia.

Ethiopian Federalism: Present

Origins

The origins of the current federal option are in the ethno-nationalist liberationist rhetoric of the post-1991 era of Ethiopian history. Led by the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), a number of ethno-nationalist liberationist fronts came together in a National Peace Conference that led to a Transitional Charter (TC) that served as the interim constitution from 1991 to 1995. It is in the negotiations that led to the TC that for the first time in

Ethiopia's history ethnic groups' rights as such are guaranteed a formal legal recognition. Ethnicity was at last "free from bondage" in the oldest of sub-Saharan African countries. Along with this also came the introduction of what was the nucleus of the contemporary federalism. The TC recognized the right of "nations, nationalities, and peoples" to self-determination up to and including secession.A subsequent proclamation, Proclamation No.7/1992 established 14 self-governing regions. It also reinforced the recognition extended to the right to self-determination by the Charter.

In complete departure from the unitary past, the Charter and the

Proclamation devolved power from the center to the self-governing regions and signaled the beginning of a 'holding together' federalism.135 In 1995, this move to a federal system through 'scaling down' was perfected when the explicitly federal (Federal Democratic Republic of Ethiopia's [FDRE] Constitution came into force. While diverse and divergent perspectives have emerged on the merit or wisdom of the federal option in Ethiopia, one cannot genuinely gainsay that the federal option was a reaction to what was thought to be an oppressive unitary past, a reaction to a state nationalism that sought to unite the country through, among others, involuntary assimilation and homogenization. One can also say that the federal option was taken due to the exhaustion of centralization and unitary system of government. It came when the long suffering nation-building project (which has been on the political scene from 1855 to 1991) has spectacularly failed. The centralist and unitarist model has little resources with which to flexibly respond to the strains imposed on the state by ethno-national diversity.

The Federal Compact: Negotiating the Federal Idea

Federalism was formally ushered in by the 1995 Constitution. The Constitution constituted the federation and continues to be its compact. Preeminent in the negotiation of the Constitution were ethno-nationalist forces, principally a coalition of ethno-nationalist fronts and movements called collectively the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF). The Constitution was drafted by a Drafting Commission duly established by law and submitted to the Constitutional Assembly in 1994 for further deliberation upon it and for adoption.

The points that were very much at issue were the issue of the federal choice, the mode of state formation, the issue of languages, national symbols (flag and emblem), the federal option, its bases for carving out the constituent units, the constitutional recognition of the unconditional right to secession were among the most contested points as a result of which federalism remains to be a controversial subject in Ethiopia to date.

What does the federal constitution offer? Brief description of the federal constitution

The Federal Constitution is a compact document made up of a total of 106 articles divided into 11 chapters. As a legal document, it is a well organized document with an enviable degree of

simplicity and clarity. It is the legal document that *constituted* the federation. From its preamble, we note that it is a compact agreed upon among the "nations, nationalities, and peoples" of Ethiopia. It is thus a solemn contract, treaty, even a vow, among these groups who reconstituted Ethiopia into a federation of disparate ethno-linguistic groups that aspire to build "one economic community" based on a "common destiny" born out of a shared past.

From the preambles, one can glean such principles with far reaching consequences as the principle of the salience of self-determination, the sanctity of human rights, the sacredness of the principle of inter-personal and inter-group equality, and the primacy of the need to build a democratic order based on the principle of the rule of law for the sake of a sustainable peace. Apart from these, the constitution postulates five basic principles as 'fundamental' pillars of the constitutional order. These principles are that of sovereignty of 'nations, nationalities, and peoples', constitutional supremacy and constitutionalism, sanctity of human rights, secularism, and of transparency and accountability of government.

In its chapter three, the Constitution provides for a catalogue of fundamental rights and freedoms. About 31 "kinds" of rights are recognized and granted a constitutional guarantee. The provisions of this chapter are *entrenched*,

i.e., they are protected from easy (and often unilateral) tinkering by making the amendment procedure rather rigid. Nevertheless, the absence of an *application* clause (that indicates whether they have *direct* or *indirect* application), *interpretation*[1] clause (that clearly indicates the principles, methods, and steps to be used in the construction of human rights clauses), *limitation* clause (that regulates the manner in which limitations are imposed when necessary), and the ambiguity with regard to the role of courts to interpret constitutional human rights clauses—owing to the bifurcated division of the of the Federal Houses (i.e., the House of peoples' Representatives and of the House of the Federation).

[1] An interpretation clause would clarify to us as to what modes, principles, and techniques ought to be adopted in the course of constructing the provisions ofchapter three. In particular, it would clarify issues of procedure (jurisdiction, standing, and justiciability), content (the scope and limitations of a particular right), "loses" itself into the other (ordinary) laws and disciplines them thereof. and remedies (as to the consequences of the decisions of the tribunal that is engaged in the work of 'making sense' of the chapter). It would also hint at the steps and principles (e.g. textual/literal, historical, purposive, etc) to be used in the actual task of interpretation. The reason all these are not self-evident in the 'normal' judicial process in Ethiopia is because, at least since 1991, the courts have had no experience in the hermeneutics of human rights; it is also the result of the fact that the courts' position vis-à-vis the Constitution is ambiguous.

Direct application relates to the situation whereby the provisions of chapter three are invoked in the process of litigation to assert a particular claim hoping to obtain a specific remedy emanating from the self-executing nature of the human rights chapter. It is so invoked when the chapter is viewed as a special law directly applied in the course of litigation to assure the plaintiff a special regime of remedy.

Indirect application is said to exist when the human rights chapter, by permeating the system from behind, prompts all public decisions (be it in court or otherwise) to be respectful of the rights and freedoms recognized therein. In these circumstances, the human rights chapter serves more as a framework of understanding, a tool of interpretation of other laws, than as a special regime of law applicable directly in its own right. In indirect application, the human rights chapter of the constitution interpretive power between courts and the House of the Federation—have played a role in the diminished implementation of human rights in Ethiopia.

The Constitution establishes a parliamentary system of government with a formally (weak) bicameral legislature at the federal level. The lower house is the supreme legislator and the supreme political organ. The upper house has little legislative role; instead it has interpretive and adjudicatory powers. It is a house in which nations, nationalities and peoples (and, indirectly, states) are represented in proportion to their numbers. The Constitution also establishes an executive made of the Prime Minister, the Council of Ministers and the Ministries. It also provides for a ceremonial executive headed by a President who serves as the non-partisan, non-political Head of State. Furthermore, it provides for a three-tiered, parallel, court system of federal and state judiciary.

A Constitutional Inquiry Council with an advisory power (to send recommendations on constitutional interpretation) that assists the House of the

Federation is also provided for. Moreover, the constitution lists down the policy objectives and directive principles that guide government policies, decisions, and activities in its chapter 10. Thus the directives that guide the foreign affairs, defence, political, social, cultural, and environmental policies of the country are specified therein.

The States and the Federal Government

The Ethiopian federation is composed of nine constituent units carved on the basis of “settlement patterns, language, identity, and consent of the people concerned.” These nine states, officially called variously as “National Regional States”, “Regional States,” “Regions”, or simply “States”.

Most of these states are ethnically heterogeneous although in most of them there are dominant ethnic groups after whom the states are often named.

The power of the states is provided for in Article 52 of the FDRE Constitution as the "reserved" or 'residual' power that is "not given expressly to the Federal Government alone, or concurrently to the Federal Government and the States." While the Constitution reserves the "plenary" powers to the states, it also makes it clear that states, among other things, have the power to set up their own administration "that best advances self-government, a democratic order based on the rule of law; to protect and defend the federal constitution", to "enact and execute" their own state constitutions, and other laws, to administer land within the framework legislations of the federal government, to levy and collect state taxes on their own revenue sources, to establish and administer their own police force, etc. Obviously one can have a fuller picture of the 'residual' powers only after considering the list of federal powers in the preceding provision which includes those powers traditionally known as federal powers (such as foreign affairs, defense, interstate commerce, interstate relations, currency, foreign trade, national security, transportation, postal services, and telecommunication, some natural resources including land, etc). Because the list of federal powers seems to be long, people often reasonably doubt if the residual powers reserved to the states in Ethiopia are really significant. Nevertheless, it is important to note at this juncture that state constitutions play an immense role in articulating these 'plenary' powers so that they can be better exercised by the states in consonance with the principle of self-rule that constitutes an aspect of federalism.

It is interesting to observe that some of the state powers "enumerated" (by way of example) in Art 52(2) (a-b) tend to impose an obligation on states. Thus, to an extent, they seem to be determining the key elements of the state constitutions. That is to say, a state constitution that does not recognize the preeminence of the principles of self-government, democracy, and rule of law, and is not poised toward protecting and defending the federal constitution cannot be accepted as valid. It stands to reason, then, that all state constitutions, minimally, need to abide by these principles.

In the Ethiopian federation, symmetry is the norm. Thus, states have "equal rights and powers." State legislatures command the supreme political power and are accountable to the people(s) of the states. States are obliged to establish local governments at various administrative levels so

that there are possibilities for local people "to participate directly in the administration" of these levels of governments. The state legislatures' powers "to draft, enact, and amend" the state constitutions is also recognized in the federal constitution. Its supreme legislative power is similarly recognized in the same provision. The states' executive and judicial powers—and by extension all the powers that mark sovereignty at the local level—are also recognized in the constitution.

Although the constitution does not explicitly stipulate the existence of the *principle of federal supremacy* in the Ethiopian federation, it holds, in consonance with the *principle of federal comity*, that "The states shall respect the powers of the Federal Government and the Federal Government shall likewise respect the powers of the States." This provision is indicative, at least in theory, of the dual nature of the Ethiopian federation.

The perusal of this provision in conjunction with the provisions that indirectly (through nations, nationalities, and peoples) grant the right to self determination to the states, give the impression that the Ethiopian federal system guarantees state sovereignty. As a result, it is incumbent upon the state constitutions to articulate, elaborate, and give institutional expression to this state sovereignty that seems to be regnant in the Constitution.

Constitutional Provisions Relating to Federalism

The Federal Democratic Republic of Ethiopia (FDRE) is a parliamentary democracy. Its head of state is the President, who is nominated by the House of Peoples' Representatives and then elected for a six-year term by a two-thirds majority vote of a joint session of Parliament (Article 70).

The federal Parliament is bicameral. The legislative institutions of the federal government are the House of Peoples' Representatives and the House of Federation. Members of the House of Peoples' Representatives are elected for a five-year term in a "first-past-the-post" electoral system. According to the constitution, this House cannot have more than 550 members, and at least 20 seats are reserved for minority nationalities. Its functions consist of legislative, financial, deliberative, informative, and representative subjects (Article 54).

The composition of the House of Federation is surprisingly very open. The election of members can be direct or indirect—the decision is left to the state councils. Thus, state councils can decide whether they elect the members themselves or whether elections are held. Additionally, each nation or nationality gets one additional member for each one million of its population (Article 61).

Member units of the federation are moulded by "settlement patterns, language, identity and consent of the people concerned" (Article 46(2)). Ethnic federalism is expressed by the formulation of "We the Nations, Nationalities and Peoples of Ethiopia" (Preamble of the Constitution). Whether minorities are specially acknowledged in the federal Parliament, or self-governed administrative units at the local level, the Nationality Right is a main constructional feature of the constitution and also a factor in the determination of the division of power.

The House of Federation is the sole custodian of the constitution. It has the exclusive right (Article 62(1)) and ultimate authority (Article 83) to interpret the constitution and this is its main function. The Council of Constitutional Inquiry was established in Article 62(2) to examine constitutional issues and to submit findings to the House of Federation. The Chief Justice of the Federal Supreme Court heads the Council. The House of Federation is not bound by the advisory opinion of the Council of Constitutional Inquiry.

The FDRE is comprised of the federal government and nine member states (also referred to as "regional states") (Article 50).

Chapter Five of the constitution—Articles 50-52—deals with the structure and division of powers. A very detailed description of the powers and functions of the federal government is given in Article 51(1-21). All of the federal powers are directed towards issues of national concern. These are, *inter alia,* overall economic and social development, national standards and basic policy criteria for health and education, defence, federal police, foreign policy, foreign commerce, declaration of a state of emergency, immigration and granting of passports, copyright, standards for measurement and calendar, and possession and bearing of arms. The exhaustive description of federal powers is followed by a general provision regarding the powers and functions of the states.

Article 52(1) indicates that "all powers not given to the Federal Government alone, or concurrently to the Federal Government and the States are reserved to the States". According to Article 52(2), the states can establish their state administration, enact and execute state

constitutions, formulate policies, strategies and plans, administer land, levy and collect taxes and duties, enact and enforce laws relating to the state civil service, and establish and administer a state police force.

Article 49 of the constitution gives special status to the capital city, Addis Ababa. According to Article 49(2), Addis Ababa has a "full measure of self-government". Addis Ababa is generally seen as the country's tenth entity. The Governor of Addis Ababa—the administrative head of the city—is elected by the city Council. But, because the Governor is accountable both to the Council *and* to the Prime Minister, Addis Ababa is not as independent as the states.

The constitution deals at great lengths with fiscal and financial arrangements of the state and the federal governments (Articles 62, 94-100). In general, in carrying out their responsibilities and functions the federal government and states each have to raise the necessary revenues. The constitution enumerates powers of taxation (Articles 96, 97) of both levels. The federal power of taxation (under Article 96) includes, *inter alia*, duties, taxes and other charges on imports and exports, air, rail and sea transport services, and income tax on employees of the federal government. The federal government levies and collects income, profit, sales and excise taxes on enterprises owned by the federal government. The state power of taxation includes, *inter alia*, income tax on employees of the state and of private enterprises as well as of enterprises owned by the state, fees for land usufructuary rights, income from transport services rendered on waters within its territory, incomes derived from private house and other properties, and royalty for the use of forest resources (Article 97). Concurrent powers of taxation are outlined in Article 98 and include, *inter alia*, profit, sales, excise and personal income taxes on enterprises the federal government and states jointly establish, taxes on the profits and companies and dividends due to shareholders, and taxes on incomes derived from large-scale mining, petroleum and gas operations, and royalties on such operations.

A joint session of Parliament has to vote by a two-thirds majority on tax powers not specifically given separately or jointly to one or both of the two levels (Article 99). The House of Federation decides upon the formula for subsidies which states may be entitled to receive from the federal government. Revenues from *joint* federal and state tax sources and subsidies provided by the federal government to the states are also determined by the House of Federation based on recommendations made by the Committee of Revenue Sharing (Article 62(7)).

Constitutional amendments involve state and federal legislative organs (Article 105) and can be initiated by both levels (Article 104). A two-thirds majority of state councils or federal Houses is needed so that the proposal can be further processed. There are two possible procedures based on the importance of the amendment. If amendments refer to fundamental rights and freedoms, both Houses of Parliament must accept the proposal by a two-thirds majority and all state councils must agree by a majority vote. In all other cases, a joint meeting of Parliament must agree by a

two-thirds majority vote and two-thirds of the states must approve the proposed amendment by a majority vote.

An exceptional provision contained in the constitution is the right to secession (Article 39). It is part of the broader right of self-determination outlined in the Preamble. Self-determination is the most important constitutional, legislative and policy instrument upon which Ethiopia has drawn to affect the positive development of federalism. The constitution includes the right to develop one's languages, promote one's culture and preserve one's history, and it gives to states the opportunity of leaving the FDRE. Detailed procedures are provided for constitutional exercise of the right of secession in Article 39(4). The procedure includes as steps a two-thirds majority vote of the council of the respective state, a referendum organized by the federal government, and a majority vote in the referendum. It was through this process that Eritrea gained de jure independence in May 1993. No other member state has ever attempted to secede.

Following the notion of the right of self-determination, Article 47(2) of the constitution states that "Nations, Nationalities and Peoples within the States … have the right to establish, at any time, their own States". A "Nation, Nationality or People" has to establish a "Council", its own representative body, to start the process of establishing its own state. This "Council" is the chief negotiator for the process, although it is nowhere specified exactly how the Council should be established, or who should serve on it. As is the case of secession, precise procedures are given in the constitution about how to establish new states within the FDRE, (Article 47(3)), including a two-thirds majority vote of the members of the Council of the Nation, Nationality or People concerned and a referendum.

Ethiopian Federalism: Distinctive Features

The federation that was born out of the concern for ethno-nationalist groups' right to self-determination (which in turn was a result of an age-old quest for ethno-cultural justice) manifested a number of *unique features*.

- The recognition of the right of secession,
- the use of ethno-linguistic criteria as a basis of state formation,

- the unconventional constitutional interpretation through the upper house of the federal legislature,
- the fact that states are not directly represented in the upper house,
- the fact that the upper house has little, if any, legislative role,
- etc, can be mentioned as evidence of its unique features.)