



Vertical Distribution of Powers in Ethiopia: a comparative study with Canada and Germany

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EXECUTIVE SUMMARY

Investigation of the three federations' distribution of powers reveals variations in the form, nature and scope of distribution of powers between the two levels of government. The Canadian constitution, in contrast to the Ethiopian and German federations, enumerates the powers of the federal government and the provincial governments and grants residual powers to the federal government. The German and Ethiopian federation enumerate the exclusive federal government powers and reserve residual powers to the constituent governments. Germany is, however, unique with its extensive area of concurrent powers compared to the Canadian and Ethiopian federations which provide concurrent powers on a very few matters. The concurrent powers in Germany are largely matters which fall under the constituent governments' jurisdiction or the federal government in Canada and Ethiopia.

The substantive powers apportioned to the federal government and the constituent units reveal significant variations. International relations, defence, citizenship, the functioning of the economy, postal services are exclusive federal government's jurisdiction in all of the federation. International treaties pertaining to the legislative competence of the constituent units require their consent in both Germany and Canada, however. Authority on the functioning of the economy is allocated largely to the federal government in Ethiopia and Canada but is concurrent power Germany. Regulation of international trade and interstate commerce is the exclusive federal government authority in Ethiopia and Canada whereas it is concurrent in Germany. Power to regulate the monetary system and currency issuance is, in all the federations, exclusive federal government power. Authority over telecommunications and postal service is exclusive jurisdiction of the federal governments in all of the federation.

Allocation of authority over road, rail and sea transportation is largely dependent on whether it involves more than one constituent unit in which case it becomes federal government responsibility. The constituent units retain authority over road, rail and sea transportation within their own territory. Civil aviation, however, is exclusive federal government authority without exception in all of the three federations. Authority over land and natural resources are assigned either to the federal government or the constituent units or concurrently. In Ethiopia authority over land is allocated in such a way that the federal government has law making authority and the constituent governments' bear administration responsibility. In Canada it is divided between the federal government and the provinces whereas it is concurrent power in Germany. Division of authority over social affairs in the three federations shows that it is largely the constituent governments' powers.

A significant difference between the three federations is their approach to division of responsibility for execution of federal laws. Canadian federation is legislative federalism in which executive authority corresponds with legislative authority. German federation differs in approach to the division of executive responsibility in contrast to the Canadian and Ethiopian. The Lander has been granted with the responsibility of execution of federal laws. The Basic law in detail regulates how the Lander governments should execute federal law on their own and under federal government commission. It also provides clearly which matters remains the execution responsibility of the federal government.

The Ethiopian federation largely falls under the legislative federalism category. A closer look at the constitution reveals that there is ambiguity as to whether execution authority corresponds with legislative authority.

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1.0 INTRODUCTION

Vertical distribution of power pertains apportionment of powers at various levels, as opposed to horizontal distribution of powers which is concerned how power is separated at one level. Vertical distribution of powers can be undertaken from the purely local all the way long to the purely global. This may extend from the municipal, sub national-regional, national, supra-national, to global level. Horizontal separation of powers is basically about separation of powers between the three branches of government at one level.

As applied to apportioning of governmental powers in a state, vertical distribution of powers can be undertaken either through decentralisation or federalism. The focus of this study is the governmental powers apportionment in federalism. It analyses the distribution of powers in three federations: Canada, Germany and Ethiopia. It is a comparative study of the vertical power distribution in these federations. The main objective of the study is to analyse the Ethiopian federation distribution of power in light of the Canadian and German federations.

Established in 1867, the Canada is the oldest federation under consideration. With only a decade and half life span, the Ethiopia is the youngest federation. Adopted in 1949 after WWII, the Basic Law established the German federation. One common feature among these federations is that all have a parliamentary form of government.

The central focus of this thesis is to investigate and analyse the vertical distribution of powers between the federal government and the constituent units in these federations. It investigates the form, nature and scope of the powers apportioned between the levels of governments in these federations. Accordingly the legislative and executive power distribution in the three

federations is analysed. The objective of the research in general is to analyse the Ethiopian federation distribution of powers in light of the Canadian and German federation. The writer argues that there is ambiguity in the allocation of governmental powers between the federal government and the constituent units. Particularly this is evident in the division of execution responsibility for federal laws. The federation also suffers from institutional gap in the enforcement of federal laws.

The main questions the study, therefore, addresses are:

1. What is the nature of the form and scope of distribution of powers in the Canadian, German, and Ethiopian federation?
2. What is the nature of the substantive powers divided the two levels of governments in the three federations?
3. To what extent and whether the division of execution responsibility is coextensive with legislative authority in the Ethiopian federation?

The thesis is organised into three chapters. The first chapter introduce some general notions of federalism. The definition and theories of federalism is explored. In this regard various understandings and conceptual debates on the nature, meaning and definition of federalism are discussed. The conceptual distinctions between federalism, federations and federal political systems are dealt with. The common distinctive features of federations are also analysed. In order to get a better understanding on the nature of federation as a political system comparison is made with other political systems. The process of Formation of federations and the motives for the establishment of federations are also matters dealt in the first chapter.

Chapter two deals the form, nature and scope of distribution of powers between the federal governments and the constituent units in the Canadian, German and Ethiopian federations. A comparative analysis of the exclusive, concurrent and residual powers distribution in the three federations has been made. Accordingly, the substantive powers allocated to both the federal government and the constituent units in the three federations have been discussed. Attempt has been also made to see the reasons for allocation of specific powers to the various levels and what factors, social, political, cultural, process of formation, and how and whether the time the federations have been established have contributed and influenced the way powers is apportioned in these federations.

The last chapter main theme is to analyze whether division of executive responsibility in Ethiopia is coextensive with legislative competence. It basically analyses the division of execution responsibility for federal laws in light of the Canadian and German approach. The chapter discusses at length the German administrative federalism and investigates how execution responsibility for federal laws is divided and regulated under the Basic Law. The chapter also investigates whether the executive power division in Ethiopia corresponds with legislative competence and the problems of institutional gaps in the execution of federal laws.

The conclusion section summaries the main problems and findings as far as vertical power distribution in the three federations and recommends some measure/ reform in the Ethiopian federation.

2.0. CHAPTER ONE: FEDERALISM: AN OVERVIEW

This chapter is intended to set the background for the theoretical framework and analyze the notions of federalism and federations for the subsequent chapters. It is aimed at giving an insight into the concept of federalism and federation in general before embarking on the discussion of distribution of powers and functions in the Ethiopian, Canadian and German federations. This chapter therefore analyses the nature and meaning of federalism, its distinction with the term federation, the common basic features of federations and its distinction from other forms of political systems, and the origin and formation of federation.

1.1 Federalism and Federation

In its broadest sense, federalism generally refers to the federal principle by which legislative powers are divided between the general government for the whole country, called by a variety of names including federal government, central or national government, and the constituent units referred to as states(US), cantons(Switzerland), Lander(Germany), provinces(Canada), or regional states (Ethiopia).¹ The division of power therefore enables the general government and the regional governments to act directly on its electorate within their own sphere of jurisdiction.

Federalism and federation, however, are notions that posed a formidable challenge for scholars. The meaning and nature of federalism has been debatable.² There is no universally

¹ Dwight Herperger, Distribution of powers and functions in federal systems.(Ottawa: Minster of Supply and Services, 1991), p.1

² Ronald Watts, Comparing federal systems,(Montreal: McGill-Queen's University Press, 1999) p.6

agreed definition of what federalism is. There is, therefore, no consensus on the meaning and nature of federalism and the study of federalism is “fraught with difficulties” which are reflected both in theory as well as in practice.³

The post war period witnessed the flourishing of literature on federalism and there were attempts to come up with a universally accepted definition of federalism. This process culminated, however, without success and by the end of the 1970s there was even scholarly consensus that it is a futile exercise of “pursuing an elusive, all embracing definition intended to encapsulate all the complexities and subtleties that inhered in federalism.”⁴

A variety of definitions of federalism have been forwarded by various scholars. The contemporary intellectual debate was spurred by Wheare’s classic work on “Federal Government” in 1946. Wheare’s definition of federalism is the starting point for an understanding and exploration of the concept of federalism. According to Wheare, federalism is distinguished by the federal principle. He defined federal principle as “a method of dividing powers so that the general and regional governments are each within a sphere, coordinate and independent”.⁵ Wheare’s definition of federalism central emphasis was on the division of powers and functions between the two tiered governments which are coordinate but are independent in their own sphere and not so much whether both operate on the people.⁶

His definition of federal principle is criticised for being too legalistic, narrow and its undue reliance upon the American experience; he contended that any definition of federal

³ Michael Burgess, *Comparative Federalism: theory and practice*, (London, Routledge Taylor and Francis Group, 2006) p.1

⁴ Id, p.47

⁵ K. C Wheare *Federal Government* (Oxford, Oxford University press, 1964) 1964. P.10

⁶ supra note 3, p.27

government which failed to include USA is unreal.⁷ Besides, critics argue that his definition of federalism conveys a “somewhat compressed and static impression of federations and federal government.”⁸

Riker, on the other hand, shifted the debate on federalism from law to politics. He criticised Wheare’s definition as a highly legalistic one with “very little understanding of political realities”.⁹ He basically claims that federalism is a bargain between national leaders and officials of constituent governments “for the purposes of aggregating territory, the better to lay taxes and raise armies”.¹⁰ Riker argues that though economic, social and cultural-ideological factors are prerequisite, politics and political elites are decisive in the formation of a federation and claims that “none of these factors could have any real significance without first taking into account the political environment which was pivotal to federal state building”.¹¹ When the bargain takes the form of a constitution, for Riker, it becomes federal if it includes:¹²

- two levels of government ruling on the same land and people
- each level must have at least one area of action in which it is autonomous
- there is some guarantee of the autonomy of each government in its own sphere.

Sociologists regard federalism beyond the mere division of power between the central government and the constituent units. Livingston criticised a legalist approach to the study of federalism. According to Livingston, legal answers are of value only to legal problems.¹³ He claims that federalism is more than division of power and the:¹⁴

⁷ Id , p.27

⁸ Id , p.27

⁹ Id, p.37

¹⁰ Id , p.36

¹¹ Id, p.37

¹² Id, p.37

¹³ Id, p.28

¹⁴ Id, p.29

Essential nature of federalism is to be sought for, not in the shadings of legal and constitutional terminology, but in the forces - economic, social, political, cultural- that have made the outward forms of federalism necessary ... the essence of federalism lies not in the institutional or constitutional structure but in the society itself. Federal government is a device by which the federal qualities of the society are articulated and protected.

Vile concludes that it is futile to attempt to arrive at a neat definition of federalism “because such attempts oversimplified the problem by treating the whole political system as if it were a single variable”.¹⁵ He, therefore, suggests shifting the debate from definition to the developmental model of a federal state “that could cope with the complexity, with the need to take into account the continuously changing nature of reality of political systems , and that avoided either the rigidity of earlier definitions or the vacuity of the later ones”.¹⁶

Like Livingston, Vile emphasised that federalism is a particular aspect of the general problem of decentralisation and claimed that federalism must be approached as a set of different techniques used to “establish and maintain a particular kind of balance or equilibrium between two levels of government ...”¹⁷

His critics question his claim that federalism is a particular kind of balance because federal supremacy has negated the theory of balance.¹⁸ In addition, his view of federalism as a particular aspect of the general problem of decentralisation has blurred the line between

¹⁵ Id, p.45

¹⁶ Id ,p.45

¹⁷ Id, p.45

¹⁸ Id, p.46

decentralised political systems and decentralisation as applied to federal political systems which presupposes contractual limited centralisation.¹⁹

Burgess argues, given the current state of the development of the concept of federalism, there is no fully-fledged theory of federalism. He argues that the problem is due to, firstly, the fact that federalism is concerned both with “fundamental and moral question as well as amoral matter-of-fact-issues” and that the amoral foundation of federalism does not manifest the moral attribute.²⁰ As a fundamental moral issue, federalism is ‘derived from certain inherent virtues such as respect, tolerance, dignity and mutual recognition, which leads to a particular form of human relationship, namely, the federal state or federation.’²¹ The amoral foundation of federalism, on the other hand, does not have connection with such qualities inherent in federalism at all and that it is “nothing more than a particular constitutional and/or political technique for achieving certain overarching goals, such as territorial expansion or economic security and benefits.”²² Secondly, federalism has been problematic because it is multifaceted. The study of federalism, as noted above in the way various scholars view federalism in their own discipline, has constitutional, political, social, economic, cultural, legal, philosophical and ideological aspects.²³ Each discipline has its own approach to the study of federalism and therefore understanding federalism and federation and comprehending its many faces would be impossible.²⁴

No less problematic in the study of federalism has also been the confusion surrounding the distinction between federalism and federation. For long distinctions were not made and did

¹⁹ Id, p.46

²⁰ Id, p.1

²¹ Id, p.1

²² Id, p.1

²³ Id, p.1

²⁴ Id, p.1

not seem obvious between the two terms. They were used interchangeably. Much of the recent literature on the subject, however, makes distinctions between the two notions. King made the distinction between federalism and federation for the first time in 1982.²⁵ Federalism is now regarded as an ideology and federation as an institutional expression.

This conceptual distinction remains disagreeable to many people.²⁶ The major criticism on King's distinction is that one cannot separate the process of federalism from the institutional arrangement of federation.²⁷ Burgess argues, however, that King's conceptual distinction is advantageous "over earlier approaches which took as their departure point a specific, often narrow and restrictive, definition suggesting only essential elements guaranteed to be the subject of endless debate".²⁸ He concludes that King's distinction between federalism and federation "has the conceptual capacity to open up the subject on essentially dynamic, changing relationship between federalism as a multidimensional driving forces and federation as its institutional structure and systematic counterpart".²⁹

In the same fashion, in order to get out of the confusion surrounding federalism, besides the distinction provided by King between federalism and federation, Watts also suggests taking into account, in addition, federal political systems as well in making the distinction.³⁰ According to Watts, federalism is a normative term and therefore refers to "the advocacy of multi-tiered government combining elements of shared-rule and self-rule".³¹ As a normative concept federalism is based on "the presumed value and validity of combining unity and diversity and of accommodating, preserving and promoting distinct identities within a larger

²⁵ Id, p.2, 47

²⁶ Id, p.47

²⁷ Id, p. 47

²⁸ Id, p.47

²⁹ Id, p.47

³⁰ See Ronald, *supra* note 2, p.6

³¹ Id, p. 6

political union.”³² Federalism therefore attempts to strike a balance between unity and diversity without one succumbing to the other and perpetuating both union and non-centralization simultaneously.³³

In contrast, a federal political system and federations are descriptive terms which apply to particular forms of political organisation.³⁴ Whereas federalism pertains to a normative concept, federations and federal political systems are descriptive terms used to designate organisation of a political system based on federal principle.³⁵ Watts uses the term federal political system generally to refer to “a broad category of political systems in which ... there are two or more levels of government combining elements of shared-rule through common institutions and regional self-rule for the governments of the constituent units”.³⁶ In this broad category of political systems are found all kinds of political systems ranging from unions, constitutionally decentralised unions, federations, confederations, federacies, associated statehood, condominiums, to joint functional authorities.³⁷

Federation is one type of political system within this broad category of federal political systems. A federal political system is the genus encompassing all sorts of multi-tiered governments, and federation is a species representing one form of political organisation/ type within federal political systems.³⁸

Federation, as a specific species within federal political system, itself is distinguished from the other multi-tiered governments/ federal political system based on the fact that the

³² Id, p.6

³³ Id, p.6

³⁴ Id, p.6

³⁵ Id, p.6

³⁶ Id, p.7

³⁷ Id, p.7-13

³⁸ Id, p.7

constituent units in a federation are not subordinate to federal government.³⁹ Moreover the constituent units have their own sphere of competence on which they exercise power independent of the federal government. The sphere of competence is provided and guaranteed in the constitution. In contrast to a confederation, both levels of governments in a federation are “empowered to deal directly with citizens in the exercise of its legislative, and executive and taxing powers and each is directly elected by its citizens”.⁴⁰

Watts has identified the following general common structural features of federations as a specific federal political system:⁴¹

- 1- two orders of government each acting on their citizens;
- 2- a formal constitutional distribution of legislative and executive authority and allocation of revenue resources between the two orders of government ensuring some areas of genuine autonomy for each other;
- 3- provision for the designated representation of distinct regional views within the Federal policy-making institutions, usually provided by the particular form of the second chamber;
- 4- a supreme constitution not unilaterally amendable and requiring the consent of a significant proportion of the constituent units;
- 5- an umpire(in the form of courts or provision for referendum) to rule on disputes between governments;
- 6- process and institutions to facilitate intergovernmental collaboration for those areas where governmental responsibilities are shared or inevitably overlap.

Burgess states that Watts’ further distinction between federalism, federation and federal political systems, has a clear “advantage of flexibility and is much more all-embracing than the narrow bifocal distinction between federalism and federations”.⁴² The disadvantage of Watts’s distinction is that “while it correctly endorses federalism as a normative idea, it has

³⁹ Id, p.7

⁴⁰ Id, p.7

⁴¹ Id, p.7

⁴² See Michael, supra note 3, p.48

the effect of subordinating federation to a mere species of a genus that itself remains somewhat ambiguous”.⁴³

1.2 Common Basic Features of Federations

As noted above, federations are one particular form of organisation of a political system among a variety of federal political systems. The term federation itself also does not have a uniformly agreed definition. There is a need therefore to distinguish federation from the other political systems. Watt has suggested certain common characteristic that may distinguish federations from other types of federal political systems. In this section we will look at the basic common features of federation that distinguish it from other political systems. These common basic characteristics of federations are two orders of government, constitutionally guaranteed division of power, a written, supreme and rigid constitution, umpiring the federation, representation and participation of the constituent states in the federal policy making institutions. Each basic feature is dealt with in detail below.

1.2.1. Two Orders of Government

A federation is composed of two tiered governments. The central government, often referred as the federal government or national government, is the general government for the whole country. The federating units referred to by a variety of names, states in the USA, Lander (Germany), Provinces(Canada), Cantons (Switzerland), regional states(Ethiopia), constitute the other tier of government. Basically in a federation there can exist only one federal government. The number of constituent units and their organisation, however, varies from

⁴³ Id, p.48

federation to federation. But federation presupposes one federal government and at least two constituent units.

Most federations do have three levels or tiers of government.⁴⁴ The third level constitutes the local governments. Nonetheless the third level does not have constitutional status and for all practical purposes it is subordinate to the regional government and it operates on the basis of delegated power as if in a unitary system.⁴⁵ In Canada and Australia local governments are reshuffled periodically and are subject to being overridden by the provincial, state, or Lander governments.⁴⁶ In Germany, however, though the municipalities do not have constitutional status and the Lander have certain rights of regulation of their affairs, the right of local autonomy is constitutionally protected.⁴⁷

The federal government operates directly on individuals and its power extends to the whole territory of the country. It is also the federal government which has international personality under international law to represent the constituent units.

The constituent units exercise legislative, administrative and fiscal power, on matters allocated to them in the federal constitution, within their own territory. The constituent units' legal personality is guaranteed in the federal constitution. The autonomy of the constituent units derives from the constitution and the essence of federation is that the federal government cannot unilaterally change the status and territorial autonomy of the constituent units. The federal government cannot, like administrative units in a unitary state, reorganise the constituent units. It cannot make territorial change to the existing constituents units

⁴⁴ Hueglin, Thomas and, Fenna Alan, *Comparative Federalism: A systematic Inquiry* (Broadview Press, Toronto, 2006), p. 33

⁴⁵ *Id.*, p.33

⁴⁶ *Id.*, p.33

⁴⁷ German Basic Law, article 28, second paragraph

unilaterally without their consent. This is usually subject to regulation by the federal constitution.

1.2.2. Representation and Participation of Constituent Units in the Federal Government

Federations can be seen basically as the outcome of a bargain or desire of the constituent units to set up a general government for matters which are deemed common and best addressed and handled by the federal government and to retain matters to themselves which are expressions of diversity. In Federations constituent units are represented in the federal government and participate in the federal policy-making process. Bicameral representation, at the national level of government, is one of the basic principles of federalism.⁴⁸ The people are usually represented in the lower house of the federal legislative organ.⁴⁹ The second chamber usually represents the constituent units.⁵⁰ There are, however, variations among federations on whether it is the people of the constituent units or the governments of the constituents that are represented in the second chamber.⁵¹ The manner of representation also varies from federation to federation. There is equal representation in the second chamber in some federations and proportional in others.

The constituent units participate in federal policy making through the second chamber. The second chamber, therefore, is the forum through which the constituent units influence federal policy-making decisions.

⁴⁸ Id , p.59

⁴⁹ Id, p.59

⁵⁰ Id, p.59

⁵¹ Id, p.55-83

The Canadian, German and Ethiopian federation show difference in the manner of representation of the constituent units at the national level. The nature of representation in the second chamber varies in the three federations. It is the Lander governments that are represented in the German second chamber called, the Bundsrat,⁵² In Canada the senate represents not the provinces but regions.⁵³ In Ethiopia it is the various ethnic groups, referred to as “nation, nationalities and peoples” that are given representation in the second chamber, the House of federations.⁵⁴ Whereas the German Bundsrat and the Canadian senate have law making power, the House of federations in Ethiopia has no role in law making. Common among the three federations in relation to representation is that they do not follow the principle of equal representation of the constituent units like the American approach. All the federations employ a variety of formula of representation.⁵⁵ In Ethiopia each “nation, nationality and people” will have one representative and for every additional one million people of that ethnic group there will be one more additional representative. In Germany, on other hand, the Lander governments may have from three to six votes depending its population size of the inhabitants according to the formula set in the Basic Law.⁵⁶ In Canada, the size of the senate is 105: the four principal regions each having 24, six for Newfoundland and one for the three territories- Yukon, the Northwest Territories, and Nunavut.⁵⁷

The Lander governments appoint and recall the representatives to the Bundesrat⁵⁸ whereas two options are provided to the constituent units in Ethiopia whereby either they elect and send the

⁵² German Basic Law, article 51

⁵³ Supra note 44, p. 190-196

⁵⁴ Ethiopian constitution, article 62

⁵⁵ ibid

⁵⁶ See German basic Law, article 51

⁵⁷ Supra note 44, p.192

⁵⁸ See German Basic Law article 51

representatives or have them directly elected directly by the people.⁵⁹ In contrast, the prime minister appoints members of the senate.⁶⁰

1.2.3. Division of Power

Division of power is a central feature of federations. It is the defining characteristic that distinguishes federation from other political systems.⁶¹ The power division is provided in the constitution. There is a constitutionally guaranteed division of power between the government of the whole country and the regional governments. Federations are therefore distinguished by the formal constitutional distribution of legislative and administrative functions including fiscal power.⁶²

Political power is divided and allocated between the federal government and the constituent units and both operate autonomously within their own jurisdiction. Division of power is based on “the dual principle implicit in every federation” of the desire to form a union on the one hand and the desire to maintain one's identity by retaining autonomy.⁶³ Division of power is directly related with the design of a federation.⁶⁴ The federal government, as the general government of the whole country, is entrusted with powers that are of concern for the federation. The states usually retain powers in their nature which are strongly “expressions of regional identity, hence the famous expression that defines federations as shared rule through common institution and self rule for the constituent units.”⁶⁵

⁵⁹ See Ethiopian constitution, article 61

⁶⁰ Supra note 44, p.192

⁶¹ See Dwight, supra note 1, p.15

⁶² See Ronald, supra note 2, p.7

⁶³ Assefa Fisseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study* (Wolf Legal Publishers, 2006-2007) p. 104

⁶⁴ Ibid, See also Ronald, supra note 2, p.17.

⁶⁵ See Assefa supra note 62, p. 105

The regional governments are sovereign as far as powers assigned to them in the constitution. Neither the federal government nor the regional governments can interfere in the power of the other. Each level of government is legally independent of the other. The regional governments can exercise only those powers assigned to them in the federal constitution. The federal government cannot interfere in the sphere of jurisdiction allocated to the regional governments. There is therefore no superior-subordinate relationship between the two levels of government as far as their respective powers assigned in the constitution.

The legislative and executive powers apportioned in the three federations between the two levels of government will be dealt in detail in the subsequent chapters.

1.2.4 Written, Supreme and Rigid Constitution

The existence of a written constitution is another common basic feature of federations. Since the hall-mark of federations is the distribution of powers, it is imperative that there should exist a written constitution. Federations are an outcome of bargains at a particular time with the view to serving generations and written constitutions are evidences of the records of the terms of the bargain.⁶⁶ “The particular purpose of constitutions in federal systems is to spell out as precisely as possible how the powers are allocated to different levels of government and the procedures to be followed for this allocations to be altered.”⁶⁷ The distribution of power must be spelt out in a written constitution and cannot be undertaken orally. All of the federations under consideration have written constitutions. Canada adopted its constitution in 1867, Germany in 1949 and Ethiopia in 1995.

⁶⁶ Id, p. 120

⁶⁷ See Thomas and Alan, *supra* note 44, p. 43

Not only are federations based on written constitution, but they are based on a supreme constitution as well. As noted previously, both the federal and regional government are allocated legislative and executive authority and are legally independent of one another. The constitution is the source of authority of the two levels of governments and therefore logically must be supreme. There is no superior-subordinate relationship between the two levels of governments and each is autonomous and derives its authority from the constitution which must be, however, supreme and binding on both tiers of governments. The constitution should be supreme as it is the source of the authority and as it also regulates the relation between the two tiered governments.⁶⁸

Rigidity is a further feature of a federal constitution. The federal constitution is expected to provide rigorous provision for the amendment of the constitution. Not only the federal constitution should be rigid, it must also be participatory. The federal constitution must ensure the right of the constituent units to participate in the amendment process. Neither the federal government nor the constituent units should be able to amend the constitution unilaterally.

This feature of a federal constitution is closely tied with the supremacy feature of a federal constitution. One mechanism to ensure the supremacy of the federal constitution is by providing rigid amendment procedure and which is participatory. Once the constitution delimits the sphere of competence or jurisdiction of both orders of governments, then any alteration to the scope and form of allocated power cannot be undertaken without the consent

⁶⁸ supra note 62, p.121

of either level of government.⁶⁹ Amendment of the constitution without the participation of either level of government is against the idea of a federation as a compact.

Supremacy of the constitution as a central feature of federation can be maintained only if the federal constitution is not susceptible to change as a result of very flexible/easy amendment procedures. The amendment procedure is therefore required to be rigid. This does not mean the constitution should remain unchanged, but the amendment, whenever social, cultural, economic and political development demand, must be participatory and based on the consent of both orders of government. The federal constitution besides defining division of power also regulates the relation between the two levels of government and therefore should not be subject to unilateral alternation. The constitution should be supreme, rigid and its amendment procedure participatory.

The right to initiate amendment, the required amount of vote, the procedures and the organs of government involved in the amendment process varies from one federation to another.⁷⁰

The German constitution, however, has got a provision, often referred to as the eternity clause, which made certain provisions of the Basic Law not subject to amendment at all.⁷¹

These non-amendable provisions are the human dignity clause, the democratic and social federal nature of the state, laws affecting the division of the federation into Lander, laws affecting the principle of participation of Lander on legislation and laws. The amount of votes required to amend the other provisions of the constitution is vote of two-thirds of the members of both the Bundestag and the Bundesrat.

⁶⁹ supra note 44, p. 44

⁷⁰ supra note 62, p.125

⁷¹ See German Basic Law, Article 79

Though no similar provision exists, under the Ethiopian constitution making some provisions non-amendable, the constitution is very rigid. This can be evidenced by the constitution's requirement of unanimous vote for the amendment of chapter III of the constitution on human rights which may amount to being practically non-amendable.⁷² The Ethiopian constitution requires the involvement both levels of government in the amendment process. In German, on the other hand, the national parliament alone amends the constitution.⁷³

The anomaly in the Canadian constitution, the British North America Act of 1867, is that it did not have amendment provision.⁷⁴

1.2.5 Resolving Disputes between Both Orders of Government

There has to be an organ vested with the power to have the final say over what the constitution says in a federation. Disputes may arise relating to the constitutionality of laws in general and over allocation of competence in particular between the federal government and the constituent units. The final word on disputes on division of power should not rest with either the federal government or with the constituent units.⁷⁵

Though division of power is the defining characteristic of federations, clear and unequivocal allocation of authority which is not susceptible to dispute is not possible. It is bound to give rise to conflict because "division of power is artificial, imperfect a generalised skeletal thing. Political life cannot be perfectly or permanently compartmentalised. The words can rarely be more than approximate crude and temporary guides to the ongoing or permissible political

⁷² See the Federal Democratic Republic of Ethiopia Constitution, Article 105

⁷³ Supra note 44, p.261

⁷⁴ Id, p. 255

⁷⁵ Wheare, Federal Government, p. 60-61 as cited by Assefa Fisseha, Federalism and the Accommodation of Diversity in Ethiopia, supra note 62, p.127

activity in any federal system”.⁷⁶ Moreover, social, economic, cultural and political development may demand adaptation and adjusting the division of power with these changing circumstances to keep pace with these developments.

Constitutional dispute that may arise between the federal government and the constituent units may be decided by a court which is part of the regular court. The courts exercise judicial review power either because they are given the mandate to be the authoritative source of constitutional interpretation or establish the mandate for themselves as in the USA.⁷⁷ In other federations, a constitutional court (as in Germany) is set up specifically to rule on disputes arising under the constitution. It could be also through direct democracy (referendum) as in Switzerland where the federal court is expressly denied judicial review power.⁷⁸

This is one of the areas one notes striking difference among the three federations. The authority to interpret the constitution in Ethiopia is given to the House of Federation, the second chamber.⁷⁹ In Germany the authority to interpret the constitution is given to the Federal constitutional court.⁸⁰ The British North American Act of 1867, the Canadian constitution, was silent on judicial review.⁸¹ It was the Judicial Committee of the Privy Council which served as the final authority on Canadian constitutional matters until 1949.⁸² Since 1949, however, ultimate judicial authority has been exercised by the supreme court of Canada.⁸³

⁷⁶ Davis, R., *The Federal Principle, A Journey through time in Quest of Meaning* (Berkely; University of California press, 1994) p. 143 as cited by Assefa, *Federalism and the Accommodation of Diversity in Ethiopia*, supra note 62, p.127

⁷⁷ supra note 44, p.276

⁷⁸ Id, p. 311-312

⁷⁹ Ethiopian constitution, article 62(1), and 83(1)

⁸⁰ German Basic Law, article 93, and 94

⁸¹ Supra note 44, p.293

⁸² ibid

⁸³ Griffiths, Ann L., *Handbook of Federal Countries*, McGill-Queen's University press, Montreal, 2005, P. 133

1.3 Federation, Unitary State, and Confederations

The common structural features that distinguish federations from the broad category of federal political system have been noted earlier. It is worth noting as well to look at specifically the distinctions between federations, unitary states and confederations.

A unitary state is markedly different from a federation and confederation. Unitary political systems encompass a broad category of states that range from the highly centralised to the most decentralised states. The UK is traditionally the most decentralised unitary state.⁸⁴ Local governments are vested with the power of regulation and administration in many policy areas.⁸⁵ France, on the other hand, is a highly centralised state “keeping administration of the regional departments under strict national supervision.”⁸⁶

In a unitary system of government, there may exist distribution of powers. But the nature and extent of the division of power is determined by the central government. The central government determines what power, how much power and how administrative units may exercise the powers it delegated to the administrative units. Moreover the delegation is subject to unilateral withdrawal, amendment or revocation by the central government.⁸⁷ There may exist therefore division of power in a unitary state too by way of delegation or devolution as well. However, in a unitary state, unlike federations, the division of power is not constitutionally guaranteed.⁸⁸

⁸⁴Supra note 44 , p.35. Sweden is also another decentralised unitary state.

⁸⁵ Id, p.35

⁸⁶ Id, p.36

⁸⁷ See Assefa supra note 62, p. 120

⁸⁸ Duchacek, Ian, Comparative Federalism, the Territorial Dimension of Politics(Lanham, University press of America, 1987) p.112-113 as cited by Assefa , Federalism and the Accommodation of Diversity in Ethiopia,

Flowing from this, the relationship that exists in a unitary state between the central government and administrative units is a superior subordinate relationship. In other words, administrative units are accountable to the central government. In federations, on the other hand, the relationship is coordinate.

In unitary states, unlike constituent units in a federation, local governments are the creation of the central government and may be abolished any time by the central government.⁸⁹ The federating units in a federation, on the other hand, are governments for all practical purposes within their sphere of competence/jurisdiction defined in the federal constitution in their own territory.

Unlike federations, the central government in unitary states may divide the country and create local governments or may decide to merge them as it deems appropriate. The legal existence of constituent units in federations, however, is constitutionally guaranteed. It is not subject to the will of the federal government. In fact, the federal government is the creation of the member states in those federations which were formed from previously semi independent states. In Federations which were established from a previously unitary state by creating new constituent units, once the federation is established the autonomy of the constituent units is guaranteed in the constitution.

supra note 62, p. 120. See also Ronald, Comparing Federal Systems, supra note 2, p.10. see also Thomas and Alan, Comparative Federalism, supra note 44, p.31-32

⁸⁹ Ronald, 'Forward: states, provinces, Lander and Cantons, International variety among sub national groups,' Rutgers Law Journal 31(summer 2000), p.943-945 as cited by Assefa Fisseha, Federalism and the Accommodation of Diversity in Ethiopia, supra note 62, p. 120

Compared to Confederations, Unitary states exhibit, a very strong alliance. Whereas the confederal government in confederations is the creation of the member states, the local governments in unitary states are the creation of the central government. Accountability is downward in a confederation; i.e. the confederal government is accountable to the member states that formed the confederation, while in unitary states the local governments are accountable to the central government. The constituent units in federations are not accountable to the federal government as far as the powers entrusted to them in the constitution.

Compared with federations, confederations are loose alliances. Federations usually “evolve out of experiences with much loose associations between the constituent units and hence Confederations are usually the stepping stones to a federal state.”⁹⁰

Confederations fall short of being federations but they are more than alliances and leagues.⁹¹ The member states in a confederation, in contrast to federations, remain the locus of sovereignty.⁹² The member states retain, therefore, the bulk of their powers and hand over only the minimum powers and responsibility, with little scope for domestic policy for the common government.⁹³ Furthermore, unlike federations, the confederal government in a confederation is dependent for revenue on the member states.⁹⁴

The following are typical features of a confederation in contrast to federations:⁹⁵

⁹⁰ See Thomas and Alan, *supra* note 44, p.34-35. For example, the US was a confederation until it adopted the federal constitution in 1789. Switzerland was at the beginning a confederation for half a millennium (1291-1848). It transformed itself into federation in 1848 by adopting a federal constitution.)

⁹¹ *Id.*, p.34

⁹² *Id.*, p.34

⁹³ *Id.*, p.34

⁹⁴ *Id.*, p.34

⁹⁵ Federalism, Stanford Encyclopaedia of Philosophy, available at

- sub units may legally exist
- the centre only exercises authority delegated by sub-units
- the centre is subject to sub-unit veto on many issues
- centre decisions only bind sub-units but not citizens directly
- the centre lacks an independent fiscal or electoral base
- and/ or the sub-units do not cede authority permanently to the centre

The US was originally a confederation. Immediately after the war of independence the system of government of the thirteen colonies established was a confederation. The legal instrument which created the confederation was called the Articles of the confederation and perpetual Union. Article III of the Confederation described the union a “league of friendship”.⁹⁶ The sovereignty of each state was unequivocally asserted in Article II of the Articles of the Confederation.⁹⁷ The confederal government did not have an executive and judiciary. It was constituted of only a congress. Moreover, Congress was composed of delegates appointed by each state. The delegates were subject to being recalled and the states had the right to instruct their delegates.⁹⁸

Congress had certain powers granted under the Articles of the confederation. Nonetheless, with the exception of a few less important powers, the majority of the issues required the vote of nine of the thirteen states.⁹⁹ The confederal government did not have authority to act directly on the people. Nor did Congress have the power to raise its own revenue. It had to rely, therefore, on the states for the revenue needed to execute its responsibilities.¹⁰⁰

The fundamental principle the US confederation was based on was sovereignty of the states that formed the union and hence the central government was subordinate to the states. The

<http://plato.stanford.edu/search/searcher.py?query=federalism> accessed on ,2009-03-17

⁹⁶ supra note 44, p. 119

⁹⁷ Id, p. 119

⁹⁸ See Assefa supra note 62, p. 115

⁹⁹ supra note 44, p.119

¹⁰⁰ Id, p.119

confederation was, as a result, dysfunctional for much of the time.¹⁰¹ The confederation survived only for less than a decade from its ratification in 1781. Congress was particularly unable to regulate the economy.¹⁰² The inadequacy of the confederal arrangement, therefore, led to the adoption of the federal constitution in 1789.

There are also hybrid systems which neither fall under the category of federations nor confederations. The EU is one such institution with hybrid qualities. The EU exhibits both elements of federation and confederation and is labelled “confederal federalism”.¹⁰³ Certain features that make the EU a federation are that significant powers have been transferred to the European Union governance. Besides, the EU not only acts on the member states but also on individual citizens and business which is enforced by the European Court of Justice.¹⁰⁴ In this respect, therefore, the EU is more than a confederation. However, the member states of the EU still retain “most traditional powers over domestic and foreign policy and dominate the revenue collection.”¹⁰⁵ Together with the requirement of unanimous vote of all member states of the EU to change the scope and dimension of supranational authority, it can be concluded that the EU is not a fully developed federation.¹⁰⁶

1.4 Centralisation, Decentralisation and Non-centralisation

Centralisation and decentralisation are concepts closely related to federation and federalism. Though closely related, however, their fundamental distinction with unitary, federal and

¹⁰¹ Id, p.119

¹⁰² Id, p. 119

¹⁰³ Id, p.35

¹⁰⁴ Id, p.35

¹⁰⁵ Id, p.35

¹⁰⁶ Id, p.35

confederal states needs to be distinguished.¹⁰⁷ As in unitary states, decentralisation and centralisation is also found in federations as well. Some unitary (for example the UK and Sweden) are decentralised states, whereas others are centralised (like France). Likewise, some federations are centralised and others decentralised.¹⁰⁸ For instance, Germany is characterised by legislative centralisation but decentralised administratively.¹⁰⁹ Australia, one of the classic federations, has become highly centralised.¹¹⁰ In contrast, Canada is a decentralised federation due to the provincial governments' aggressive resistance to any erosion of their constitutional powers.¹¹¹

Federal systems are distinguished from unitary states basically because there is a constitutionally guaranteed division of power in the former. The issue of centralisation and decentralisation essentially concerns "the character and dynamic of power allocation."¹¹² Centralisation and decentralisation are a matter of degree with no fixed criteria/ formula. There are multiple indices and it is very difficult and complex to measure the level/ degree and of centralisation and decentralisation.

Understood broadly, decentralisation refers to "devolution of power and responsibilities from the national to the sub national level."¹¹³ Decentralisation is closely associated with federalism because both lead to "towards vertical power sharing among multiple layers of

¹⁰⁷ Id, p.35-36

¹⁰⁸ Id, p.36

¹⁰⁹ Id, p.36

¹¹⁰ Id, p.36

¹¹¹ Id, p.36

¹¹² Id, p.36

¹¹³ Federalism and Decentralisation, available at <http://ksghome.harvard.edu/~pnorris/Acrobat/Driving%20Democracy/Chapter%207.pdf> accessed on 09/03/2009

government.¹¹⁴ Federation is one, among several and distinct, institutional mechanisms for decentralisation of power.¹¹⁵

However, some scholars prefer to use the term non-centralisation to decentralisation in relation to federalism because the latter implies “a hierarchy with power flowing from the top or centre whereas the non-centralisation infers a constitutionally structured dispersion of power and represents better a federation.”¹¹⁶

1.5. Origin and Formation of Federation

The way federations are formed and the motive that prompts them to form a federation as well varies from one federation to another. There is a need to distinguish between ‘origins’ and ‘formation’ of federation.¹¹⁷ The ‘origin’ of federation has to do with an investigation of the particular motive states have for forming a federation. It therefore deals with the question why states form a federation. As a result the origins of federation concern the reason that drives states to form a federation. Formation, on the other hand, pertains how the federation comes into existence. While origin is concerned with the reasons for the federal order than other political systems, the formation of federation looks into the way or how the federation is formed.¹¹⁸

¹¹⁴ Id

¹¹⁵ Id. Other institutional mechanisms of decentralisation include, devolution to elected and non-elected regional government bodies, delegation of central departmental responsibilities and decision making to local managers in the field ; and the use of traditional villages council or urban communities for consultation and planning process

¹¹⁶ See Ronald, supra note 2, p.71

¹¹⁷ See Michael supra note 3, p.77

¹¹⁸ Id, p.77

There are generally two ways by which federations may be formed. The first can be described as federation by aggregation. It is also referred to as ‘coming together’ federations.¹¹⁹ In coming together federation, previously independent states come together and establish the federation. These federations are also referred to as centre-seeking, implying that the previously independent states consent to handover certain powers to the newly formed federal government and the rest to themselves. “Independent states may come together by ceding or pooling sovereign powers in certain domains for the sake of goods otherwise unattainable...”¹²⁰ The federal government is the outcome and creation of the agreement of the states. The federal government is absent during the bargain and is created by the states. USA and Switzerland are federations formed through this process.

In federations formed through holding together, the federation is built from a former unitary state.¹²¹ The unitary state creates constituent units and by devolving power to the constituent units, it transforms itself to a federation. India and the Nigerian federations were established through this process.

The motives that prompt states to form a federation are many and vary from federation to federation. The motives for the formation of federations in coming together and holding together federation also differs. The motives that drive a unitary state to transform itself into federation are different from the motives behind the formation of federations by previously semi-independent states.

¹¹⁹ Alfred Stepan Federalism and Democracy: beyond the US model, *Journal of Democracy* 10:4(October 1999) p.19-33 as cited by Assefa , Federalism and the Accommodation of Diversity in Ethiopia, supra note 55 p. 217

¹²⁰ See supra note Federalism, *Stanford Encyclopaedia of Philosophy*, available at <http://plato.stanford.edu/search/searcher.py?query=federalism> accessed on ,2009-03-17

¹²¹ Alfred Stepan , Federalism and Democracy: beyond the US model, *Journal of Democracy* 10:4(October 1999) p.19-33 as cited by Assefa , Federalism and the Accommodation of Diversity in Ethiopia, supra note 62, p. 217-219

The two predominant reasons deemed as the motives for origins of federation are defence and security on the one hand, and economic and commercial interest on the other. Burgess however, argues that the motives that lead to the origin of federation cannot be reduced only to two factors. The motive and historical circumstances of the formation of each federation varies.¹²² In some cases the political factors outweigh the socio-economic factors, while in other respects the reverse might be the case”.¹²³ Burgess rejects Riker’s two conditions- military condition and expansion condition – as an explanation of the origin of federation. Riker argues these two conditions arise from bargains between politicians who offer and politicians who accept the bargain and he considers these two conditions necessary for the occurrence of federations.¹²⁴ Burgess contends that it is “not possible to reduce the variety of factors impinging on the federal bargain, as Riker contended, to two simple criteria of necessity. The complexity of each historical circumstance makes this much more difficult...”¹²⁵

Instead, Burgess proposes what he calls the theory of circumstantial causation as an explanation for the origins of federations. In this theory, he broadly categorises the series of motives for union to a greater or lesser extent in each federation, but takes into account the relative importance of the different factors that have varied with each factor. The two principal factors he categorises as the origin of federation are perceived common interest on the one hand and real or imagined external and/ or internal threats on the other.

¹²² See Michael ,supra note 3, p.76-110

¹²³ Id , p.81

¹²⁴ Id, p. 77-79

¹²⁵ Id, p. 81

Among common interests which could be the motives for formation of federation, according to Burgess, may be: ¹²⁶

- shared political values
- expectation of stronger economic ties and associated benefits
- a multiplicity of a range of communications and transactions
- desire for political independence
- prior political association
- strategic (territorial) considerations
- geographical proximity
- common ideological-cultural factors, such as nationalism, religion and inherited traditions and customs
- political leadership and a broadening of the political elite
- similarity of social and political conditions
- the appeal of federal models
- the culmination of historical processes that were founded upon prior political commitments.

The external and internal threats which could motivate states to form a federation could be military, economic and cultural insecurity, which may be real or imagined, including “a perceived threat to the stability of the existing political order”.¹²⁷

¹²⁶ Id ,p. 100

¹²⁷ Id, p.100

3.0 CHAPTER TWO VERTICAL DISTRIBUTION OF POWER

In chapter one, we have looked into the theoretical issues related to federalism. It dealt with the issues revolving around the conceptual distinctions between federalism and federation and their distinguishing features in contrast to other political systems. Moreover, the driving force for the establishment of federations has been explored.

The central theme of this chapter is vertical distribution of power. It analyses the vertical distribution of power in the Canadian, German and Ethiopian federations. The nature, manner of distribution of power, and the scope of the power divided between the federal government and the component units in these federations will be explored. The substantive powers granted to various levels of governments in the three federations will be discussed. Accordingly, comparison will also be made of the exclusive, concurrent and the residual powers of the federal governments and the component units in these federations. The discussion will be based on largely the texts of the constitution of these countries. Judicial decisions will be used wherever available and deemed appropriate.

The Ethiopian federation is the most recently established federation compared to the German and Canadian federation under investigation. It is now close to a decade and half old. Yet there is no single case decided on disputes involving power division since its inauguration. Nor is there any advisory opinion by the organ given the responsibility to interpret the constitution elaborating on the power division. The discussion on the division of power in Ethiopian will rely, therefore, purely on the text of the constitution.

2.1 Manner of Distribution of Powers

Before proceeding to the analysis of the specific power division it is important to look at the manner of division of powers in these federations. There is no one uniform universally agreed method of dividing power in federations. Federations have used a variety of methods to apportion power between the federal government and the constituent units.

Dividing Powers

The central part of the negotiation and compromise in federations, among other things, is the division of powers between the two levels of government.¹²⁸ Though division of power is regarded as the defining feature of federations, the form, scope and nature of division of power varies from federation to federation. No two federation exhibit similarity in the method of division of power between the two levels of government.

A number of factors influence the form and scope and nature of division of power. Historical, social, economic cultural and political situations have bearings on the form and scope of power divisions in federations.¹²⁹ No less significant factor influencing divisions of powers is the way the federation is formed.¹³⁰

The period the federal constitution has been adopted and the role government had is also to be noted for the variation among federations in the manner and scope of division of power. Power division did not present difficulty in the old federations. The older federations did not have relevant examples to draw lesson “in establishing a workable constitutional design and

¹²⁸ Supra note 44, p. 145

¹²⁹ Solomon Nigussie, Fiscal federalism in the Ethiopian ethnic based federal system,(2006) , p.36-37

¹³⁰ ibid

help them assess the relationship between codified frameworks and actual outcomes.¹³¹ Moreover, the older federations' constitutions were written when government role in the economy and society was very small and hence presented less difficulty in conceptualising and dividing power between the two levels of government.¹³²

2.2 Approaches to Division of Power in a Federation

There are three issues that need to be resolved in any federation in undertaking division of power.¹³³ First, the way sovereign power of government is sliced. Second is which power be assigned to which level of government. The third is the constitutional expression of this division of power.

2.2.1 Which Specific Power to Which Level of Government

One of the central decisions federations have to make when undertaking division of power is determining which specific power should go to which level of government. This question is particularly prominent in legislative federalism because it requires determination of substantive powers to be assigned to which level of government: the federal government or the constituent units.

One suggested principle earlier provided by A.V Dicey is that “whatever concerns the nation as a whole should be placed under the control of the national government” and all other matters “which are not primarily common interests should remain in the hand of several

¹³¹ Supra note 44,p. 145

¹³² *ibid*

¹³³ *Id* , p. 146

states”.¹³⁴ This principle in its contemporary understanding implies entrusting powers to the constituent units powers “whose costs and benefits can readily be contained within one set of borders” and the federal government with powers whose costs and benefits “inevitably spill across internal borders”.¹³⁵ Public service is a good example of the former and defence of the latter.

Based on this principle, policy fields concerning the functioning of the market economy which includes customs (tariffs), currency, patents, weights and measures, trade were assigned to the federal government.¹³⁶ These policy fields have extensive spill over effects.¹³⁷ Education, social policy, religion, culture, and language (in multi lingual societies) on the other hand were deemed matters not of primarily of common interest and with very limited externalities at the time and hence assigned to the constituent units.¹³⁸

Thus the external affairs and the national market were assigned to the federal government and social affairs to the constituent units.¹³⁹ To a great extent, this is also generally the case, with certain variations, in the Canadian, German and Ethiopian federations discussed below in the specific substantive powers allocated to the federal government and the constituent units.¹⁴⁰

2.2.2 Patterns of Enumeration

¹³⁴ Id, p. 147-148

¹³⁵ *ibid*

¹³⁶ Id, p.148

¹³⁷ *ibid*

¹³⁸ *ibid*

¹³⁹ *ibid*

¹⁴⁰ Canadian constitutional Act , section 91,92, 93, 94; The Basic Law, article 71-74;The Ethiopian constitution article 51 and 52

Once determination is made which specific power should go to the federal government and the constituent states, the next important issue in the task of division of power is to give these decisions “textual form” or to write them into a binding document.¹⁴¹ The textual form could take two options: enumerated and residual powers and exclusive and concurrent powers.¹⁴²

Enumerated and Residual powers

So far, the approach federations followed to divide powers exhibit a variety of approaches. Some federations provide only one list. Others two list. Still some federations have three lists. In the one list method the powers of one level of government are enumerated and the powers of the other level of government are left unspecified.¹⁴³ This is the earliest and simplest method of dividing power.¹⁴⁴ For instance in the US, Switzerland, and Australia, the list of specified powers are assigned to the national government while the constituent units retained the residue power.¹⁴⁵ These federations were created by a previously semi independent units. The federal government was created by the states and hence the federation was established and wrote the power division into the constitution. They specified the powers of the federal government and retained residual powers to themselves.

In contrast, in Canada and India the federal government retained residual powers.¹⁴⁶ Assignment of residual powers is a reflection of preference to maximise the power of the level of government vested with it.¹⁴⁷

¹⁴¹ supra note 44, p.148-149

¹⁴² Id, p. 149

¹⁴³ ibid

¹⁴⁴ ibid

¹⁴⁵ US constitution Article section 8 and 9; Switzerland constitution, article 3; Australia constitution article 107

¹⁴⁶ See Canadian and Indian constitution. Canadian constitutional Act peace, order and good governance clause vest the federal government residual powers. Section 91 of the Indian constitution grants residual power

In the two list method, the powers of both levels of government will be enumerated. There exists therefore, two separate lists.¹⁴⁸ In this method “the two levels of governments are given an equality of presence in the constitution, each having concretely identified jurisdiction”.¹⁴⁹

In the three list method, the powers of both levels and the joint responsibilities are enumerated.¹⁵⁰ Indian federation has got a union list for the federal government, state list and a concurrent list in which both levels of government exercise power.

The Canadian, German and Ethiopian federations as well exhibit different manner of division of power. Canadians in their constitution, the British North America Act (BNA), as the instrument was referred to¹⁵¹, came up with a different manner of dividing power quite different from the US Constitution, which provided the first blueprint to the manner of division of power by providing one list containing the powers of the federal government and leaving the residual powers to the states. Canadians, in a complete departure with the American approach came up with a two lists of powers. The BNA provided for a separate list of provincial and federal government powers. Moreover, it placed the residual power in the federal government hand. The peace, order and good government clause of section 91 of the Act, deemed to grant residual power to the federal government through judicial interpretation as well, is vested to the federal government.

specifically to the federal government

¹⁴⁷ Supra note 44, p.145

¹⁴⁸ Id, p.149

¹⁴⁹ ibid

¹⁵⁰ ibid

¹⁵¹ Canadian constitutional Act, section 91,92, 93, 94

The German Basic Law provides for an exclusive list of federal government powers and residual powers to the Lander coupled with an extensive list of concurrent powers on which both levels of government exercise. ¹⁵²

The Ethiopian federation¹⁵³ provided federal government powers list and reserved residual powers to the constituent units. It also contains certain list of the constituent units' powers.

The Ethiopian federations can largely be categorised with federations which provide one list as it lists the federal government powers and reserve the residual powers to the constituent units.¹⁵⁴ The reason for a separate list for the constituent units is not clear. However, it did not provide a different power to the constituent units which would not fall within the residual powers of the constituent units.

The German approach is basically a one list approach but with a long list of concurrent powers. As in the Ethiopian federation, residual powers are reserved to the Lander in Germany.¹⁵⁵

Exclusive and Concurrent Powers

Exclusive powers refer to powers assigned to one particular level of government (in a federation) and which is under the control of that level of government alone.¹⁵⁶ Normal features of federal constitutions is that they grant concurrent power implicitly and explicitly and therefore assignment of a specific power to one level of government does not necessarily

¹⁵² The Basic Law, article 71-74

¹⁵³ The Ethiopian constitution article 51 and 52

¹⁵⁴ *ibid*

¹⁵⁵ German Basic Law articles 70-74

¹⁵⁶ *Supra* note 44,p. 150

mean the other level is denied.¹⁵⁷ The rule in the US constitution, for instance, is concurrence. The powers enumerated under Article I Section VIII remain exclusive powers of the federal government only where the states have been specifically prohibited from exercising that particular power. Absent that it is concurrent power. Where the states have not been specifically prohibited even the powers enumerated for the federal government remain concurrent powers. Federal constitutions have paramountcy provision to resolve clashes that inevitably arise on concurrent powers-when the two levels of government have jurisdiction over the same policy fields.¹⁵⁸

All of the three federations have assigned exclusive powers to either level of government and on different subject matters (discussed below). A significant difference can be also witnessed in the nature and scope of concurrent powers allocated in the three federations. German's federations stand out different in both the scope and content of concurrent powers.

2.3 The Substantive Powers Divided between the two Orders of Government in the three Federations

As noted earlier, the manner of allocating power in the three federations is different. Canadian constitutional Act provides two lists: federal and provincial government. German and Ethiopian federation's allocation of powers, in general, is similar. The German constitution extensive list of concurrent powers makes it distinct. The Ethiopian constitution lists the federal government powers and reserves the residual powers to the constituent units but it then proceeds with certain lists of constituent units' powers.

¹⁵⁷ *ibid*

¹⁵⁸ *ibid*

This difference in the approach to the allocation of power in the three federations makes analysis of division of powers a daunting task. What I will do in this chapter is to analyse the power division in these federations by having regard to some categorisation Herperger used in his analysis of the distribution of powers in twelve federations.¹⁵⁹ Rather than approaching from the perspective of either the federal government or constituent units, this chapter will proceed with the analysis looking into the allocation of exclusive powers in the fields of international relation, functioning of the economic union, and jurisdiction over telecommunications, postal and broadcasting. Then the content and nature of allocation of residual and concurrent powers in the three federations will be dealt.

Since in the nature of residual powers, specific powers will not be specified, analysis of residual power will be only to those matters which have been indicated by implication to the level of government in the texts of the three countries constitution and judicial decisions. Canada will be treated separately as the constitution's peace, order and good governance clause has been interpreted to grant federal government with residual powers.

2.3.1 Exclusive Powers

International Relations

International relation is one of the policy fields usually granted to the federal government in many federations. In some federations it is exclusively given to the federal government. Others provide mechanisms by which constituent units play role in international relations.

¹⁵⁹ Supra note 1 The study includes both the established federations and emerging ones. These include: USA, Canada, Germany, Austria, Switzerland, Australia, India, Malaysia, Pakistan, Nigeria, Rhodesia and Nyasaland, and West Indies.

International relations comprise defence, foreign policy, operation of diplomatic service and international treaties.¹⁶⁰

Defence in all of the federations under investigation is exclusively vested in the federal government.¹⁶¹

German Basic law provides that “... defence including protection of the civilian population” falls under federal exclusive jurisdiction. In Canada power over the militia, military and naval service and defence is federal exclusive powers.

In Ethiopia establishment and administration of national defence, public security forces as well as a federal police is vested to the federal government.

Foreign affairs and International Treaties

Foreign policy and operation of diplomatic service are also the other components of international relations that belong generally exclusively to the federal government in the three federations. Foreign affairs in general are exclusive federal jurisdiction in Ethiopia and Germany.¹⁶² Federal government is empowered to negotiate and ratify international agreements in both countries.

In Germany, however, there is a qualification to the federal exclusive power over foreign affairs. According to the Basic law article 32(1), foreign affairs are exclusive power of the federal government.¹⁶³ However, Article 32(2) and (3) empowers the Lander to enter into international agreements concerning matters that fall within their jurisdiction and requires

¹⁶⁰ Id. P 26

¹⁶¹ Canadian constitutional Act, article, section 91(7); German Basic Law article 73(1); Ethiopian constitution article 51(1)

¹⁶² German Basic Law, article 73(1); Ethiopian constitution article 51(8)

¹⁶³ German Basic Law, article 32(1)

consultation with the Lander governments when treaties the federal government enter are likely to affect Lander legislative power. There is no such counterpart provision under the Ethiopian constitution. The constitution is silent on any role the constituent units may have in international treaties even in matters which fall within their jurisdiction.

Germany's EU membership, however, has also impact on the division of power in Germany particularly on foreign affairs. It has boosted the Lander governments' role on foreign affairs. A new provision added, after the Maastricht Treaty which established the EU, has empowered the Lander to participate directly in the European policy making process on matters which fall under their legislative jurisdiction.¹⁶⁴

Nothing is provided as to foreign affairs powers of the federal government in the Canadian BNA Act. Britain exercised for long foreign relations on behalf Canada. Canada obtained full sovereignty and gained its treaty and foreign affairs powers in December 1931.¹⁶⁵

Though Canada gained its foreign affairs power from Britain, however, there remains ambiguity on who has got power over treaty and foreign affairs. It is still contested as both levels of government are claiming authority over foreign affairs and power to enter treaty.¹⁶⁶ The dominion government contends that the provinces did not have the right to conclude international treaties. The federal government argues on the basis of customary law and

¹⁶⁴ Supra note 1, p. 164; Basic Law, article 23

¹⁶⁵ Blanpaw R. And Alem A., International Encyclopaedia of Laws: Canadian constitutional law, (volume II) Kluwer Law International , the Hague, 2004, p.193

¹⁶⁶ Id, p. 195

Canadian courts decisions that only Canada has internationally recognised personality and “undivided external sovereignty”.¹⁶⁷

The federal government claim for exclusive right to conclude treaties did not go unchallenged, however. The provinces have contested this legally and in practice. Quebec, for instance, argues that its legislature is the only one empowered to legislate on subjects listed in S. 92-93 of the Constitutional Act 1867 “and had in fact had entered into more than 300 agreements”.¹⁶⁸

One of the contentious issues in federations with regard to treaty making power is the extent to which and whether the federal government is empowered to legislate upon matters which fall within the constituent government’s jurisdiction.

In Germany there is a constitutional requirement to consult the Lander when treaties are likely to affect land legislative power. Nothing is provided in the Ethiopian constitution to what extent and whether federal government may enter in to treaties concerning matters that fall under the constituent jurisdiction. Nor is there a judicial decision to this effect.

In Canada, provincial governments must pass the necessary implementing legislation for the performance of obligation of international treaty entered by the federal government. Source of this requirement is not the constitution but a judicial decision of the Judicial Committee of the Privy Council (JCPC), which served as the last appellate court with respect to

¹⁶⁷ Id, p. 195

¹⁶⁸ Id, p.197

constitutional issues in Canada until 1949 after which Canadian Supreme Court took over the responsibility.¹⁶⁹

The JCPC in the labour convention case made distinction between the formation and performance of international treaty making authority of the dominion and provincial governments. It decided that the federal government treaty power did not allow the dominion government to legislate in matters allocated to the province “by virtue of having undertaken international obligations dealing with those matters”.¹⁷⁰

JCPC decision confined federal government treaty making authority to formation of international treaty and left the performance authority to the provincial governments which in effect subjected the federal government treaty making authority and therefore its international obligation to the consent of provinces to implement the treaty. The federal government treaty making power is, therefore, dependent on the willingness of the provincial government as far as matters that fall under their jurisdiction is concerned.

The reason in the JCPC decision is that unless the formation and performance of international treaty obligations is divided, theoretically federal government authority could extend to the exclusive provincial jurisdiction. To safeguard the authority of the provinces the JCPC ruled that performance of international obligation requires implementing legislation when the international treaty affects the provincial governments’ exclusive jurisdiction. The impact of this decision is that it limits “the federal government’s ability to guarantee the performance of

¹⁶⁹ Ibid, supra note 1, p. 27

¹⁷⁰ Supra note 44, p. 293

treaty obligation with other countries when matters under provincial jurisdictions are involved.¹⁷¹

Citizenship in all of the three federations is exclusive federal government authority.¹⁷² Matters concerning nationality are federal government power in Ethiopia. Citizenship in the federation in Germany is exclusive federal power. The dominion government in Canada has exclusive jurisdiction over naturalisation and aliens.

Immigration is federal exclusive power in Ethiopia.¹⁷³ The constitution is emphatic on this point and provides that “all matters relating to immigration, as well as the granting of passports, entry into and exit from the country, refugees and asylum” shall be determined and administered by the federal government.

Similarly, in Germany freedom of movement, passports, residency registration and identity cards, immigration, emigration and extradition is exclusive federal government power.¹⁷⁴ However, matters concerning refugees and expellees including the law relating to residence and establishment of foreign nationals are concurrent powers.¹⁷⁵

Concurrency is the norm in Canada concerning immigration. In Canada, federal government assumes authority over such things as levels of immigration into the federation as a whole.¹⁷⁶

¹⁷¹ Supra note 1, p. 27

¹⁷² The German Basic Law, article 73(2); Ethiopian constitution article 51(17); Canadian constitutional Act, section 91(25)

¹⁷³ Ethiopian constitution article 51(18)

¹⁷⁴ German Basic Law, article 73(2) and (3)

¹⁷⁵ German Basic Law, article 74(4) and (6)

¹⁷⁶ Supra note 1, p. 27

Provincial governments share legislative responsibility in those matters which directly relate to their own territorial jurisdiction.¹⁷⁷ However, the only province that has enacted immigration law is Quebec.¹⁷⁸ The federal law sets forth the national standards and objectives and defines eligible and ineligible classes of immigrants whereas Quebec is responsible on the selection, establishment and the integration of immigrants going to Quebec.¹⁷⁹

Functioning of the Economic Union

This is a broad category in which jurisdictional authority has been assigned in a variety of ways to either levels of government or both. The functioning of the economic union includes matters concerning trade and commerce, currency, banking, insurance, transportation and communication, and natural resources.

Trade and commerce is explicitly exclusively assigned to the federal government in Canada.¹⁸⁰ In Ethiopia the federal government authority extends only on interstate and international trade.¹⁸¹

The power granted to the federal government in Canada over trade and commerce is very broad. The federal government jurisdiction extends to two aspects of commerce regulation:¹⁸² (1) international and interprovincial trade and commerce and (2) general trade and commerce affecting Canada as a whole. This was one of the sweeping powers among the

¹⁷⁷ Id, p.27

¹⁷⁸ Supra note 165, p.129

¹⁷⁹ ibid

¹⁸⁰ Canadian constitutional Act, section 91(2)

¹⁸¹ Ethiopian constitution, article 51(12)

¹⁸² Supra note 165, p. 119

enumerated powers.¹⁸³ It was not qualified to inter-state and foreign commerce as in Ethiopia and other federations.

Judicial interpretation, however, had confined federal jurisdiction over trade and commerce to interstate and foreign commerce. Trade within a constituent unit remains the provincial governments' jurisdiction in Canada by virtue of the judicial interpretation of the "trade and commerce clause.

Besides, the provincial governments in Canada have exclusive authority over property and civil rights.¹⁸⁴ This, therefore, limits the federal government trade and commerce power to regulate by legislation contracts of particular business or trade.¹⁸⁵

However recent developments in the Canadian constitutional law indicate considerable broadening of federal jurisdiction in the field of commerce.¹⁸⁶ This is particularly evident after the establishment of the Supreme Court and its assumption of jurisdiction of constitutional issues. Its decisions "liberalised the interpretation of the commerce clause by acknowledging that local elements of a commercial activity could be considered as integral parts of international or interprovincial commercial enterprise and that, in such cases, the transaction, even if completed inside a province, could henceforth be subject to the federal jurisdiction".¹⁸⁷

¹⁸³ Supra note 44, p. 293

¹⁸⁴ Canadian constitutional Act, section 92(13)

¹⁸⁵ Supra note 165, p.119

¹⁸⁶ *ibid*

¹⁸⁷ *ibid*

In Ethiopia intra-state commerce falls under the jurisdiction of the constituent units by reading of the exclusive power vested to the federal government over foreign and inter-state jurisdiction¹⁸⁸ and by reading of article 52(1) which vests residual power to the constituent units of powers not exclusively vested to the federal government.

In Germany not only trade and commerce but the law relating to economic matters is a concurrent power.¹⁸⁹ This also includes mining, industry, energy, crafts, banking, stock exchanges and private insurance. The federal government retains, however, exclusive authority over unity of customs and trading area, treaty regarding commerce and navigation, free movement of goods, exchange of goods and payments with foreign countries as well as custom and border protection.¹⁹⁰ The Lander have exclusive authority on laws relating to shop closing hours, restaurants, game halls, display of individual persons, trade fairs, exhibitions and markets.

Concerning power over monetary system, regulation over currency falls under the exclusive authority of the federal government in all of the three federations.¹⁹¹ Legal tender and issuance of money are exclusive federal government authority in all of the three federations. Power to regulate interest is vested exclusively to the dominion government in Canada.¹⁹²

The Ethiopian constitution seems to grant broad powers to the federal government. Formulation and execution of the country's financial and monetary policies and strategies is

¹⁸⁸ Ethiopian constitution, article 51

¹⁸⁹ German Basic law, article 74(11)

¹⁹⁰ Id, article 73(5)

¹⁹¹ German Basic Law, article 73 (4); Ethiopian constitution, article 51(4) and (7) ; Canadian constitutional Act, section 91(14) (15) (20)

¹⁹² Canadian constitutional Act, section 91(19)

federal power. These include responsibility to print and borrow money, mint coins, and regulate foreign exchange and money in circulation.¹⁹³

Legislative authority over banking (chartered banks) is exclusive authority of the federal government in Ethiopia and Canada.¹⁹⁴ Power over banking and incorporation of banks including saving banks is federal exclusive power in Canada.¹⁹⁵ In Germany it is concurrent power.¹⁹⁶

Transportation and communication is an integral part of the functioning of the federal economic union with either level of government exercising authority over those aspects relevant to them. Legislative authority over roads and bridges is largely shared power. In Germany, construction and maintenance of long distance highway is a concurrent power.¹⁹⁷ In Ethiopia federal responsibility extends only to major roads linking two to or more states.¹⁹⁸

There is nothing stated in the Canadian constitutional Act as to the responsibility of federal government over roads and bridges in the section which provides the exclusive powers of the federal government. It can be deduced from the reading of the section on the exclusive power of the provincial government, which vest the provincial governments with the power over local works and undertakings which includes. Inter provincial roads, however, come under that federal government authority.¹⁹⁹

¹⁹³ Ethiopian constitution, article 51()

¹⁹⁴ The National Bank of Ethiopia establishment proclamation No. 591/2008

¹⁹⁵ Canadian constitutional Act, 91(15) (16)

¹⁹⁶ German Basic Law, article 74(11)

¹⁹⁷ Id, article 74(22)

¹⁹⁸ Ethiopian constitution, article 51(9)

¹⁹⁹ Canadian constitutional Act, section 92(10)

The three federations have divided responsibility for Rail transportation in different ways. In Ethiopia rail transportation is under the exclusive jurisdiction of the federal government. The federal government is not only responsible for the regulation but for the development and administration of rail transportation as well.²⁰⁰ It is not clear whether the constituent units in Ethiopia do have authority to develop rail transportation within their territory. Like the responsibility over roads which confined the federal exclusive authority to roads linking to two or more states whereby the constituent units are empowered over roads within their own territory, there is no saving clause for the constituent units power in the development and administration of rail transportation within their border. If the constituent units have authority over roads within borders, it is not illogical to think that they have authority over rail transportation within their border.

In Canada the provincial governments have power over local works and undertakings. It can be derived from this that the provincial governments have exclusive authority over rail transportation within their own territory.²⁰¹ The federal government has exclusive authority on rail transportation extending beyond the limits of the province.

Authority over rail transportation in Germany is either exclusive or concurrent power. Authority is divided depending on whether it is wholly and predominantly owned by the federal government or the Lander.²⁰² Federal government has exclusive authority on the operation of railways wholly or predominantly owned by the federation. This responsibility extends the construction, maintenance and operation of railroad lines and the levying of

²⁰⁰ Ethiopian constitution, article 51(9)

²⁰¹ Canadian constitutional Act, section 92(10)

²⁰² German Basic Law, article 73(6a)

charges for the use of the lines belonging to federal railways.²⁰³ Non-federal railways on the other hand is concurrent power.²⁰⁴

Sea transportation is exclusive federal government power irrespective of whether it is within the territory of a constituent unit in Ethiopia. The federal government power extends to sea transportations not connecting more than two constituent units. The federal government is responsible for the development, administration and regulation of sea transport.²⁰⁵

In Canada, on the other hand, the federal government generally has authority over navigation and shipping and ferries between a province and any British or foreign country or between two provinces. This implies therefore that provincial governments' authority is confined on intra-province ferries.²⁰⁶

In Germany, unlike the Canadian and Ethiopian federations, maritime and coastal shipping, inland navigation and inland waterways used for general traffic is a concurrent power.²⁰⁷

Civil aviation has a transcending character on regional borders. Civil aviation generally is federal exclusive authority in the three federations.

As in the other older federations, civil aviation did not exist as a mode of transportation at the time of writing the constitution, the Canadian British North America act, and hence did not provide whose jurisdiction civil aviation is.

²⁰³ *ibid*

²⁰⁴ *Id*, article 74(23)

²⁰⁵ Ethiopian constitution, article 51(9)

²⁰⁶ Canadian constitutional Act, section 91(13) and 92(10)

²⁰⁷ German Basic Law, article 74(21)

Civil aviation was made federal authority through judicial review in other federations with the exception of Switzerland where the constitution was formally amended to formally recognise aviation as a federal responsibility.²⁰⁸

Like other federations, civil aviation became federal authority thorough judicial review in Canada. This did not present problems as the federal government retained residual authority.

Both the German and Ethiopian federations were established long after the invention of the aircraft and therefore have made civil aviation exclusive federal authority.²⁰⁹

Weights and measures and the determination of standards of time is exclusive power of the federal government in all of the three federations.²¹⁰ Whereas, jurisdiction over granting patent for inventions and copyright in all of the three federations is vested to the federal government.²¹¹ The wording in the German basic law is slightly different. The federal government legislative authority pertains to industrial property rights and includes publishing whereas the Canadian constitution extends the protection to discovery as well.

Jurisdiction over Telecommunications, Postal service and Broadcasting

Primary jurisdictional authority rests mainly with the federal government. International and interstate aspects of telecommunication are under federal exclusive authority in Canada. Recent decisions by the Supreme Court in AGT v. CRTC and CNCP has confirmed the authority of the federal government to regulate the interprovincial and international aspects of

²⁰⁸ Supra note 1, p. 29

²⁰⁹ German Basic Law, article 73(6); Ethiopian constitution, article 51(9)

²¹⁰ German Basic Law, article 73(4); Canadian constitutional Act, section 91(17); Ethiopian constitution, article 51(20)

²¹¹ German Basic Law, article 73(9) , Canadian constitutional Act, section 91(22) (23) , Ethiopian constitution, article 51(19)

telecommunications.²¹² There is, however, recognition of provincial powers over telecommunication activities solely within provincial boundaries.²¹³ This distinction, however, is becoming less evident now than it was in 1867 with the increasing globalisation of information system.²¹⁴

In Germany and Ethiopia telecommunication is the exclusive authority of the federal government.²¹⁵ In the older federations, jurisdiction over broadcasting was not foreseen and therefore nothing was provided in the constitutions of these countries. Jurisdiction over its regulation was determined largely through judicial decisions. The German Basic Law is silent on whose jurisdiction broadcasting is. Since the Lander governments have residual authority, broadcasting is their jurisdiction. The constitutional court has also ruled in the Television I case that jurisdiction over broadcasting belongs to the Lander.²¹⁶

In Ethiopia too, the constitution is silent on whether the federal government has exclusive jurisdiction. Nonetheless, the federal government is exercising jurisdiction over broadcasting.²¹⁷ A federal broadcasting agency has been set up which grants licence to broadcasters throughout the country.

Jurisdiction over postal service in all of the three federations is exclusive authority of the federal government.²¹⁸

²¹² Supra note 1, p.29

²¹³ *ibid*

²¹⁴ *ibid*

²¹⁵ German Basic Law, article 73(7); Ethiopian constitution, article 51(9)

²¹⁶ Television case I 2 BverfGE 205(1961)

²¹⁷ Ethiopian broadcasting proclamation

²¹⁸ Canadian constitutional Act, section 91(5); Ethiopian constitution, article 51(9); German Basic law, article

Jurisdiction over Natural Resources

Both orders of government have come to assume varying levels of legislative authority over natural resources. In Ethiopia right of ownership on land and natural resources are vested in the state and the people.²¹⁹ Jurisdiction is divided based on law making and enforcement responsibilities. The federal government has legislative authority “to enact laws for the utilisation and conservation of land and other natural resources...” whereas the states have the responsibility of administration.²²⁰

In Germany, it is concurrent power. Both levels of government have jurisdiction over transfer of land and natural resources.²²¹ In Canada, jurisdiction over land and natural resources is divided between the federal government and the provincial governments. The constitutional Act has allocated property of natural resources to the provincial governments.²²² In its broad sense the provincial governments have exclusive legislative authority over property and civil rights in the province.²²³ Besides, the management and sale of public lands belonging to the province as well as the timber and wood thereon, and local works and undertakings is the exclusive jurisdiction of the provincial governments.²²⁴ A new provision added in 1982 granted the provincial governments’ exclusive jurisdiction over non-renewable natural resources, forestry resources and electrical energy.²²⁵

73(7)

²¹⁹ Ethiopian constitution, article 40

²²⁰ Id, article 51(5) and 52(2d)

²²¹ German Basic Law, article 74(15)

²²² Canadian constitutional Act, section 109 and 117

²²³ Id, section 92(13)

²²⁴ Id, section 92(5) and(10)

²²⁵ Supra note 165, p.124

The federal government is vested with exclusive authority over sea coast and inland fisheries.²²⁶ The Supreme Court decided that off shore minerals fall within peace, order and good governance power of the federal government and therefore is the federal government's exclusive jurisdiction. Uranium was also vested to the federal government by the courts based on the peace, order and good governance clause because it was deemed to be the general advantage of Canada.²²⁷

2.3.2 Residual Powers

The scope of residual power is dependent upon how much exclusive power is vested to the other level of government. The more the exclusive list, the less the scope of residual power is. As noted earlier, residual powers are vested to the constituent units in Germany and Ethiopia.²²⁸

Seen in light of this, the German Basic law seem to have left very few powers to the Lander given its extensive list of exclusive federal government powers and concurrent list. That is why the German federation is often referred to as a centralised federalism.²²⁹ The centre enjoys extensive law making power.

It is hard to reach a different conclusion however as far as the Ethiopian federation is concerned. On the face of it, it appears that much is left to the constituent units by way of

²²⁶ Canadian constitutional Act, section 91(12)

²²⁷ Supra note 165, p.124

²²⁸ Ethiopian constitution article 52(1); German Basic Law, article 30 and 70

²²⁹ Supra note 44, p.36

residual powers given a very small list of federal exclusive powers.²³⁰ But one wonders what is left to the constituent units when one looks at the broad wording of the federal government powers and function. A mere glance at the first three sub articles of article 51 makes one to ask what is left to the constituent units. The broad areas of jurisdiction and the generality of the wording used in the article leaves one uncertain where to draw the line what is federal government power and what remains to the constituent units.

Canada by contrast has vested residual power to the federal government. This is what makes the Canadian federation unique. This section will first treat Canada separately and then explores the nature and scope of residual powers in all of the three federations.

Residual Powers in Canada

Canada and India are the only federations which vested residual power to the federal government. The peace, order and good governance clause of the Canadian constitutional Act is usually deemed to be a grant of residual powers to the federal government. The central purpose in granting the peace, order and good governance power was to centralise power in contrast to the framers of the US constitution who intended to make the states very strong by leaving the residual powers to the states.

²³⁰ See Ethiopian constitution article 51 and 55. There are 21 lists of the powers of the federal government. Addition powers of the federal government include the power to enact the penal, commercial and labour code found in article 55. The first three articles grant the federal government the power to formulate the country's overall policies and strategies in respect of economic, social, and development matters. And the federal government has authority to set national standards for science, health and education.

It was also in sharp deviation from the US federation by then, which was the only example it could draw lesson on the power division/allocating jurisdiction. Judicial decision has worked, however, the other way round.²³¹

Courts have made restrictive reading of the peace, order and good governance clause.²³² JCPC ruling had limited the reach of the peace, order, and good governance clause.²³³ This power is subdivided into three: the emergency power, the residual power and the national concern power.²³⁴

The emergency power entitles the federal government to legislate in a crisis situation even on matters which fall within the exclusive jurisdiction of the provincial governments.²³⁵ Through the residual power, the federal government assumes authority/jurisdiction on those subject matters which did not exist at the time of confederation or was forgotten by the drafters of the 1867 constitution.²³⁶ New powers the federal government acquired, through the judicial process, include aeronautics, the international capital, and the incorporation of companies other than those with provincial objects and off shore minerals.²³⁷ But, according to the supreme court, for the federal government to acquire new power, the new matter must not be an aggregate but having “ a degree of unity that made it indivisible, an identity which made it distinct from provincial matters and a sufficient consistence to retain the bounds of form...”²³⁸

²³¹ Supra note 44, 293

²³² Id, p. 294

²³³ ibid

²³⁴ Supra note 165 , p.116

²³⁵ ibid

²³⁶ Id, p.117

²³⁷ ibid

²³⁸ ibid

The third aspect of the peace, order and good governance clause, as interpreted by the JCPC, is the national concern power. This grants the federal government power to legislate on even matters that fall under provincial exclusive powers so long as the matters have become of national interest.²³⁹ To curb the centralisation of powers by the federal government, however, the parameter the courts have developed require that “for a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with fundamental distribution of legislative power under the constitution...”²⁴⁰ The new subject matters thus obtained become exclusive power of the federal government, “including its intra-provincial aspects”.²⁴¹

Following, we will look at the scope of residual powers in the three federations. In many federations, when the power division is worked out, the areas usually left to the constituent units are education, culture and social affairs. These are deemed to be local matters which are of no or less concern to the national government.

Social Affairs

Within social affairs come education, health, labour, and social services. These matters are usually the jurisdiction of the constituent units in the three federations.

²³⁹ Id, 118

²⁴⁰ *ibid*

²⁴¹ *ibid*

Concerning education, constituent units have exclusive authority over primary and secondary education in all of the three federations.²⁴² In Canada it is within the exclusive authority of the provincial governments as linguistic minorities are concentrated territorially within particular constituent units.²⁴³

Post-secondary level is generally federal government jurisdiction in Ethiopia. There is no specific provision, however, in the constitution which states/indicates which level of government is responsible for which. In broad terms the federal government is vested with the power to “establish and implement national standards and basic policy criteria for...education...”²⁴⁴ In practice and the policy document issued by the federal government indicate that the constituent units are responsible for primary and secondary education whereas the federal government for post-secondary education. It is solely the federal government which is engaged in building and expanding universities throughout the country.

The general approach to health services in the three federations is that constituent units are assigned responsibility for hospitals and public health and sanitation.

In Ethiopia the federal government has authority to set national standards and basic policy criteria for public health.²⁴⁵ In Canada, though this is not specifically addressed in the Constitutional Act, it is assumed to be the power of the provincial governments.²⁴⁶ The provincial governments are responsible for the establishment, maintenance and management

²⁴² Supra note 1, p. 30. In Ethiopia too this is the constituent units jurisdiction though there is no explicit provision in the constitution

²⁴³ Canadian constitutional Act, section 93. Supra note 1, p. 30

²⁴⁴ Ethiopian constitution, article, 51(3)

²⁴⁵ Ethiopian constitution, article 51(3)

²⁴⁶ Supra note 165, p.126

of hospitals and regulation of the medical profession.²⁴⁷ In addition the provincial governments' authority over health also emanates from their authority over matters of a local or private nature.²⁴⁸ The federal government is responsible, however, for marine hospitals.²⁴⁹ Besides the federal government may assume jurisdiction over health "when it is an accessory to a valid federal law(i.e. veterans' hospitals); or when the law is in relation to criminal law(i.e. where the health concern arises in the context of a public wrong and the response is a criminal prohibition)".²⁵⁰

The law on pharmacies, medicines, medical products, drugs, narcotics, poisons, admission to the medical profession as well as the measures to combat human and animal diseases are concurrent powers in Germany under the Basic Law.²⁵¹ The concurrent powers of the federal government and the Lander extend as well to the economic viability of hospitals and the regulation of hospital charges.

Concerning social services, there are varied approaches among the three federations. Unemployment insurance is exclusive jurisdiction of the federal government in Canada.²⁵² It is a concurrent jurisdiction in Germany.²⁵³

In Ethiopia there is no unemployment insurance. The constitution did not provide this under the list of the federal government power and if at all the issue arises it is assumed to be within the jurisdiction of the constituent units as they are the reservoir of residual power.²⁵⁴

²⁴⁷ Canadian constitutional Act, section 92(7) and (13)

²⁴⁸ id, section 92(16)

²⁴⁹ Id, section 91(11)

²⁵⁰ Supra note 165 , p. 127

²⁵¹ German Basic Law, 74(19a)

²⁵² Canadian constitutional Act, section 91(2A)

²⁵³ German Basic Law, article 74(12)

Law and Internal Security

Concerning the division of authority over the law, considerable variations and different approach in the three federations can be noted.

Civil law is a concurrent jurisdiction in Germany ²⁵⁵ whereas it is the provincial governments' jurisdiction in Canada and Ethiopia. The Canadian constitution gives room for Quebec to have its own civil code whereas the common law applies in all other provinces. ²⁵⁶

In Ethiopia too, civil law is constituent units' jurisdiction by virtue of residue power. ²⁵⁷ But there is a qualification to this. The federal government may assume the authority to make civil law when the given area of civil law is deemed to be necessary to create one economic community. ²⁵⁸ The federal government does not assume this power, however, automatically. Determination first has to be made by the House of Federation, the second federal house, that a particular area of civil law is necessary to establish and sustain one economic community.

So far the federal government has requested the Council of Constitutional Inquiry, responsible for giving recommendation to the House of Federation on constitutional dispute, an advisory opinion on whether it can issue a uniform family law. The council decided that family law is the constituent jurisdiction both by virtue of residual power and the fact that it is highly tied to culture which is guaranteed to the constituent units.

²⁵⁴ Ethiopian constitution, article 52(1)

²⁵⁵ German Basic Law, article 74(1)

²⁵⁶ Supra note 165 , p 123

²⁵⁷ Ethiopian constitution, article 52(1)

²⁵⁸ Id, article 55(6)

In Canada, the provincial governments are vested with legislative authority over property and civil rights.²⁵⁹ It is the most comprehensive legislative field granted to the provincial governments.²⁶⁰ It pertains to the entire body of private law which governs relationship between individuals.²⁶¹ This subject matter encompasses property, succession, family, torts, contracts and labour relations.²⁶²

This head of power does not include, however, marriage and divorce. Marriage and divorce is federal government exclusive authority.²⁶³ The primary reason for the exclusion of marriage and divorce from the list of exclusive provincial jurisdiction is “to protect religious minorities against provincial majorities, the federal parliament being considered more open to religious diversity than its provincial counterparts”.²⁶⁴

Legislative authority over Criminal law, both in Canada and Ethiopia, is exclusive federal government jurisdiction.²⁶⁵ The reason the Canadian constitutional Act of 1867 vested exclusive jurisdiction to the federal government over criminal law is the expectation that “a bi-racial and bi-cultural parliament would be more reluctant to impose religious values”.²⁶⁶

Exclusive federal legislative jurisdiction allocation over criminal law in both and Canada and Ethiopia, however, did not totally bar the constituent units’ power to legislate over criminal law. The Ethiopian constitution has a proviso. The constituent units retain the power to legislate on matters not provided by the federal criminal code. The provincial governments in

²⁵⁹ Canadian constitutional Act, section 92(13)

²⁶⁰ Supra note 165, p.123

²⁶¹ *ibid*

²⁶² *ibid*

²⁶³ Canadian constitutional Act, section 91(26)

²⁶⁴ Supra note 165, p.123

²⁶⁵ Ethiopian constitution, article 55(5), Canadian constitutional Act, section 91(27)

²⁶⁶ Supra note 165, p.130

Canada, on the other hand, can impose punishment by fine, penalty, or imprisonment for enforcing any law of the province made only in relation to matters enumerated under their exclusive jurisdiction.²⁶⁷

The central issue over the allocation of criminal law in Canada is not whether the provincial governments have legislative power on criminal matters.²⁶⁸ The issue is on what is criminal law. The courts decisions have confirmed that it is not restricted to declaring behaviours which are considered as crime in nature. As this has posed a threat to provincial governments' jurisdiction the courts have come up with certain parameters to define more precisely federal jurisdiction over criminal law. These are:²⁶⁹

1. The basic thrust of the law must be a prohibition of an act or some particular conduct. The law can also be used to regulate certain activities, but this must be an incidental or secondary aspect the main thrust of the law.
2. The federal government must be able to show which public consideration the law is supposed to protect. These interests relate to public peace, security, health, morality, or order (including the preservation of ... the economic system)
3. The law must provide for penalties that are typical of the criminal justice system, i.e. fines, or imprisonment, or both

The Canadian constitution explicitly provides the federal government power over criminal law also extends to its legislative authority over procedure in criminal matters whereas the Ethiopian constitution is silent on this. Whether the federal government has the power to legislate on procedural matters is not clear.

²⁶⁷ Canadian constitutional Act, section 92(15)

²⁶⁸ Supra note 165 , p.121

²⁶⁹ *ibid*

In Germany legislative authority over criminal law is a concurrent jurisdiction.²⁷⁰ This extends to laws on court organisation and on procedure as well.

The Ethiopian federal government authority over the law seems unparalleled compared with Germany and Canada. Besides its exclusive authority to make criminal law, it is vested with the power to issue labour and commercial codes.²⁷¹

Labour law, on the other hand, is one of the jealously guarded exclusive authorities of the provincial governments in Canada.²⁷² In Germany it is a concurrent power and the Basic Law, goes further than the Canadian and Ethiopian constitution, and lists that the concurrent power over labour includes the organisation of the enterprises, occupational health and safety, employment agencies and social security.²⁷³

Though not as broad as the Ethiopian federal government power to issue commercial code, the Canadian federal government has exclusive authority over bills of exchange, promissory notes as well as on bankruptcy and insolvency.²⁷⁴

With regard to organisation of courts, the Ethiopian constitution establishes a dual court structure. The constituent units have their own courts and have the power to determine their jurisdiction.²⁷⁵ Canada and Germany, on the other hand, established a single integrated system in which the federal government relies upon regional courts rather than their own to

²⁷⁰ German Basic Law, article 74(1)

²⁷¹ Ethiopian constitution, article 55(3)(4)

²⁷² Dorsen Norman, Rosenfeld Michel, et al, Comparative constitutionalism: case and materials, Thomson West, p.352

²⁷³ German Basic Law, article 74(12)

²⁷⁴ Canadian constitutional Act, section 92(18)(21)

²⁷⁵ Ethiopian constitution, article 78(3)

administer the vast majority of laws.²⁷⁶ In Canada, the responsibility for the constitution, maintenance and organisation of provincial courts, both civil and criminal is the exclusive jurisdiction of the provincial governments.²⁷⁷ In Germany, on the other hand, court organisation and procedure is a concurrent jurisdiction.

On matters of internal security and policing, in Canada, authority is divided between the two orders of government resulting in the developments of both regional and federal police forces.²⁷⁸ Eight of the ten provinces in Canada, however, have opted for a cooperative arrangement in which the federal force performs all policing services.²⁷⁹

In Ethiopia, the constituent units are responsible to maintain public order and peace and the establishment and administration of police within the state.²⁸⁰ The federal government as well is responsible to establish for federal police force.²⁸¹

In Germany, internal security is the land governments responsibility. It becomes the federal exclusive jurisdiction, and the federal criminal police office has authority, when the danger of international terrorism threat transcends the boundary of one land or when the jurisdiction of a land's police authorities cannot be perceived or when an individual land requests assumption of federal responsibility.²⁸² Cooperation regarding criminal police work between the federation and the Lander is federal government exclusive a authority.

²⁷⁶ Supra note 1, p. 32

²⁷⁷ Canadian constitutional Act, 92(14)

²⁷⁸ Supra note 1, p. 32

²⁷⁹ *ibid*

²⁸⁰ Ethiopian constitution, article 52(2)(g)

²⁸¹ *Id*, 51(6)

²⁸² German Basic Law, article 73(9a)

Concerning responsibility for prisons in Canada, the establishment, maintenance and management of public reformatory prisons in and for the province is the provincial government's responsibility.²⁸³ The federal government has got also exclusive jurisdiction for the establishment, maintenance and management of penitentiaries.²⁸⁴

In Ethiopia, though the constitution is silent about responsibility for prison, the federal government and the constituent units run their own prison.²⁸⁵

In Germany, neither in the section under the exclusive power of the federal government nor in the concurrent power list is their mention of whose responsibility is establishment and administration of prisons. By virtue of article 30 and 70 of the Basic Law, it is assumed that prison establishment, maintenance and management is exclusive responsibility of the Lander.

In all of the three federations each level of government is responsible for the establishment, appointment and payment of their officers. In Canada, the federal government is responsible for fixing and providing the salaries and allowances of civil and other officers of the government of Canada whereas the provincial governments are responsible for provincial officers.²⁸⁶

²⁸³ Canadian constitutional Act, section 92(6)

²⁸⁴ Id, 91(28)

²⁸⁵ Federal prison commission establishment proclamation No. 365/2003

²⁸⁶ Canadian constitutional Act, section 91(8) and 92(4)

In Germany, the federal government bears the exclusive responsibility for the legal relations of persons employed by the federation and by federal corporations under public law.²⁸⁷ On the other hand, the statutory rights and duties of civil servants of the Lander, the municipalities and other corporations of public law including judges of the Lander is a concurrent power.²⁸⁸ The Lander, however, have authority to regulate the career, remuneration and pensions of the civil servants of the Lander.

There is requirement under the Ethiopian constitution, though the states are entitled to enact and enforce laws on the state civil service, to make sure that educational, training and experience requirements approximate national standards.²⁸⁹

Authority to make law on weapons and explosives in Germany is vested to the federal government whereas the Ethiopian constitution confers the federal government with the authority to regulate the possession and bearing of arms.²⁹⁰

The federal governments in Germany and Canada are explicitly vested with legislative authority over statistics and census.²⁹¹ Though not provided in the list of powers of the federal government, the Ethiopian constitution established population census commission, accountable to the federal legislature, vested with the responsibility to conduct population census periodically.²⁹²

²⁸⁷ German Basic Law, article 73(8)

²⁸⁸ Id, article 74(27)

²⁸⁹ Ethiopian constitution, article 52(2)(f)

²⁹⁰ German Basic Law, article 73(12), Ethiopian constitution, article 51(21)

²⁹¹ Canadian constitutional Act, article 91(6)

²⁹² Ethiopian constitution, article 103

The Basic Law vests exclusive authority to the federal government over the production and utilisation of nuclear energy for peaceful purposes.²⁹³ The Canadian constitution, written before the advent of the nuclear technology, was silent on this. However, the federal government power over atomic energy was not problematic as the federal government is the reservoir of residual powers. The federal government asserted its authority through the peace order and good governance clause which has been interpreted by courts as giving residual power to the federal government.

The Ethiopian constitution is silent on allocation of authority over nuclear technology and in principle it can be argued that it belongs to the constituent units. But in the face of the jurisprudence in other federations and the fact that defence responsibility is vested to the federal government, it is expected that the federal government would assume the power if dispute arises.

The power of the federal government to borrow money on public debt is explicitly provided in the Canadian constitution.²⁹⁴ Whereas the Canadian provincial governments have authority to borrow on the sole credit of the province, the Ethiopian constituent units can do so only under terms and conditions set by the federal government.²⁹⁵

2.3.3 Concurrent Powers

In this section we look at the nature and scope of concurrent powers in the German, Canadian and Ethiopian federation. Some of the concurrent powers have been dealt with in relation to

²⁹³ German basic Law, article 73(14)

²⁹⁴ Canadian constitutional Act, 91(4)

²⁹⁵ Ethiopian constitution, article 51(7); Canadian constitutional Act, section 92(3)

the discussion of exclusive and residual powers. This section will deal only those concurrent powers not dealt before.

The nature and scope of concurrent powers is one of the most important differences between the Canadian and Ethiopian federations on the one hand and German federation on the other. Concurrent powers are the distinguishing features of the German federation. There is extensive list of concurrent powers. Concurrent powers in the Canadian and Ethiopian constitution, on the other hand, very much limited.

The Canadian Constitution lists of concurrent powers are on age pensions, agriculture, immigration and export of non-renewable natural resources, forest products, and electrical energy.²⁹⁶ With regard to the issue of paramountcy of federal law, when the provincial government is in conflict with federal law, the federal law overrides conflicting provincial laws in the concurrent filed only in the area of agriculture and immigration. The provincial laws takes precedence in the age pensions concurrent field even if the provincial law is in conflict with federal law.

There are no lists of concurrent powers in the Ethiopian constitution other than some areas of taxation. These are the powers to levy and collect profit, sales, excise and personal income taxes on enterprises jointly established, profits of companies and dividends due to share holders, and on incomes derived from large scale mining and all petroleum and gas operation and royalties on such operations.²⁹⁷

²⁹⁶ Canadian constitutional Act, section 94A, 95

²⁹⁷ Ethiopian constitution, article 98

Concurrent Powers in Germany

From comparative investigation what can be concluded is that the significance attached to concurrent powers is much more in Germany in contrast to the Ethiopian and Canadian federations. Not only is the extensive list of concurrent powers that distinguish the German federation. Unlike many federations including the Canadian federations, the Basic Law does not provide a sweeping paramountcy of federal laws in all areas of concurrent powers whenever constituent units' laws conflict with the federal law.

The Lander has authority to exercise the concurrent legislative power as long as the federal government has not enacted law.²⁹⁸ The federal government power to legislate in some of the concurrent fields is subject to two conditions. The federal government can legislate on the concurrent field "if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal legislation necessary in the national interest."²⁹⁹ Even if the federal government has made use of its concurrent legislative power, the Lander still is empowered to make laws at variance with federal legislation.³⁰⁰

As noted earlier, the field of concurrent powers is extensive. Some of the concurrent fields have been already dealt with when we discussed distribution of exclusive and residual powers in the three federations. Some of the concurrent fields not dealt with previously will be looked into here.

²⁹⁸ German Basic Law, article 72(2)

²⁹⁹ *ibid*

³⁰⁰ *Id*, article 72(3)

Besides the substantive civil and criminal laws concurrent powers we discussed earlier, procedural laws, court organisation, the legal profession, notaries, provision of legal service are concurrent powers. Registration of births, deaths and marriages are concurrent powers in Germany whereas these responsibilities are constituent governments in Canada and Ethiopia by virtue of residual power.³⁰¹ Other concurrent fields include, the law of association, public welfare, expropriation, the prevention of abuse of economic power, promotion of agricultural production and forestry, urban real estate transactions , land law, law on food products, alcohol and tobacco, meteorological service, hunting , land distribution , management of water resources, regional planning. Many of these powers are constituent units' powers in Canada and Ethiopia.

2.3.4 Comparative Assessment of Legislative Powers Apportionment

There are prevalent differences among the three federations in terms of the reason for the establishment and the manner of establishment of the federations. The various political, social and economic factors existing in these federations will have impact on the nature and scope of powers allocated between the federal governments and the constituent governments. No doubt that even the time the federations were established will have bearing on the distribution of powers in these federations. However, useful comparison on the form, nature and scope of distribution of powers could be made between the Ethiopian, Canadian and German federations. One distinctive feature that makes all the three federations similar is their

³⁰¹ Id, article 74(1)(2)(3)

government organisation. All have parliamentary government. Perhaps another similarity we find is between Canada and Ethiopia is that the adoption of the federations is partly in response to the linguistic and culture diversity.

Established in 1867, Canada is the oldest federation in comparison to the Ethiopian and German federations. Established at a time when the only example it could draw was the US constitution, the Canadian federation had to confront the bi-cultural and bi-linguistic nature of the federation. The Canadian constitution, the British North America Act as it was referred to by then, had to accommodate this reality. The country was composed of provinces largely of English speaking and Quebec – a French speaking province.³⁰²

Canadian federalism had set an example by following a different approach to the method of dividing power in federations. Unlike the US approach, where the federal government powers are enumerated and the residual powers left to the states, the Canadians provided for a two list of the powers of the federal government and the provinces.³⁰³ Not only the Act provided two lists of powers, it also departed from the US example by vesting residual power to the federal government.³⁰⁴ This was due in part to the central bias the framers had at the time of adopting the constitution. Judicial decisions, however, turned the direction the other way round. As opposed to the US where judicial interpretation had led to centralisation, the Canadian experience with constitutional interpretation had resulted more in the protection of provincial jurisdiction.

³⁰² Supra note , p. 107

³⁰³ See sections 91 and 92 of the Constitutional Act, 1867

³⁰⁴ Section 91 of the Canadian constitutional Act, 1867

Canadian and Ethiopian federations defy some of the assumptions connected with the manner of the formation of federations and its impact on the nature and scope of power division in federations. The assumption is that coming together federations usually retain significant sovereign powers to the constituent units.³⁰⁵ The federal government is the creation of the constituent units and the states retain powers to themselves which they have not specified and delegated to the federal government. The idea of enumerating powers of the federal government and reserving residual powers to the constituent governments units therefore is said to be a reflection of the desire to limit federal government powers.

The assumption in holding together federalism is that the federal government has greater powers as it is the main actor in the formation of the federation. The central government pre-exists the constituent units and usually has dominant role in the transformation of the unitary state into a federation. As a reflection of this dominant role of the central government in the transformation of the unitary state to a federation, the assumption is that the federal government will have greater powers and hence the federal government retains residual powers to itself and enumerate the constituent governments' powers.

Quite the reverse has happened in the Canadian and Ethiopian federations. The Canadian federation is largely a coming together federation. It was originally formed from three British colonies.³⁰⁶ The outcome of the power division in the British North America Act, however, does not reflect this process. The constitution rather enumerates both levels of governments and places the peace, order, and good governance power with the federal government, which

³⁰⁵ Supra note 44, p.149

³⁰⁶ Supra note 82 p.107. These were: Nova Scotia, New Brunswick and the United provinces of Canada(which was made up of Canada east and Canada west which became Quebec and Ontario respectively. Other provinces joined later.

has been interpreted by courts to grant the national government, among other things, residual powers. Despite the fact that the Ethiopian federation is a holding together federation in which the central government had a dominant role in the transformation to a federation, the form of division of powers does not reflect this. Though the federation is formed through devolving power/ disaggregation residual powers is vested to the constituent units, not to the federal government.

In contrast to the German and Ethiopian federations, Canadian federation was adopted at a time when power division was relatively easy. This was partly due to the fact that government functions, at the time of adoption of the Canadian constitution, were considered small. Besides, many of the current technological advances were not known at the time of writing the constitution. These matters were made federal jurisdiction either through judicial interpretation or residual power of the federal government. One such regulatory authority is over aeronautics which has been granted to the federal government by judicial process.³⁰⁷

Adopted after the WWII, both the German and Ethiopian federations have benefitted the new developments in other federations. The Ethiopian constitution, for instance, makes federal authority to formulate the country's economic, social and development policies. The German Basic Law has provided for a detailed and elaborate division of power between the federal government and the constituent governments.

³⁰⁷ Supra note 165 , p.117

Germany stands out different from the Ethiopian and Canadian federations because the federation is not adopted in response to ethnic, cultural and linguistic differences.³⁰⁸ It was primarily adopted to distribute political power and is therefore a case of territorial federalism. The German basic Law contains a very elaborate system of vertical distribution of power between the federal government and the Lander. It reserves powers to the land governments not exclusively given to the federal government. Besides the federal government exclusive powers list, the German Basic Law, provides for a very extensive list of concurrent powers unlike the Canadian and Ethiopian federal constitutions.

The Ethiopian federation was adopted in 1995. It is the youngest of all federations under considerations. It was basically adopted after close to two decades of civil war. The central purpose of the adoption of the federation was therefore in response to the ethno nationalist movements to end ethnic right suppression and ensure right to self-determination right to the various ethnic groups. Unlike the other federations under consideration, Ethiopia is a country of diverse ethnic, linguistic, cultural and religious groups. The federation was adopted to ensure political, linguistic and cultural autonomy of the regional states which are constituted largely based on ethno-linguistic criteria.

The vertical division of power is designed to address to the concerns of the ethno-linguistic groups concerning language, culture and self-administration. Like the German Basic Law, the Ethiopian constitution enumerates the federal government powers and reserves residual powers to the states. Much is not clear what were the considerations taken by the framers of the constitution or what guiding principles they developed in undertaking the vertical division of power.

³⁰⁸ Supra note 44. P.57-58

Despite the fact that the Ethiopian and Canadian federations were adopted partly in response to cultural and linguistic diversity, comparison of both the Ethiopian and Canadian federations reveal significant differences. One obvious reason is the nature of the diversity. Not less than eighty ethnic-linguistic groups are said to exist/ live in Ethiopia whereas as the Canadian federation have to concern itself with only the two linguistic groups.

The substantive power division in both federal constitutions reveal a different stand on certain powers they apportioned/ allocated between the two levels of governments. A case in point is legislative authority with regard to criminal law in which both countries constitutions vested this power to the federal government. The reason why criminal law legislative power is vested to the federal government in Canada is the fear that the provinces would impose their religious view on minorities believing that the bi-cultural and bi-racial parliament would be less prone to imposing certain religious views. It is not clear whether this was also the consideration or motivation behind the framers of the Ethiopian constitution.

The Ethiopian constitution grants the power to make civil laws to the constituent governments by way of residual power. In Canada, however, there is no such sweeping power given to the provincial governments. The provincial governments are granted with legislative authority over property and civil rights. This is deemed to include only property, succession, family, torts, and contract and labour relations.

Marriage and divorce have been singled out and given to the Canadian federal government, however. Protection of religious minorities against provincial majorities is the justification

for granting the authority to the federal government and as it is considered to be open to religious diversity.

As part of the civil law, family law is vested to the constituent governments in Ethiopia. There are no, however, similar considerations of protection given to religious minorities.

Unlike Canada, where labour relations are provincial jurisdiction, legislative authority over labour is vested in the federal government in Ethiopia. What is more, the federal government in Ethiopia also has legislative power over commercial code. The federal government of Canada authority over commercial laws, however, extends only to promissory notes, bills of exchange, bankruptcy and insolvency.

In contrast to Canada and Ethiopia, however, many of these subject matters- civil law, criminal law, labour law, commercial law in Germany are concurrent powers. It is difficult to find what guiding principle was used in these federations by the framers while undertaking the division of powers. The general principle, as noted earlier, that is said to guide federations in determining what specific power should go to either to the federal government or the constituent units is whether the matter is national or local. According to this principle federal government must be assigned with matters which are national in character to the federal government and local matters to the constituent governments. This however does not tell how specific powers should be allocated.

Question arises how to determine what is national in character and how national is national. Similarly, there will be difficulty determining what is local and how local is local matter. Nor is the other guiding principle, assigning matters/ powers whose benefits and costs spread/

cross boundaries to the federal government and matters whose costs and benefits can be contained be granted to the constituent governments, easy to use as a guiding principle in specifically allocating substantive powers to the two levels of government.

Some of the specific apportionment to the federal government and the constituents units seem to reflect these general descriptions. For instance, International relations, defence, functioning of the economy are matters granted to the federal government in all of the federations under considerations. However variations can also be noticed as far as the assignment of the specific powers within these powers. International treaties, for instance, is not the exclusive jurisdiction of the federal government in Canada and Germany. The constituent units have shared role in international treaties in both countries. This is particularly true if the international treaty pertains to matters which fall under the legislative authority of the constituents units. Judicial interpretation has subjected federal government treaty making power to the consent of the provincial government in Canada, for example, if the matter falls within the legislative competence of the provincial governments. The provincial governments must enact the necessary implementing legislation for the performance of international obligation the federal government entered.

Citizenship is exclusive federal government authority in all of the federations. However, immigration is concurrent jurisdiction in Canada whereas this is exclusive federal government powers in Germany and Ethiopia.

Another area where one witnesses significant difference among the three federations in the scheme of allocating authority is the functioning of the economic union which raises the

question how far the principle of allocation of national matters to the federal government and local matters to the constituent units is true. Concerning trade and commerce, one striking difference is between Germany, on the one hand, and Ethiopia and Canada on the other. In Germany trade and commerce is a concurrent jurisdiction whereas it is exclusive federal jurisdiction in Ethiopia and Canada. Pursuant to the original Canadian constitutional Act, the exclusive federal government jurisdiction was broad authority over trade and commerce. Judicial interpretation had confined it to inter-state and foreign commerce. Another limitation on the federal government authority is the exclusive provincial authority over property and civil rights.

Authority over the monetary system, one area very national in character and in which the principle is applied, is exclusive federal government power in all of the federations.

Transportation and communications is the other area where one sees disparity in the allocation of authority. One thing common among the three federations is that civil aviation is exclusive federal government jurisdiction due to its transcending character. Division of authority over land, rail and sea transportation varies among the three federations. Telecommunications is exclusive federal authority in Germany and Ethiopia whereas in Canada provincial governments have authority if it is within their territory.

Authority over land and natural resources is also allocated in a variety of ways. It is concurrent in Canada and Germany whereas the Ethiopian federation gives law making authority to the federal government but administration responsibility to the constituent units.

Great disparity can be noted in the nature of the powers assigned to the constituent units. Concerning social affairs, particularly education and labour, responsibility is assigned to the two levels of government in different ways in the three federations. An interesting contrast and a diverging approach in the allocation of legislative authority is labour. Labour is exclusive federal government authority in Ethiopia, exclusive provincial authority in Canada whereas it is concurrent in Germany.

Primary and secondary education is largely constituent units' authority but post secondary education is the jurisdiction of the federal governments in the three federations. The justification for granting primary and secondary education to provincial governments in Canada is the fact that linguistic minorities are concentrated territorially in the provinces and it seems to be the same consideration in Ethiopia too where, though the constitution does not explicitly provide who is responsible for which level of education, in practice one looks similar approach to division of responsibility over education.

Another dissimilarity, among the three federations, in the legislative competence of constituent units is in the area of health. It is provincial jurisdiction in Canada and Ethiopia whereas it is concurrent power in Germany.

The following chapter deals with the nature of division of execution responsibility in Ethiopia in light of the German and Canadian approach to the issue. This chapter has analysed the legislative power division in the three federations. The next chapter is concerned with whether executive responsibility is coextensive with the legislative competence investigated here.

4.0. CHAPTER THREE: IMPLEMENTATION AND ADMINISTRATION OF FEDERAL LAWS

The previous chapter had dealt with the nature and scope of powers allocated to the federal government and the constituent units in the three federations. It basically dealt with the nature and content of legislative powers assigned to both orders of government. It was noted that the manner of distribution in the Ethiopian and German federations is similar, albeit with some difference. Both federations grant express powers to the federal government and leave residual powers to the constituent units. Germany, unlike the Ethiopian and Canadian federations, however, has an extensive list of concurrent powers.

Canada, on the other hand, has a two list and left the residual powers to the federal government. In terms of the scope of the powers, through it is difficult to quantify the scope of the powers granted to both levels of governments in the three federations the nature of the some of the powers divided exhibit some similarities. The significant divergences in some of the specific powers allocated to both orders of government have also been noted.

This chapter looks into the problems revolving around the issue of division of responsibility for execution of federal laws. This issue hinges on the nature of the division of powers: whether the assignment of responsibility for execution of laws is coextensive with legislative authority. The chapter aims to analyse division of responsibility for administration of federal laws in the Ethiopian federation by drawing lesson from Canada and German federations on execution of federal laws.

3.1 Legislative vs. Administrative Federalism

Like the difference in the manner of distribution of legislative power, federations differ in the manner they divide responsibility for execution of federal laws. One of the grand decisions federations have to make when working out the division of power, between the federal government and the constituent units, is whether executive responsibility is coextensive with legislative authority.

And this goes to one of the central decisions that have to be made on whether the division of power/responsibility between the two orders of government is substantive or procedural. There are two approaches federations devised to address this issue. And this has become the ground to distinguish between what are called legislative federalism and administrative federalism.

3.1.1 Legislative Federalism

Legislative federalism is division of various policy fields which results in substantive power division. In this approach to division of powers, “discrete policy areas are assigned to the respective levels of government, with each level then being sovereign within its own field”.³⁰⁹ Legislative federalism apportions responsibility for policy making and implementation to each level of government within its area of policy jurisdiction.³¹⁰ The policy division extends

³⁰⁹ Supra note 44, p. 146

³¹⁰ *ibid*

from initiation, formulation, implementation to administration of policy areas allocated to each level of government.

The US is the primary example which introduced this model of division of power. It is also termed coordinate federalism.³¹¹ As legislative federalism leads to policy field division, theoretically both levels of government are expected to operate in isolation.³¹² Flowing from this, therefore, there is less need, unlike administrative federalism, for representation of the constituent units in the federal government as each level of government is self contained.³¹³

From the three federations under investigation, the Canadian and the Ethiopian federations fall in this category.³¹⁴ Both federations divide policy areas to both levels of government. The Canadian constitution provides two lists on which each level of government exercises authority from initiation, formulation, administration to implementation of policies on the specific powers allocated to them. Execution responsibility is coextensive with legislative authority. There are no provisions in the constitution indicating responsibility of the provinces for the execution of federal laws. The federal government is therefore, responsible for the administration and implementation of federal laws throughout the country through its executive machinery and the states are responsible with regard to their jurisdiction.

³¹¹ Ibid

³¹² ibid

³¹³ ibid

³¹⁴ Both constitutions divided legislative power between the federal government and the constituent units. Besides, they provided that each level of government is responsible for its respective powers. See article 50(2), 51, 52, 55 of the Ethiopian constitution, and section 91 and 92 of the Canadian constitutional Act.

The Ethiopian federation in principle falls in this category. There are, however, certain ambiguities on some of the powers as to the division of responsibility for the execution of federal laws.

3.1.2 Administrative Federalism

Administrative federalism pertains to the division of roles than substantive powers. Whereas legislative federalism results in division of policy areas, “the bulk of policy responsibilities” in administrative federalism is shared between the two levels of governments.³¹⁵ The national government is responsible for providing for policy guidance for the whole federation whereas the constituents units are responsible for implementation and administration of the policies in their locality.³¹⁶ Shared responsibility for policy making therefore necessitates “input from sub national governments into the process of national policy making” and this requires direct representation of the constituent units in the federal government usually in the upper house.³¹⁷

A point worth noting , however, is that administrative and legislative federalism are to a certain extent ideal types and the existing federations’ exhibit a mixed approach. No system is purely administrative or administrative federalism. US and Australia which are categorised under legislative federalism have certain elements of administrative federalism. Germany which is prime example of administrative federalism also has got some elements of legislative federalism/division of policy areas.³¹⁸

³¹⁵ Supra note 44, p. 146-147

³¹⁶ Id, p.147

³¹⁷ ibid

³¹⁸ Id,p.146-147

3.2 Implementation and Administration of Federal Laws in Germany

One of the hallmarks of German federalism is its administrative federalism. Most policy areas are concurrent fields in which both governments have authority. Both levels of governments are also involved in the initiation, formulation and implementation of policies.

Typical of the German federal arrangement is the role and representations of the Lander in the federal government.³¹⁹ The federation is structured and organised so as to ensure the role of the Lander in the formulation of policies. Unlike other federations, including the Ethiopian and Canadian, the German Bundesrat is constituted of representatives of the Lander governments.

The Landers send the delegates who are members of the land governments to the Bundesrat. They represent the interest of the land governments and usually vote in block.³²⁰ The Bundesrat has a suspensive veto power over some of the legislations and consent of the Bundesrat is a prerequisite for some of the legislations to be enacted.³²¹

Besides their role in the law making at the federal government, distinctive feature of German federalism is that the Lander governments also participate in the execution of federal laws. Main responsibility for the administration of federal laws falls on the Lander. The Basic Law outlines in detail on the responsibility and manner of execution of federal laws by the Lander

³¹⁹ The Lander governments are represented in the second chamber by a formula already set in the Basic law. Articles 50, 51

³²⁰ German Basic Law, article 51(3)

³²¹ Id, articles 76-77

and regulates the respective levels of governments' rights and duties in the administration of federal laws.³²²

The Basic law outlines three approaches to the administration of federal laws. There is land administration of federal laws. The second is Lander administration of federal laws but based on of federal commission. Thirdly, there are certain matters specified in the Basic Law which remain under the federal government exclusive administration responsibility.

The principle is that the Lander is responsible for the execution of federal laws "in their own right in so far as the Basic Law does not otherwise provide".³²³ This authority extends to the establishment of the requisite authorities including the power to regulate their administrative procedures.³²⁴

Only in exceptional circumstances where it can be shown that "a special need for uniform federal legislation" justify authority of the federal government to regulate the administrative procedure. This still, however, requires the consent of the Bundesrat.³²⁵ The federal government is prohibited from entrusting municipalities and associations of municipalities with any tasks whatsoever.³²⁶

The federal government authority, with the consent of the Bundesrat, to issue general administrative rules however is maintained.

³²² See chapter VIII of the Basic Law

³²³ German basic Law, article 84

³²⁴ *ibid*

³²⁵ *ibid*

³²⁶ *ibid*

The federal government has authority to oversee the administration of federal laws by the Lander.³²⁷ This however is also strictly regulated in the Basic Law. In the exercise of oversight the federal government cannot send its commissioners without the consent of the Lander or the Bundesrat.

The power to decide whether there are deficiencies in the execution of federal law is vested in the Bundesrat and is appealable to the constitutional court.³²⁸ When the Lander also executes federal law under federal commission, the Lander similarly retains the authority to establish the authorities and regulate the administrative procedure.³²⁹ Federal law enacted, with the consent of the Bundesrat, however, may authorise the federal government to establish the authorities and regulate the administrative procedure.

As in the case of administration of federal laws by the Lander in their own right, the federal government has authority, with the consent of the Bundesrat, to issue general administrative rules.³³⁰

Significant involvement of the federal government, when the execution of federal laws is based on federal commission, is that the appointment of intermediate authorities is subject to its approval. The federal government has power to subject the land authorities to instructions from the competent highest federal authorities.³³¹ The federal government has also authority to require land authorities to submit reports and documents.

³²⁷ Id, article 84(3)

³²⁸ Id, article 84(4)

³²⁹ Id, article 85

³³⁰ Id, article 85(2)

³³¹ Id, article 85(2) (3)

There are also areas of federal laws the federal government has exclusive responsibility for their execution.³³² The federal government establishes federal administrative authorities and administrative substructures.³³³ These include the foreign Service, federal financial administration, federal waterways and shipping , federal Border Police, social insurance institution whose jurisdiction extends beyond the territory of a single land, the armed forces, production and utilisation of nuclear energy, air and rail transportation, federal highways, posts and telecommunication , the federal bank.³³⁴ Except for posts and telecommunication, there is a possibility of delegating, however, the responsibility for the execution of federal laws to the Lander with the consent of the Bundesrat.³³⁵

The matters over which the Lander have authority to execute federal laws whether in their own right or based on federal commission is not specified in the Basic Law. It can be concluded that it pertains to any federal law except those federal laws for which the federal government has sole responsibility for their execution.

3.3 Execution of Federal Laws in Ethiopia

As noted earlier, the Ethiopian federation largely falls within the category of legislative federalism. There are, however, legal and institutional lacunae in regulating the division of executive power. There are legal ambiguities in the enforcement of federal laws in Ethiopia.³³⁶

³³² Id, article 86,87,87a,87b,87c,87d, 87e,87f,88,89,90

³³³ ibid

³³⁴ Id, articles 86-90

³³⁵ ibid

³³⁶ Supra note 63 , p.353

3.3.1 Division of Powers or Roles?

As noted in the previous chapter the federal government powers are listed and residual powers are reserved to the constituent units. The power division indicates that substantive powers are divided between the federal government and the constituent units. The general principles in the constitution also point the constitution's division of power inclination towards legislative federalism approach.

The constitution declares that the federal government and the states each have their own legislative, executive and judicial powers on matters vested to them by the constitution.³³⁷

The constitution also provides for a dual structure. Accordingly, it established the federal parliament, the executive organ / the Prime minister and the Council of Ministers /and the federal courts at the federal level on the one hand, and the state council, the constituent unit's legislative body, and the state administration and state courts at the constituent level on the other.³³⁸ Parallel executive structures are provided at both levels so that each is sufficient and responsible to administer and implement its own law.

The council of ministers and the Prime Minister are vested with the highest executive powers and therefore are responsible for the implementation and administration of federal laws and decisions of the House of Peoples Representatives, the federal legislative body.³³⁹ The proclamation enacted to define the powers and duties of the various ministries also further

³³⁷ Ethiopian constitution, article 50(2)

³³⁸ Id, article 55, 77, 78 and 50(2)

³³⁹ Id, article 72(1) and 77(1)

strengthens the duality of the structure.³⁴⁰ It provides that each ministry is responsible for the implementation of federal laws in the subject matters which fall within its jurisdiction.

The dual nature of the organisation of the executive, together with the substantive tasks assigned to both level of governments, leads one to the conclusion that executive responsibility is coextensive with legislative powers. The general impression, therefore, one gets from the general principles laid down and the division of powers is that it follows a legislative federalism approach.

Closer examination of the various provisions of the constitution and the practice, however, reveals that it is not the case.

Conceptual ambiguities surround the division of power in Ethiopia. The constitution, as noted above, gives prominence to the parallel structure whereby both levels of government each exercises not only their execution powers but also judicial powers assigned to them in the constitution. The practice in the execution of some of the federal laws as well attests to the prevalent ambiguities.

One such instance is the respective levels of governments' power to regulate land.³⁴¹ According to the constitution, authority over land is divided so that the federal government has authority to make law for the utilisation and conservation of land and natural resources whereas the constituent units will have the authority to administer land based on federal law.

³⁴⁰ Proclamation no. 4/1995

³⁴¹ Ethiopian constitution, article 51 and 52

It provides, therefore, for separate legislative and administrative responsibility of the federal and state governments over land.

However, the Council of Constitutional Inquiry, the organ entrusted with the responsibility of screening constitutional cases, had turned down a request for invalidation of Amahara state, one of the nine states, law on land distribution, enacted in contravention of the constitution and even prior to the enactment of the federal law on land.³⁴² The federal parliament later enacted rural land administration law and it even went to the extent of endorsing the states laws that were enacted prior to it.³⁴³ This has given rise to the question whether the federal parliament can confer this kind of power.³⁴⁴ This is a clear evidence of the uncertainties surrounding the division of execution responsibility for federal laws.

Other areas of laws for which the division of responsibility for execution gives rise to ambiguity include criminal law, labour law and commercial code.³⁴⁵ As noted in the previous chapter, in all of these areas the authority to make law is vested to the federal government. These are not, however, found in the section of the constitution which provides the powers and functions of the federal government. These powers are provided in the section which provides the law making power of the House of Peoples Representatives, the federal legislature. And this raises the doubt as to whether the federal government responsibility is that of law making and the constituent units' administration and implementation of these federal laws. Nothing is also provided explicitly or implicitly whether this is the intention of the framers. Nor is there judicial decision to that effect.

³⁴² Biyadlegn Meles and et al v. the Amhara regional state

³⁴³ Rural Land Administration Proclamation No. 87/1997

³⁴⁴ Supra note 63, p.319

³⁴⁵ Ethiopian constitution, article 55

Following, taking up criminal law, we look into how the practice and the laws apportioning jurisdiction over criminal law deviated from the legislative federalism approach the constitution gives predominant place.

Responsibility for Execution of Criminal Law

The area of responsibility one notes a deviation from legislative federalism, which is the hallmark of the constitution, is the division over legislative and administrative responsibilities as far as criminal law is concerned. Following the logic of the constitution that executive authority is coextensive with legislative authority one would assume that the federal government is responsible for the execution of criminal law. This is not the case, however. The laws enacted after the constitution and the practice completely deviate from the principle laid down in the constitution.

In principle, executive responsibility by virtue of article 50(2) for criminal laws is that of the federal government. There is no any implicit or explicit provision in the constitution which grants the responsibility of execution of criminal law to the constituent units. However, the law that was enacted to determine and apportion the federal courts jurisdiction later made departure from the letter and spirit of the constitution.³⁴⁶ The practices also attest to the fact that the federal government is responsible only for legislation whereas the constituent units are responsible for administration and implementation of federal criminal laws. The constituent units on their own undertake crime investigation and prosecution on those crimes declared non-federal crimes.

³⁴⁶ Federal courts Proclamation, No. 25/ 1996.

The law was intended to define the jurisdiction of the various levels of federal courts over criminal matters. In allocating the federal courts criminal jurisdiction, the law lists the types of crimes federal courts will assume jurisdiction and it also provides the specific jurisdiction of each level of court.³⁴⁷

By specifying the federal courts criminal jurisdiction to certain types of crimes, the law leaves the responsibility on the remaining criminal provisions within the federal criminal code to the constituent units.

This had a far reaching consequence on the overall division of power. It goes beyond the criminal judicial jurisdiction allocation between the two levels of government. It also divided responsibility of administration of federal criminal laws to the constituent units which the constitution did not provide.

Thus the federal police commission responsibility thereby became confined to these lists deemed to fall under federal courts criminal jurisdiction.³⁴⁸ This implied that the constituent units bear the execution responsibility for the crimes deemed non federal crimes.

³⁴⁷ Federal courts Proclamation, No. 25/ 1996. The proclamation lists the following offences to fall under federal courts jurisdiction: offence against the Constitutional order or against the internal security of the state; offences against foreign states; offences against the law of nations; offences against the fiscal and economic interests of the Federal Government; offences regarding counterfeit currency; offences regarding forgery of instruments of the Federal Government; offences regarding the security and freedom of Communication services operating within more than one Region or at the international level; offences against the safety of aviation; offences regarding foreign nationals; offences regarding illicit trafficking of dangerous drugs;

³⁴⁸ Federal police proclamation No. 313/2003, article 7(1)

While apportioning judicial jurisdiction over criminal laws for the federal courts, the law went beyond and in practical terms it resulted in transferring responsibilities for investigation and prosecution of crimes declared non federal to the constituent units outside the letter and spirit of the constitution. This is bound to raise constitutional issue because the federal law is in effect making the constituent units bear the responsibility for execution of federal criminal laws which the constitution clearly makes the federal government responsible for the execution laws that fall within its jurisdiction including federal criminal law.

The absence clear division of execution responsibility has implication on accountability and financial expenditure responsibility of the two levels of governments. Firstly, the absence of clear division blurs the division of responsibility for execution of federal laws. This raises the question of accountability of the two levels of government. It becomes difficult for citizens to identify and hold government accountable.

Secondly, the absence of clear division of execution responsibility also has implication on the division of expenditure responsibility. The constitution provides that each level of government is responsible for the financial expenditures necessary for carrying out their responsibility.³⁴⁹ The absence of clear division of execution responsibility blurs the financial expenditures responsibility each level of government. For instance, execution responsibility for federal laws in principle is the federal government. However, the laws issued to determine the federal police and public prosecutor responsibility and on the federal courts jurisdiction seem to confine the federal government execution responsibility to certain criminal

³⁴⁹ Ethiopian constitution, article 94

provisions and leave the bulk of the execution of the criminal code to the constituent governments.

Nor is there delegation of execution of the bulk of the non-federal crimes to the constituent units. According to the constitution, when power is delegated the delegating party bears the financial burden.³⁵⁰ Nonetheless the constituent governments are taking the financial burden since the division of execution responsibility for federal laws is ambiguous, and as the practice show, the constituent governments are bearing the financial burden of executing federal law.

3.3.2 Institutional Gap

There are institutional lacunae as well in the execution of federal laws.³⁵¹ Despite the constitution's emphasis on the respective levels of governments responsibility for the administration and implementation of the laws each enacted in the matters assigned, there are institutional gaps in the implementation and administration of federal laws.

The federal government while establishing certain federal institutions for the implementation of federal laws, there remains gap in the implementation and administration of other federal laws. The federal government has not established all the necessary government institutions for the administration and implementation of federal laws.

³⁵⁰ The Ethiopian constitution, article 94

³⁵¹ supra note 63, p.355

The main federal agencies the federal government set up for the enforcement of federal laws include custom authority, federal inland revenue, telecommunications, postal service, insurance and banking, federal defence forces, the federal police force, federal prosecution, and intellectual property agency. These are not the only federal institutions.³⁵² Besides many of these agencies and ministerial offices, do not have branch office outside Addis Ababa. There is no also express delegation of these powers to the state executives.

³⁵² Id, p.357

5.0 CONCLUSION

One of the defining characteristics of federations is formal constitutional division of legislative, executive and financial powers between the federal government and the constituent units. Nonetheless, federations differ in the form, nature and scope of the powers they apportion between the two levels of government. The comparative investigation of the vertical distribution of powers of the Canadian, German and Ethiopian federations asserts this.

The form the German and Ethiopian federations followed in apportioning governmental powers is more or less similar. The federal government powers are enumerated and residual powers are reserved to the constituent governments. The Canadian federation form of distribution of power is different, however. It enumerates the powers of both levels of government. Moreover, in sharp contrast to the Ethiopian and German approach, it reserves authority over the peace, order, and good governance; a clause judicially interpreted conferring residual authority, to the federal government.

In contrast to the Canadian and Ethiopian federation, on the other hand, the German federation has an extensive list of concurrent powers. Not only do the three federations exhibit difference in the form of distribution of powers, significant variations also can be discerned in terms of specific powers allocated to both levels of government.

International relations, defence, citizenship are exclusive federal government's jurisdiction in all of the federation. International treaties pertaining to the legislative competence of the

constituent units require their consent both in Germany and Canada, however. Performance of treaties in the provincial governments in Canada needs provincial governments implementing legislation. Nothing is stated in the Ethiopian constitution as to whether the federal government can enter into international treaties that fall under the constituent jurisdiction. Nor is there judicial settlement of the issue.

Authority on the functioning of the economy is allocated largely to the federal government or is concurrent power. Regulation of international trade and interstate commerce is the exclusive federal government authority in Ethiopia and Canada whereas it is concurrent in Germany. Power to regulate the monetary system and currency issuance is, in all the federations, exclusive federal government power.

Allocation of authority over road, rail and sea transportation is largely dependent on whether it involves more than one constituent unit in which case it becomes federal government responsibility. Civil aviation, however, is exclusive federal government authority without exception in all of the three federations.

Authority over telecommunications and postal service is exclusive jurisdiction of the federal governments in all of the federation. In Canada, the federal government power over telecommunication pertains only to the international and inter-provincial aspect.

Authority over land and natural resources are assigned either to the federal government or the constituent units or concurrently. In Ethiopia authority over land is allocated in such a way that the federal government has law making authority and the constituent governments' bear

administration responsibility. In Canada it is divided between the federal government and the provinces whereas it is concurrent power in Germany.

Except for certain tax matters, there are no concurrent powers in Ethiopia. Immigration, agriculture, pension and export of non-renewable natural resources, forest products, and electrical energy are the only enumerated concurrent powers in Canada. The concurrent powers in Germany are very extensive. Largely they pertain to matters which fall under the constituent governments' jurisdiction in Canada and Ethiopia. These include civil laws and procedural laws, court organisation, land law, law on food products, management of water resources. Though civil law generally is provincial governments' competence in Canada, authority over marriage and divorce is exclusive federal government jurisdiction. In contrast to Canada and Ethiopia, where it is made exclusive federal government authority, criminal laws including the procedural laws are concurrent powers in Germany.

Labour law is the area where its allocation does not show any similarity. It is exclusive provincial governments in Canada, exclusive federal government in Ethiopia but a concurrent power in Germany.

Division of authority over social affairs in the three federations shows that it is largely the constituent governments' powers. Post secondary education is federal government responsibility whereas elementary and secondary school is that of the constituent governments in the three federations. Health matters are also constituent governments' responsibility in the three federations. Setting standard for health is vested to the federal

government in Ethiopia, whereas the law on pharmacies, medicine, medical products and drugs in Germany is concurrent powers.

Social services are largely constituent governments' jurisdiction. Particularly unemployment services are exclusive federal government authority in Canada whereas it is a concurrent power in Germany. Nothing is provided under the Ethiopian constitution and it is assumed to be constituent governments' responsibility by way of residual authority.

Another significant difference that can be noted between the three federations is their approach to division of responsibility for execution of federal laws. Canadian federation is legislative federalism in which executive authority corresponds with legislative authority. Each level of government is responsible for the administration of laws that fall under its jurisdiction.

German federation differs in approach to the division of executive responsibility in contrast to the Canadian and Ethiopian approach. German federation has an elaborate system of execution of federal laws. The Lander has been granted with the responsibility of execution of federal laws. The Basic law in detail regulates how the Lander governments should execute federal law on their own and under federal government commission. It also provides clearly which matters remains the execution responsibility of the federal government.

The Ethiopian federation largely falls under the legislative federalism category. A mere glance of the various provisions seem to indicate that execution responsibility is coextensive with legislative authority. A closer look at the constitution reveals that there is ambiguity as

to whether execution authority corresponds with legislative authority. A case in point is responsibility for criminal law enforcement. The constitution grants federal government with the power to make criminal law. Nonetheless it does not provide this in the provision of the constitution on the powers and functions of the federal government. The federal government legislative authority over criminal law is provided in the section which deals with the structure and powers of the House of Peoples Representatives, the federal government law making body. The section besides generally stating that the House has law making authority on matters that fall under federal government jurisdiction also includes criminal law as part of its legislative jurisdiction which is not provided in the section on federal government powers and functions.

The Constitution did not specify whether the execution responsibility is that of the constituent governments. A law issued later to establish federal courts deviated from the constitution principle of dividing execution responsibility between the two levels of government. This law singled out and defined the federal courts criminal jurisdiction. Together with the federal police establishment proclamations, the federal government unilaterally determined which areas of the criminal law are its responsibility of execution leaving the bulk of the criminal law provision execution responsibility to the constituent governments.

What is more, despite the fact that execution responsibility is divided between the federal government and the constituent governments, there are institutional gaps. The federal government did not establish the requisite organs responsible for execution of federal organs for some matters in the constituent units. There is therefore lack of clear division of execution responsibility between the two levels of government.

The absence clear division of execution responsibility has implication on accountability and financial expenditure responsibility.

The absence of clear division blurs the division of responsibility for execution of federal laws. This makes it difficult for citizens to identify and hold government accountable. The absence of clear division of execution responsibility also has implication on the division of expenditure responsibility. The constitution provides that each level of government is responsible for the financial expenditures necessary for carrying out their responsibility. The absence of clear division of execution responsibility blurs the financial expenditures responsibility of each level of government. For instance execution responsibility for federal laws in principle is the federal government. However, the laws issued to determine the federal police and public prosecutor responsibility and on the federal courts jurisdiction seem to confine the federal government execution responsibility to certain criminal provisions and leave the bulk of the execution of the criminal code to the constituent governments which put them in a situation to bear the financial burden.

Besides, these laws in determining the execution responsibility of federal courts, police and public prosecutors gives rise to constitutional issue. The federal government in effect is determining the division of execution responsibility through the laws it issues unilaterally which is unconstitutional.

One possible avenue to rectify this problem is for the constituent government to challenge the constitutionality of these laws of the federal government. The practice so far attests that the states in practice execute federal government laws. The constituent governments should bring

a constitutional case to the House of Federation, entrusted with the responsibility to interpret the constitution.

Additional advantage of challenging the constitutionality of these laws is that the organ responsible for constitutional interpretation will have a chance to clarify the nature and scope of the division of execution responsibility of federal laws.

A further advantage is that the financial expenditure responsibility for execution of the federal laws will also become clear. Once the reach and scope of the division of execution responsibility is clarified through interpretation then the financial expenditure responsibility will become clear. According to the constitution, it is when power is delegated that the delegating party bears the financial burden. Nonetheless the constituent governments are taking the financial burden since the division of execution responsibility for federal laws is ambiguous, and as the practice show, the constituent governments are bearing the financial burden of executing federal law. Judicial settlement of the matter would also benefit the constituent on whether they are entitled to claim for the expenditure they incurred in executing federal laws. The financial obligation each level of government, therefore, would become clear when the division of execution responsibility is clarified.

Another legal solution is to amend the constitution. Two options can be noted. One is to clearly provide whether execution responsibility of the federal government is coextensive with its legislative authority. Hence this would make clear who is responsible for execution of federal laws and the corresponding financial obligation.

The second one is to follow the German approach to the division of execution responsibility for federal laws. The German Basic Law provides an elaborate system whereby, respecting the autonomy of the Lander governments, the Lander governments execute federal laws. This requires identifying and contextualising to the Ethiopian situation. It requires careful determination on which federal legislative authority is to be executed by the constituent governments on their own, which matters with federal commission and, which ones should remain under exclusive execution responsibility of the federal government and the manner how the relationship between the two levels of government is to be regulated

The problem of institutional gaps is the easy one. All that the government need to do is to establish the necessary government requisite federal organs responsible for execution of federal laws in each constituent government. This may be very costly, however. If this be so, another constitutional solution is to delegate execution responsibility of federal laws to the constituent governments. The constitution provides that the federal government is empowered to delegate its powers to the constituent units. The advantage of this is that the federal government will be able to carry out its responsibility and bring its service close to the public using the existing constituent units' local offices.

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