

**Federalism for Unity and Minorities’
Protection: (A Comparative Study on
Constitutional Principles and their Practical
Implications: US, India and Ethiopia)**

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Abbreviations and Terminologies

Bundesrat	The upper house of Germany
Canton	The designation of the constituent units (regional states) in Switzerland
CCI	The legal advisor of the Ethiopian upper house: Council of Constitutional Inquiry (of Ethiopia)
Derg	The Ethiopian regime which is removed from power in 1991
EPRDF	The ruling party of Ethiopia: The Ethiopian ‘Peoples’ Revolutionary Democratic Front
FDRE	The constitutional name of Ethiopia: Federal Democratic Republic of Ethiopia
HOF	The upper house of Ethiopia: House of Federation
HOPRs	The lower house of Ethiopia: The House Peoples Representatives
ICCPR	International Covenant on Civil and Political rights
ISC	Interstate Council, an institution in India which facilitates cooperation and policy coordination between the union and the states and among the states
Land	The name of constituent units (regional states) in Germany
Rajya Sabha	Indian upper house
TPLF	Tigray peoples Liberation Front, a party which controls the EPRDF
UDHR	Universal Declaration of Human Rights
UN	United Nations
US	United States

Executive summary

Most federal systems don't accommodate diversity sufficiently and they fail to provide an effective mechanism to hold the units together. Firstly, they fail to accommodate diversity sufficiently because differences are not adequately represented in the shared federal institutions. Secondly, absence of genuine accommodation of differences means failure to provide effective mechanism to hold the units together because insufficient representation of diversity leads to conflicts and this becomes a danger for the union.

The following two basic questions will be addressed under this study: How diversity could be sufficiently accommodated? What mechanisms should be used to hold the units together efficiently? Therefore, this study aims at identifying problems and demonstrating feasible solutions regarding protection of diverse groups and preservation of the integrity of a union in federal systems.

To achieve the purposes of this study, three jurisdictions will be considered: Federal arrangements of US, India and Ethiopia. Indian and Ethiopian federal systems are directly relevant for the study as they are multi-ethnic federal countries and the US system is relevant for the study as its constitutional distribution of power is almost identical to Ethiopian federation except few differences and it has some important lessons relevant for both Ethiopia and India.

Federalism as a tool to strike the balance between unity and diversity is an area which needs to be explored to determine how it protects the minorities or diverse groups while the union is settled well. This would be peculiar if one is considering ethnic federal structures like Ethiopian and Indian systems as the tension between unity and diversity is extremely

challenging. It is also interesting to test whether the nation state (territorial) federal systems like US could be employed in ethnic federal systems. This paper will be addressing such aspects of federalism.

This comparative study will explore on the issues how the US nation state or territorial federal system and the Ethiopian and Indian identity based federal systems function, which groups in a federal system need to be considered as minorities, how shared federal institutions could protect diverse interests, how the forces of diversity and unity could be balanced, what factors may lead to disintegration or instability and what type of an umpiring organ is best to resolve constitutional disputes for a federal system to be efficient and stable.

While revolving around the above issues, the writer will try to show how Ethiopian unicameral legislator is problematic as the upper house which represents the minority groups is denied legislative power under the constitution. What is more, the constitutional right of secession which is one of the unique features of Ethiopian federation and other potential dangers to federal unions will be reached to show how a stable federal system should be framed.

Introduction

Unity, regional autonomy, protection of minorities, minimization of conflicts among different sections of a society and establishment of a civilized and democratic community are among the most important current political issues in many countries around the world. Federalism is a form of government structure which can address such subjects. Neither, unitary nor confederal forms of government can be effective in accommodating diversity and building a lasting unity simultaneously. A unitary form of government erodes regional autonomy and a confederal one will face a problem in building a sustainable unity.

The focus of this study will be on federal forms of government as a means to ensure unity while granting regional autonomy and protecting the interests of diverse groups who otherwise will be vulnerable. Most federal systems have failed to incorporate one or both of such purposes of federalism though they tried to do so. While some federations build unity by setting aside or providing only limited room for diverse interests, others give excessive emphasis for diversity which in turn exaggerates differences and that ultimately leads to conflicts which endanger unity. This study is committed to identify such problems and viable solutions for these problems in ethnic federal systems of Ethiopia and India and the territorial federal system of the US.

The study will also demonstrate worthy federal experiences which have to be adopted in one or more of the compared jurisdictions. The main problems with the Indian and Ethiopian shared federal institutions in addressing the basic questions including protection of minorities, ensuring regional autonomy, and preserving integrity of the respective federations and the

limited and inconsistent minorities' protection system in the US federation will be examined in this study.

This thesis has six chapters. Chapter one will focus on theoretical aspects of federalism, unity, diversity and minority rights. Ethnic and nation state federal systems, salient features among federations, the question who are minority groups and the rights to be claimed by such groups will be analyzed in this chapter.

Chapter two will focus on representativeness of shared federal institution. Representativeness of federal legislatures, the roles of second chambers, manner of selection of members of such chambers and their composition and electoral systems and their implications in the compared jurisdictions: US, Ethiopia and India, will be addressed under this chapter.

Chapter three will present constitutional and political asymmetries of power, intergovernmental relations and cooperative versus competitive federalism in the three compared jurisdictions. Undesired asymmetries of power, especially in Ethiopia and India, which endanger the integrity of the respective federations, will be examined.

Chapter four is devoted to address the main factors which may lead to disintegration of a federal system. Hence, factors including an undesired asymmetry of power, absence of federal supremacy clause, a constitutional secession and failure to accommodate diversity genuinely are crucial issues under this chapter.

Chapter five will explore on the issue which type of constitutional adjudicating institution is feasible to ensure protection of rights of minorities and preservation of unity. Lastly, chapter six will provide conclusion.

Chapter One: Federalism and Minorities Protection: Theoretical concepts

Introduction

Under this chapter, there will be theoretical analysis on concepts regarding federalism and minority's protection. Federalism generally, ethnic federalism which is implemented in multiethnic countries and nation state federalism which is introduced in countries with homogenous society will be addressed. Common features of federalism and how federalism is a solution for unity in diversity will also be given emphasis in this chapter. The chapter will also explore on the issue who are minorities for which we still don't have a universal definition. Lastly, the importance of recognition of minority rights and what participatory rights could be claimed by minorities will be addressed.

1.1 Federalism

There is no a universally accepted definition for the term federalism. However, to make a proper analysis of theoretical and pragmatic aspects of federal systems in different countries, it is better to start with the question what is federalism.¹ As federalism is basically about a

¹ Malcolm M. Feeley and Edward Rubin, *Federalism, political identity and tragic compromise*, the University of Michigan Press, 2008 p.7 In this book, Malcolm M. Feeley and Edward Rubin have explained federalism and

political arrangement of a country, each federal system has its own unique nature which is shaped by long historical, political, social and economic factors. Thus, finding a single definition for this term seems impossible.

Yet, one may propose a definition which can persuade many scholars if not all. Though this term is complex and susceptible to different definitions, as Malcolm M. Feeley explained it, “a political entity that is governed by a single central government making all significant decisions cannot be described as federal entity without abandoning the ordinary meaning of the term.”² Malcolm M. Feeley added that “the same is true for a group of separate political entities that have entered into an alliance that precludes conflict among them but leaves all other decisions under the control of the separate political entities.”³

If all basic decisions are made by the central political entity, then existence of constituent units cannot make the system federal, rather it is simply a decentralized form of government while the units are subjects of the central political entity. This would mean that their power, if any, is given and can be taken away by the central government at any time as they are formed by and subjects of the central entity.⁴ A federal system is also different from other forms of association like confederations as such forms of arrangement give total sovereignty for the units and subordinate the central political entity to the constituent units. Therefore, a federal system is somewhere in between. Both the central and constituent units under federal system have constitutionally guaranteed autonomous power and thus one is not the subject of the

related concepts like political identity under chapter one. They have also gone through related but different concepts like decentralized forms of government, consociation and democracy which need to be distinguished from federalism.

²Ibid

³ Ibid

⁴ Ronald Watts, *Comparing Federal Systems*, 2nd ed., Montreal and Kingston: McGill-Queen’s University Press, 1999, 943-945 in Assefa, Fiseha (2007) *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, revised edition, Addis Ababa: Artistic Printing Enterprise P.134.

other.⁵ Both are established by a constitution which is neither under the monopoly of the central nor constituent political entities and both have independent legitimate power which enables them to act on people directly.⁶

This would mean that neither decentralized forms of government in which regional political units are subjects of the central government nor confederations which grant all significant decision making powers for the separate units are under the scope of federalism. Even though it is relatively an easy task to differentiate federalism from other forms of government like confederation which puts the center in the hands of regional states and decentralized forms of government which subject regional entities to the center, it is difficult to define federalism itself. These days the concept of federalism is getting more perplexing than being a simple issue. Even the distinction between the concepts federalism and federation is dubious. It is not sufficient to make a distinction between federal systems and other forms of government to understand the meaning of federalism.

Making a distinction between federalism and other related concepts like federation helps to better understand federalism.⁷ Though there is confusion regarding such distinction,⁸ significant developments have been made by scholars regarding the subject. As Watts explained in his book, scholars such as King take the position that “federalism is a normative and philosophical concept, involving the advocacy of federal principles, whereas federation is a descriptive term referring to a particular type of institutional relationship.”⁹

⁵ Elazar, Daniel, *Exploring Federalism*, Tuscaloosa, AL: University of Alabama Press, 1987, 2-7 in Assefa Fiseha (2007) *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, revised edition, Addis Ababa: Artistic Printing Enterprise, p. 135

⁶ Ibid

⁷ Ronald L. Watts, *Federalism, Federal political systems and Federations*, Institute of Intergovernmental Relations, Queens University, Kingston, Ontario K7L 3N6, Canada, 1998, p. 119

⁸ Ibid

⁹ Ibid

Others argue that both federalism and federation are descriptive stating that “Federalism refers to a genus of political organization encompassing a variety of species, including federations, confederacies, associated statehoods, unions, leagues, condominiums, constitutional regionalization, and constitutional home rule.”¹⁰ They claim that federation is one “species” of federalism.¹¹

This claim seems weak. Political organizations including “confederations, associated statehoods, unions, leagues, condominiums” (see footnote 10) and others which are claimed to be species of federalism may have common features with federalism but they should not be confused and considered as all of them being embraced by federalism. For example, ideologies of confederation and political institutions based on these ideologies should not be considered as part and parcel of federalism though they may share some common features.

What is more, this claim is untenable in its argument that both federalism and federation are descriptive. The practice of federal states shows that there are principles or norms of federal systems in the constitutions or legal tradition based on which descriptive or empirical part of federal set up is established.

Watts in 1994 proposed that “for the sake of clarity three terms should be clearly distinguished: federalism, federal political systems and federations.”¹² Watts’ distinction has provided significant clarification over the subject, yet, I suggest that for better clarification regarding the issue, two terms as have been used by King (1982)¹³ should be used than the three terms employed by Watts. According to Preston King, before we talk about empirical

¹⁰ Ibid

¹¹ Ibid

¹² Ibid

¹³ Preston King, *Federalism and federation*, Johns Hopkins University Press, 1982 in Watts supra note 9 p. 119.

aspects, we have to start with federal ideologies which are the basis for inquiry into comparative understandings of federalism.¹⁴

When we take a federal system, firstly we have a constitution or covenant which sets the principles of federalism. Such a document provides shared and self-rule and it sets rules for the settlement of disputes between self and shared rule. Then, in a federal system we have two or more separate units exercising autonomous power according to the norms of self-rule set out in a constitution and the central government too exercises autonomous power according to the constitution. Thus such set of rules and other conventional rules forming part of the constitution are fundamental principles, norms or ideologies. Institutions are established based on and to implement such norms.

Therefore, obviously this would mean that in federal systems we have norms and institutions based on such norms. No scholar can argue that federal systems have no ideological basis. It then means that precisely we have two basic elements in a federal set up: theoretical and empirical i.e. principles and functional institutions. The fact that there are institutions based on federal principles could not be taken to mean that federalism (federal ideology or norm) incorporates both norms and institutions. Rather, I argue that federalism is an ideology and thus it can exist in a constitution even though institutions are not established which would mean that the ideology is not realized.

Thus, as many scholars agree, I share the approach that federalism is an ideology or a norm on which a federal system is established. Considering the difficulty to draw a single definition acceptable to all, Thomas J. Anton has rightly proposed an uncomplicated definition stating that “federalism is a system of rules for the division of public policy responsibilities among a

¹⁴ Ibid , also see <http://www.amazon.com/Federalism-Federation-Preston-King/dp/0801829232>

number of autonomous governmental agencies.”¹⁵ The Stanford Encyclopedia has also followed the same line: “federalism is the theory or advocacy of federal principles for dividing powers between member units and common institutions.”¹⁶ If we interpret it to be a descriptive term or to include broad category of political forms, then we will end with confusion and we can’t clearly demarcate what it clearly constitutes.

We have institutions established based on norms of federalism. If “federation” is all about institutional patterns in a federal system as explained by King,¹⁷ then making further classification by using other terms like “federal political systems”¹⁸ to describe the “genus of political organization marked by a combination of shared and self-rule” and federation to describe “a specific species within the genus of the federal political system”¹⁹ would be superfluous and confusing.

If we start drawing such specific species, then we still can continue further classifications by using other terms to make reference to other specific species in a federal system. Rather, we have to make a general distinction between federalism as a norm and federation as the whole pattern of institutions based on federal norms. Then we can make further classifications (species) within each of them. But to understand federalism which is the issue at hand, we have to make the general distinction rather than employing three or more terms.

We have shared rule, self-rule and umpiring system principles or norms under the notion of federalism. Political and umpiring institutions are established based on such principles. Then,

¹⁵ Thomas J. Anton, *American Federalism and Public policy*, George Washington University, 1989 P. 3

¹⁶ <http://plato.stanford.edu/entries/federalism/>

¹⁷ Preston King, *Federalism and federation*, Johns Hopkins University Press, 1982 in Watts This book generally draws distinction between federalism as an ideology on the one hand and as institution or pattern of institutions on the other hand.

¹⁸ Ronald L. Watts, *Federalism, Federal political systems and Federations*, Institute of Intergovernmental Relations, Queens University, Kingston, Ontario K7L 3N6, Canada, 1998, p. 119

¹⁹ Ibid

if we take federation to mean all about these institutions and their relationships, then we are making precise distinctions between ideological and empirical elements of a federal system. Talking about federal systems is not talking about shared or self-rule independently; rather it is dealing about the relationship between shared and self-rule and settlement mechanisms in case of conflict between constitutionally autonomous political entities. While dealing with such empirical elements, we make reference to principles set in the constitutions. When we are considering powers and political institutions of a constituent unit, we are also dealing with what are left for the central entity or other units and thus we are exploring on the relationship between institutions in a given federal set up.

Therefore, I suggest that to understand federalism properly, it is better to make a distinction between federalism as an ideology on one hand and federation as an empirical element of a federal system representing institutions and their relationships on the other hand. We may use the term federations or federal political systems interchangeably than to mean one the species of the other. Otherwise, it would lead to the drawing of further species and that ultimately will result in confusion.

It precisely means that we have two basic elements in any federal system generally having their own sub elements: federalism as an ideology or norm providing self-rule, shared rule and umpiring system principles under the constitution, convention or other document and federation as pattern of institutions²⁰ concerned with institutions of self-rule, shared rule, umpiring institutions and their relationships.

²⁰ Preston King, *Federalism and federation*, Johns Hopkins University Press, 1982, p. 21. This book generally draws distinction between federalism as an ideology on the one hand and as institution or pattern of institutions on the other hand.

1.1.1 Ethnic and nation state federalism

While some countries like the United States have a relatively homogeneous society, others like India and Ethiopia constitute high cultural, linguistic and religious diversities. Nation state federations like US which have similar societies in different regions follow nation state federalism and thus territorial determination and political organization of the constituent units is not based on ethnicity, language or religion. Thus, the doctrine followed in the US is liberal principle of governance and that means an individual, not linguistic or religious group is the basis for the functioning of the federal system.²¹ The Indian federal system is also established based on the liberal principle. But, the facts in India, especially high religious consciousness has led to tensions among groups and there is wide spread discrimination of religious groups which couldn't be solved by a liberal system of governance.²²

In Ethiopia, ethnic identity is the basis for political and territorial organization of the constituent states and that is based on the assumption that ethnic federalism is the best way out to solve ethnic conflicts. Those who are pro-ethnic federal arrangements, therefore, insist that the best feasible way for unity in diversity in multicultural states is ethnic federalism.²³ But this claim faces many challenges as I will explain in detail later. Neither purely nation state federalism which sets aside ethnicity nor extreme ethnic federal arrangement setting aside geographical, economic or other social and historical relations between the people is a

²¹ <http://www.oppapers.com/essays/Liberal-Principles-Evident-American-Constitution-Governmental/58375>

²² G. Alan Tarr, Robert F. Williams and Josef Marko, *Federalism, Sub national constitutions and minority rights*, Westport, Connecticut, London, 2004, P. 203-210.

²³ Alem Habtu, *Ethnic Federalism in Ethiopia: Background, Present Conditions and Future Prospects*, Queens College/CUNY, Flushing, NY 11367, a paper Submitted to the Second EAF International Symposium on Contemporary Development Issues in Ethiopia, July 11-12, 2003, Addis Ababa, Ethiopia, P. 28.

solution for countries like Ethiopia and India with diverse ethnic, linguistic, cultural and religious groups.

Unlike Ethiopia which is the only non-colonized country in Africa, India had been under British colonial rule. Indian provinces created under Britain administration were not established based on ethnicity, language or religion.²⁴ But later, reorganization of territories based on ethno-religious identity took place in 1966.²⁵ The system of ethnic federalism was introduced in Ethiopia in 1995 upon adoption of the present constitution which introduced regional states organized based on ethnic identity. The ethno-religious diversity in Ethiopia and India is extremely complex. India has about 1, 632 languages²⁶ and Ethiopia has 84 ethnic groups from which the two main ethnic groups: Oromo and Amhara constituting about 62% of the total population and the third populous ethnic group Tigray being politically dominant.²⁷

Now, Ethiopia has nine regional states organized based on ethnicity and two city states (Addis Ababa and Dire Dawa) administered by the federal government.²⁸ India is also organized based on ethno-religious identity into 28 constituent units and 7 union territories (administered by the federal government).²⁹ Ethiopian ethnic federalism differs from India and other Federal countries like Switzerland (which recognize ethnic groups by allocating legislative and executive powers) in that it also incorporates the right to secession for ethnic

²⁴ Harihar Bhattacharyya, *Federalism and Regionalism in India, Institutional Strategies and Political Accommodation of Identity*, 2005, p.5

²⁵ Ibid

²⁶ Ibid

²⁷ Supra note 23 p. 7

²⁸ International Crisis Group report on Ethiopia: Ethnic federalism and its discontents, Africa Report N°153 – 4 September 2009, p.i

²⁹ Supra note 18. p. 4

groups.³⁰ What is more, Ethiopia and India, by using language as the main basis to organize territories, differ from others like Switzerland in which language is not the basis³¹ to organize the cantons. In Switzerland, 17 cantons among 26 have the same official language (German) but they don't form one canton (regional state) which would have happened in Ethiopia or India irrespective of the fact that the regional state will be too large.

When we consider all federal systems in the world, we can understand that ethnic federalism is not the only way to address the interest of ethnic groups. Once we have the population size of each ethnic group, it is possible to provide appropriate representation in the legislative and executive positions by a constitution without a need to divide the whole nation along linguistic or /ethnic groups. Ethiopian ethnic federalism faces a serious threat of disintegration because of the secession clause and the organization of territories based on ethnicity which has exaggerated differences between ethnic groups.

This would mean that one principal goal of federalism, unity, is at risk. Under the Ethiopian ethnic federal system, individuals living even for life in a region, zone or district for which they don't belong to the ethnic group have no the same political rights granted to those who belong to that ethnicity as the basis for political participation is ethnicity. This clearly undermines the notion of citizenship and thus ultimately results in disintegration.

Ethnic federalism followed by Ethiopia and India also undermines those Ethnic groups dispersed over the whole nation and which don't constitute a defined territory to exercise political rights like right to self-determination and secession (in Ethiopia) which others may invoke under the constitution. In Ethiopia for example only a few ethnic groups out of 84 could satisfy the definition of nationalities and peoples under the constitution to exercise those

³⁰ Supra note 24.

³¹ http://www.absoluteastronomy.com/topics/Cantons_of_Switzerland

rights granted for nationalities/ethnic groups. This would mean that there are ethnic groups left in between as I will explain it in the subsequent sections.

1.1.2 Salient features of federalism

Federations have gone and are going through a long process of change and thus it is difficult to provide all shared features of federal systems precisely.³² In addition to the dynamic nature of federal systems, there are historical, social and cultural differences which resulted in some unique features for every federal system and thus making it difficult to find broad shared features. Yet, it is undisputed fact that there are some general common features among federations. Thus some features of federalism are shared by all federations and absence of them may mean that the form of government is not a federation.

One of those basic features is that there is constitutionally defined vertical division of power between the center and the constituent units. If power is decentralized by the will of the central entity, it is not a federation as that power can be taken away. Even in the absence of constitutionally reserved power for local entities, pragmatic reasons may force the central government to give some level of autonomy to provinces. Ethiopia was, for example, a de facto federal state until the reign of Emperor Menilik due to geographical, political, social and communication problems.³³ But this couldn't in strict sense be a form of federalism as the

³² Assefa, Fiseha , *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, revised edition, Addis Ababa: Artistic Printing Enterprise, 2007, p. 112

³³ Ibid p.21. During the reign of Emperor Menilik, though the policy was committed to centralized form of government, practically regional governors in remote areas were exercising autonomous power over the subjects. It is not because there was some supreme legal document which grants such autonomy for the local governments, rather it is because of weakness of the central government together with poor communication and transportation system that governors at remote provinces were exercising highest level of autonomy.

autonomy of local authorities is simply based on the strength of the power of the center and not on constitution. Therefore, constitutional division of legislative, executive and judicial power between the central government and regional units and the fact that both the central entity and regional units are autonomous over those powers allotted to them is the pillar of every federal system making it unique from other forms.³⁴

A written and supreme constitution is the second common feature of federal systems.³⁵ Firstly the powers allotted to the center and regional units should be expressly provided in a written constitution. Otherwise, regional states in case the federal government is strong, or the federal government when regional states are powerful, have no guarantee against the denial of their power. Their power has to be derived from a constitutional document and thus one should not be created by the other.³⁶

The mere fact that the constitution is written is not sufficient. The constitution has also to be supreme and it has to bind both levels of government. If the central political entity is, for example, above the constitution then there is no supreme constitution in the first place. The constituent units' autonomy in this case is exercised only until modification of the constitution by the center. In a federal system, both levels of government have to be established by and are subjects of the constitution.

Such supremacy of the constitution is introduced in most federal systems. The constitutions of Ethiopia, India and US, which are the concerns of this work, incorporated principles which make each of these constitutions a supreme law of the land. Absence of this principle means that one level of government is subject to the other and thus the system is one of unitary,

³⁴ Assefa, Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, revised edition, Addis Ababa: Artistic Printing Enterprise. 2007, p. 113

³⁵ Ibid, p.135

³⁶ Ibid p. 136

decentralized form of government (without guaranteed autonomy), confederation or other. And thus is not federation.

The other common feature among federations is that the constitution has to be durable. This depends on the rigidity of their amendment formulas. Written constitutions by their nature are durable. Constitutions are not formulated to serve only the existing society unlike statutes which may address even temporary problems for days or months. The constitution in a federal system is above both levels of government; and that means neither the central entity nor the constituent units could have unilateral power to alter the terms of the constitutions as they want it to be.³⁷ Therefore, both the center and constituent units can have a guarantee to exercise their power under the constitution only when there are rigid requirements for amendment of the constitution.

Most federal systems have such rigid requirements. Art V of the US constitution provides a rigid system of constitutional amendment. Such amendment as stated in Art V is valid only:

*When ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.*³⁸

Art 105 of the constitution of Ethiopia has similar procedures like US. The fundamental rights provisions under chapter three of the constitution can be amended only up on approval

³⁷ Supra note 32 p 141.

³⁸ Art V of US constitution

by all constituent states' councils³⁹ by majority vote and by two third majority vote of the House of Peoples Representatives (here in under HOPRs) and House of Federation (HOF).⁴⁰ For other cases, two thirds majority vote of the councils of member states and a two third majority vote of a joint session of the two houses is required.⁴¹

Compared to the constitutions of US and Ethiopia, the Indian constitution has less rigid amendment procedures. In most cases, the parliament has full and independent power to amend the provisions of the constitution⁴² which is totally impossible in US and Ethiopia. Yet there are rigid procedures to some extent under Art 352 (a-e) when it comes to the division of powers and the relationship between the federal and state governments.⁴³ In such cases “ratification by the legislatures of not less than one-half of the states” is required.”⁴⁴ Generally, rigidity, though its degree may differ, is one of the common features among federations.

Lastly, the existence of a constitutional adjudicator to settle disputes between the center and the constituent units is an important common feature among federations.⁴⁵ Without such an umpiring institution, any other features of federalism are meaningless. This organ also ensures respect for the fundamental individual rights by both the central and state governments through constitutional review. Federations like Germany, South Africa and Russia have a constitutional court for this purpose. The supreme courts of US and India are the ultimate umpiring judicial institutions. Ethiopia has the House of Federation, a political institution, as

³⁹ State councils under Ethiopian federalism are legislatures of constituent regions.

⁴⁰ Art 105 (1) of the constitution of Ethiopia.

⁴¹ Art 105 (2) of the constitution of Ethiopia.

⁴² Art 350 (1) of Indian constitution

⁴³ Art 352 (a-e) of Indian constitution.

⁴⁴ Ibid

⁴⁵ Supra note 32 p. 144

an umpiring organ. Having a political institution as a judicial organ is indeed problematic as I will explain it in chapter two.

1.1.3 Federalism, unity and diversity

“The political and social climate that prevails in the world today emphasizes difference, disunity, and destruction rather than the qualities of unity and productive and constructive energy that are required to sustain human societies.”⁴⁶ Here I am not trying to go through the hot debate between individual liberalism and communalism. In the modern world, taking one of them as an option by setting aside the other is dangerous. Countries like France may have a more or less homogenous society because of the long assimilation process and thus it may be relatively easy to adhere to a principle of individual liberalism in France.

In countries where the historically attempted assimilation process has failed and a multi ethnic, linguistic and cultural society exist, then nation state and individual liberalism cannot function well. Attempting high scale assimilation in the contemporary world cannot be enforced without violating individual human rights. There may be gradual voluntary assimilation like which is happening in some countries of Europe. But we cannot do it over night to change the whole society.

Individuals from some ethnic, linguistic or cultural groups are shaped by that society and give value for that identity. Here, like other many scholars, I argue that we have to be in between rather than rejecting communalism or individual liberalism automatically. For unity,

⁴⁶ Unity in Diversity Acceptance and Integration in an Era of Intolerance and Fragmentation, Carleton University Ottawa, Ontario, Canada, 1994 (<http://bahai-library.com/theses/unity.diversity.html>)

we can recognize and promote all identities and at the same time leave the individual free to choose among values.

By doing so, we can avoid conflict and retain unity. Here, I am not saying that ethnic federalism like Ethiopia is a feasible way to preserve unity in diversity as this would exaggerate the differences and lead to conflict. Rather, there are other ways through which identity problems can be addressed as I will provide details in the subsequent chapters.

Federalism (not pure ethnic federalism), is one solution for unity while preserving identity. Specifics in any federal system will differ based on previous political, historical, social and economic factors. But, the basic goal in all federal systems is to keep unity while addressing diverse interests.

Federal idea is all about balancing forces of unity and identity. If the center is too strong and swallows identity, then this will lead to conflict and in turn becomes a danger for unity. On the other hand high domination by constituent entities against the state may also allow the regional states to leave the federation easily and thus becomes a threat to unity. Therefore, a wisely framed federation has to provide a proper balance between these tensions. While identity has to be properly accommodated, the federal government has to be slightly influential to the extent required to hold the constituent units together.⁴⁷ A well-built central entity is also compulsive necessary for the countries defense system. If the central government is under the control of states, then both unity and the countries defense system are at risk. The shift from confederation to federal system of government in US was for instance to avoid problems associated with a weak central political entity.

⁴⁷ Supra note 32 p. 120

While some federal systems have constitutional mechanisms providing for some supremacy of the federal government, the Ethiopian federal supremacy is reflected through pragmatic means (party system). So far it is through one dominant party loyalty system that the regions and the federal government are co-operating. If states become strong and conflict arises in blurred areas of power in the future, there is no constitutional provision which determines who will prevail. Considering the basic goals and principles of federalism the constitution may be interpreted to give slight supremacy for the federal government in case of areas of doubt.

The Indian federation on the other hand is designed with a strong central government in mind and this is because of high economic and industrial disparities between regions which lead to continuous conflicts threatening integrity unless it is addressed by a strong central government.⁴⁸ In US the supremacy clause under Art VI clause 2 shows supremacy of the federal government if there is conflict of laws between the federal and state laws.⁴⁹ Here, by conflict of laws, it is not about cases where one level of government encroaches into the power of the other to make a law. If this happens, then the law is void and there is no conflict. The supremacy clause rather comes to play to solve conflict of laws which arise while the two levels of government in a federation are acting within their legitimate power.

⁴⁸ <http://www.legalservicesindia.com/articles/c1onst.htm>

⁴⁹ Art VI, clause 2 of US constitution.

1.2 Minorities protection

Basically, there are three types of minorities: ethnic, linguistic and religious. Art 27 of the ICCPR has employed these three terms as a basis to determine whether there are minorities in a given state or not.⁵⁰ “Minorities frequently find democratic majority rule processes to be extremely threatening. The danger is that the majority will simply use its power to win elections, and then take away the rights of the minority.”⁵¹ Minority rights are not well addressed even under the current minority protection schemes.

Attempts to build a nation state in most European countries had undermined the rights of minorities.⁵² In some countries the tension had led to disintegration and thus formation of new independent states.⁵³ The Frame work Convention for the Protection of National Minorities (1998)⁵⁴ was introduced to solve European minority issues effectively. But intentional ambiguity was used to enable leaders reach an agreement by breaking their disagreements and thus the document was more of political than legal nature.⁵⁵ For example the basic term in the

⁵⁰ Art 27 of the ICCPR. This provision provides that in countries where ethnic, linguistic and religious minorities exist, every one belonging to such minority group should not be deprived of his right together with the group to manifest and use their culture, religion and language.

⁵¹ <http://www.colorado.edu/conflict/peace/treatment/minority.htm>

⁵² Mark Mazower, *Dark continent: Europe, twentieth Century*, Penguin Books, 1999, p 44

⁵³ Ibid

⁵⁴ “The Frame Work Convention for the protection of national minorities” has provided rights for national minorities though it doesn’t define who the national minorities are. The minority rights protection regime under this Frame Work Convention is limited in scope since it excludes non-nationals. Art 27 of the ICCPR unlike the Frame Work Convention doesn’t use the term “national” and the UN Human Rights Committee has interpreted this provision to include any one even migrant workers as the term used in the provision is “persons”

⁵⁵ Perry Keller, *Re-thinking Ethnic and Cultural rights in Europe*, 18 *Oxford Journal of Legal studies*, 1998. P. 31-33.

Convention “national minority” is not defined; what measures states are expected to take is not stated.⁵⁶

The existence of a federal system is more suitable to accommodate minorities in the political atmosphere thereby to ensure respect for identities. But the mere fact that there is a federal system doesn’t mean that minority rights are properly recognized and protected. Here, it has to be noted that minority rights protection is not about equal political participation between persons belonging to the minority and the majority. It rather is a right in addition to equality and other human rights⁵⁷, and it is about preservation of identity of the minority group. I will elaborate this point in the subsequent sections.

What is more, it has to be noted that though we are preserving group identity, minority rights are individual rights granted for those who belong to the minority group.⁵⁸ An individual right is given for persons belonging to the minority group and thus every person having such belongingness has the “right in community with others” (minority group members) “to enjoy culture, profess religion and use language.”⁵⁹ Even though it is not group right, group of individuals belonging to the minority group or the minority group as a whole may be affected similarly and may bring action together through a representative.⁶⁰

Minority rights protection cannot be realized easily unless the minority group is provided with participatory rights in the political process. Thus accommodation of such minority group

⁵⁶ Ibid

⁵⁷ Human Rights Committee, General Comment 23, Art 27, 1994, U.N. HRI/GEN/1/Rev.1 pa.1 p. 1

⁵⁸ Ibid Pa. 3.1 p. 1

⁵⁹ Ibid. pa, 1 p. 1

⁶⁰ Lubicon Lake Band V Canada, Communication No. 167/1984, (March 1990), Pa.32.1 p. 23

through participatory rights (in addition to granting of minority rights) is an important aspect of protection of minorities.⁶¹

1.2.1 Who are minorities?

Unfortunately, there is no universally accepted definition on the group of people who belong to minorities in spite of so many attempts by scholars to put a precise definition from long years on. Even though there was protection of minorities to some extent under the League of Nations system after WW I crisis which vanished once again as a result of WW II,⁶² there was no attempt at that time to define the term minorities.

Even after World War II, the UN Charter doesn't refer to minority rights or minorities.⁶³ The UDHR too gives emphasis for individual human rights based on general nondiscrimination principle without giving special account for minority rights and the General Assembly at that time took the view that it is "difficult to adopt a uniform solution" to this perplexing problem as the question regarding minorities is different in different countries.⁶⁴

The International Covenant on Civil and Political Rights (ICCPR) provides protection for minorities without defining who minorities are. It clearly states that "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of the group, to enjoy their own

⁶¹ Robert F. Williams, Josef Marko and Allan Tarr, *Federalism, sub national constitutions, and minority rights*, West port, Connecticut, London, 2004, p. 42

⁶² Steven Wheatley, *Democracy, minorities and international law*, Cambridge University press, 2005, p. 10

⁶³ Ibid

⁶⁴ Supra note 57.

culture, to profess and practice their own religion or to use their own language.”⁶⁵ This is the only provision about minority rights protection under the ICCPR.

Of course, the ICCPR paves the way to give the term minority some common but not totally accepted definition as it provides some factors which are helpful in determining minorities i.e. ethnicity, language, and religion. But it still fails to provide a definition and doesn't answer the question: which ethnic, linguistic, and religious groups within the states are minorities?

Even though the Human Rights Committee, in its General Comment 23 on Article 27 of the ICCPR, tried to make clarification on rights of minorities it doesn't attempt to approach the questions who are minorities directly. But its determination on minority rights was significant at least to know to a greater extent if not completely the scope of the term minorities.⁶⁶ The General Comment makes it clear that by minorities the ICCPR is not talking only about national minorities but also migrant minorities as the ICCPR doesn't make distinction between nationals and foreigners.⁶⁷

The General Comment of the Human Rights Committee, however, is not much helpful because firstly, it is not binding on the international community and secondly the Frame Work Convention of Europe by employing the term “national minorities”⁶⁸ clearly stand against the general comment. This Frame Work Convention also doesn't provide any definition regarding minorities.⁶⁹

⁶⁵ Art 27 of ICCPR.

⁶⁶ Human Rights Committee, General Comment 23, Art 27, 1994, U.N. HRI/GEN/1/Rev.1, pa 5.2 p 2

⁶⁷ Ibid

⁶⁸ The Frame Work Convention for the protection of national minorities, Strasbourg, 1.II.1995

⁶⁹ Ibid

Definitions made by Francesco Capotorti and Jules are the most known but still are not sufficient as they don't answer all questions about minorities. The definitions are the following respectively.

*A group numerically smaller to the rest of the population of the state, in a non-dominant position, whose members – being nationals of the state – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, tradition, religion or language.*⁷⁰

*A group of citizens of a state, constituting a numerical minority and in a non-dominant position – whose members, being nationals of the state, possess ethnic, religious or linguistic characteristics which differ from those of the majority population, having a sense of solidarity with one another, motivated if only implicitly, but a collective will to survive and whose aim to achieve equally with the majority in fact and in law.*⁷¹

If there is one majority group over the rest of the population (50%+1 of the whole), then that group cannot be a minority.⁷² It may happen however that there is no ethnic, linguistic or religious group which is the majority out of the whole population.⁷³ In this case, through application of Art 27 of ICCPR and the first definition, all groups will be considered as minorities and protected thereby.⁷⁴

Even though the above two definitions are very important in determining minorities by making reference to ethnic, linguistic and religious groups, still they cannot be free from

⁷⁰ Francesco Capotorti, "Study on the rights of persons belonging to ethnic, linguistic and religious minorities" 1977, Para. 568

⁷¹ Jules Deschens, "Proposal concerning a definition of the term minority" 1985, Para. 181.

⁷² Steven Wheatley, *Democracy, minorities and international law*, Cambridge University press, 2005, p. 19

⁷³ Ibid

⁷⁴ Ibid

criticism. The definitions are narrow in scope by employing the terms citizens and nationals of state.⁷⁵ In our global world there is high movement of people from country to country and international law is developing accordingly to protect the human rights of individuals irrespective of nationality. According to the above definitions it is difficult for migrants to claim linguistic, cultural and religious rights unless they get nationality. To grant nationality is in the discretion of states and thus migrants will be systematically left behind if we are following the above definitions.⁷⁶

Most federal systems have no clear minority rights protection regime under their constitution. Under US constitution, there is no any reference to minority rights at all. Indeed there is relatively homogenous society in US and the need to talk about preservation of diversity is minimal. It is the general equality clause which is prevalent. There is a modicum of affirmative action (promoting disadvantaged groups) to bring real equality but not to preserve diverse identity. In India some religious groups are recognized as minorities.⁷⁷ The case in Ethiopia is complex if we take a look at the constitution of the Federal Democratic Republic of Ethiopia (FDRE). Even though the country constitutes more than 80 ethnic groups most of which are minorities, the constitution doesn't talk about these minorities.

Under the FDRE constitution, rather than minorities proper, only the “nations, nationalities and peoples”⁷⁸ of Ethiopia may be determined as minorities. Such nations, nationalities and peoples of Ethiopia are those groups of people who satisfy two requirements under the constitution; those having common culture, language or religion and constituting identifiable

⁷⁵ Supra note 68, P. 24

⁷⁶ Perry Keller, Re-thinking Ethnic and Cultural rights in Europe, 18 Oxford Journal of Legal studies, 1998, P.44

⁷⁷ <http://www.countercurrents.org/communiyani101005.htm>

⁷⁸ Art 39 (5) of the constitution of Ethiopia.

territory under Art 39 of FDRE constitution.⁷⁹ It means that those minorities who have no identifiable territory because they are dispersed over the territory have no any place under the constitution as minority.

From the above discussion, it follows that there is a need for some definition which is universally accepted to prevent abuse against minorities by the states. The difficulty then is the nature of the problem to be addressed i.e. the issue of diversity, is complex because it differs from country to country. It was because of this problem that the ICCPR while recognizing rights of minorities fails at the same time to define who minorities are. On my part, giving recognition for the rights of minorities under international human rights conventions or within federal constitutions without defining the term is not helpful for the minorities because it means that the determination of minorities to be protected is left for states and states are systematically excluding minorities.

Some modification on the definition given by Francesco Capotorti, which is considered better by most writers⁸⁰, could bring proper definition and avoid the confusion over the subject. The basic problem with Francesco Capotorti's definition is that it fails to protect non-nationals by employing the term "nationals." It means that by using the term "persons" (like Art 27 of the ICCPR) instead of "nationals", we can protect all individuals who belong to a minority group. Such modification is crucial especially for migrant workers who are denied citizenship systematically. Once we determine minority groups, then we can provide them with minority rights to preserve their identity and participatory rights to enable them actively involved in the political process.

⁷⁹ Ibid

⁸⁰ Francesco Capotorti, "Study on the rights of persons belonging to ethnic, linguistic and religious minorities" 1977, Para. 568

1.2.2 Recognition of rights of minorities and participatory rights

The general equality principle is a human rights notion which is applicable for all human beings irrespective of the fact that an individual belongs to a minority or majority group.⁸¹ Human rights are implemented based on the equality principle and thus belong to everyone and are applicable uniformly. Then, minority rights protection scheme is an additional right for specific group of persons who are determined as ethnic, linguistic or religious minority.⁸²

While nondiscrimination principles in international and national legal documents are there to avoid discrimination i.e. different treatment which is committed most of the time against minorities, minority rights protection is introduced to preserve differences (identities) by providing special rights.⁸³

Such treatment of the minorities should not be confused with positive discrimination/affirmative action which has the aim of achieving equality. Affirmative action is temporary. On the other hand minority rights are permanent and inherent rights of minorities to preserve their identity. Such rights should not also be taken as special benefits for the minority group.⁸⁴ They rather are inherent rights for that group to preserve and enjoy its identity (language, culture and religion) like what the majority enjoys.⁸⁵ To be precise, there is a need for minority rights as long as we have ethnic, linguistic or religious minority

⁸¹ Human Rights Committee, General Comment 23, Art 27, 1994, U.N. HRI/GEN/1/Rev.1, pa 1, p.1

⁸² Ibid

⁸³ <http://www.ohchr.org/Documents/Publications/FactSheet18rev.1en.pdf> p. 2

⁸⁴ Supra note 81

⁸⁵ Ibid

even in case affirmative action is not necessary as minority rights protection is an additional scheme to the rule of equality.

Recognition of minority rights also means increasing the scope of social values. By providing minority rights, we are preserving ways of life including cultural, religious and linguistic values and that will increase the opportunity to choose among the ways of life⁸⁶ on our planet. Then, any one from the majority or minority group will have broad opportunity to choose the value of life which is most important to him/her. Of course recognition, promotion and respect for minority rights in turn helps to bring equality though the basic reason why we need to recognize and promote minority rights is to preserve identity.⁸⁷

Full realization of minority rights is possible only through accommodation of the minority group in the political process. The question of who shall be granted participation rights in this regard is directly related to another question: why we need to grant such participatory rights for groups.⁸⁸

In cases where participatory rights are granted not because diversity is considered as a value rather because there are potential and influential requests from the groups which have to be met to avoid conflict, then determination of a group which is entitled to participatory rights is based on discussion for each specific case.⁸⁹ To be precise, political negotiation is preferred to recognition of diversity in determining whether a specific group is entitled to participatory rights. On the other hand when countries like Switzerland consider "diversity as a value and participation rights as a legitimating factor, then a more general or normative stand toward

⁸⁶ Perry Keller, Re-thinking Ethnic and Cultural rights in Europe, 18 Oxford Journal of Legal studies, 1998. P. 31-33.

⁸⁷ Human Rights Committee, General Comment 23, Art 27, 1994, U.N. HRI/GEN/1/Rev.1, pa 1, p.1

⁸⁸ Robert F. Williams, Josef Marko and G. Allan Tarr , Federalism, sub national constitutions, and minority rights, West port, Connecticut, London, 2004, p. 44

⁸⁹ Ibid p.45

participation rights will be pursued.”⁹⁰ It may also be possible to consider all diversities to be entitled for such treatment, but encouraging any type of difference ultimately results in developing individual difference and that in turn will result in social anxiety.⁹¹

Here, as the main goal of introduction of participatory rights is to enable a group with a distinct identity to participate in the political process, such group can be identified by following the definition that I have proposed under section 1.2.1 and using democratic procedures⁹² in case of reasonable confusion.

Regarding the way how minority rights could be better protected, Williams and Marko suggested that "on balance...federal arrangements in which sub national units are granted broad constitutional space can make a significant contribution to the protection of the rights of minorities.”⁹³ But when it comes to the situation in which "language and religious minorities are dispersed throughout a country than concentrated in the territories of component units”,⁹⁴ the above suggestion doesn't work well; and this is based on studies on US, India and Belgium regarding the subject.⁹⁵ The same is true in Ethiopia as religious and linguistic groups are dispersed throughout the country.

⁹⁰ Ibid

⁹¹ Supra note 88 and 89.

⁹² Ibid

⁹³ Ibid. p.16, this suggestion by Robert.F and Josef Marko is, as they make it clear, one which works better in most cases but not for all situations.

⁹⁴ Ibid p. 16

⁹⁵ Robert F. Williams, Josef Marko and G. Allan Tarr, *Federalism, sub national constitutions, and minority rights*. West port, Connecticut, London, 2004, p. 16

1.2.3 What participatory rights should be claimed by minorities?

The territorial integrity of a state is a basic principle of international law and is in the best interest of states to defend themselves against outside enemies and to bring stable economic development. Thus as Williams and Marko explained it "participation rights should promote integration without paralysis of the system and without risking an ethnification of politics."⁹⁶

Ethiopian ethnic federalism doesn't satisfy the above requirement. Organization of regional political entities is based on ethnicity and thus citizenship doesn't help citizens to work and participate in the political process when they are living in a region to which they don't belong to the ethnic group even in case they are living there for life. The secession clause in the constitution adds fuel to the ethnically organized society. While modern society needs integration to build strong common defense and commerce, ethnic federalism clearly stands against such demand.

In India, though there are some regions which are organized based on religion or ethnicity, the central government has strong constitutional powers to hold the units together. In US too supremacy of federal laws over state laws is a reflection of supremacy of the federal government to some extent required. When we see the case in Ethiopia, practically the federal government is influential because of the party system. If such one dominant party system fails in the future, then there is no guarantee to ensure unity unless some constitutional amendments are made.

⁹⁶ Ibid p. 45

In any federal system where diversity exists, two basic interests must be balanced regarding participation rights. Ignorance of one leads to conflict and disintegration. On one hand, the groups must “have an effective say” in the political process.⁹⁷ On the other hand, the “influence given to the groups must not be so strong that they can completely paralyze the system.”⁹⁸ Williams and Marko make it clear that “participation rights ought not to lead to a situation in which political mobilization is based exclusively or primarily on ethnic arguments.”⁹⁹ Such approach will amplify differences and lead to anarchy between ethnic, linguistic and religious groups.

Here, there has to be proper balance. Accommodation of the groups through participatory rights should avoid autocracy by the majority and at the same time it should not be to the extent that the group becomes totalitarian.¹⁰⁰ Unity in diversity is the feasible way for stable development in countries with ethnic, cultural and religious differences. As Ian.D Coulter explained it, such diversity will not be a problem “if we have the social space to tolerate these differences, to express them without fear and when acting on them poses no harm to others.”¹⁰¹

Such equilibrium while accommodating the groups makes the government system legitimate not only regarding the majority but also the diverse groups and avoids internal conflicts.¹⁰² Otherwise arrangement couldn’t solve problems in multi-ethnic states.

⁹⁷ Robert F. Williams, Josef Marko and G. Allan Tarr , *Federalism, sub national constitutions, and minority rights*, West port, Connecticut, London, 2004, p. 46

⁹⁸ Ibid

⁹⁹ Ibid

¹⁰⁰ Ibid

¹⁰¹ Ian D Coulter, *Diversity versus unity*, commentary, J Can Chiropr Assoc. 2007, p. 77

¹⁰² Supra note 88, 95 and 96.

Chapter two: Representativeness of shared federal institutions

Introduction

The two basic issues which make federalism indispensable in most countries are the forces of shared rule and self-rule. Questions for equitable share of power at the center need to be addressed properly if all regional states within a federation are to be free from an undesired domination by the central government.

The main focus of this chapter will be on accommodation of minorities in the federal political decision making, basically representation of minorities in the two federal houses. The role of the upper house in protecting minorities, and the electoral system and its impact on minorities' protection will be explored. Whether the federal legislatures of compared jurisdictions are legitimate (representative) will be tested here.

2.1 The need for and representativeness of shared federal institutions

A mere existence of principles of federalism on paper doesn't solve problems of plural society. Practical accommodation of diversity is necessary to build lasting unity. Federalism is a means of understanding to reconcile clashing groups and thus political accommodation and

mutual understanding among the diverse society is an essential element in every federation.¹⁰³ As Watts clearly explained it in his book, every federal system has two basic purposes: namely to ensure self-rule through constitutional division of political power and to achieve unity at the same time through shared federal institutions by working together on areas of conjoint interest.¹⁰⁴

Here, legitimacy and efficiency of shared federal institutions are preconditions for the functionality of federal systems. Watts has made it clear that “representativeness within the institutions of the federal government of the internal diversity within the federation and effectiveness in the federal government decision making” should be satisfied if shared federal institutions are to be acceptable by citizens of constituent units.¹⁰⁵

Representativeness of the federal legislature, executive and other federal institutions needs special consideration in this regard. While India and the US have bicameral federal legislatures, Ethiopia has a two-house parliament but a one-house (unicameral) legislature and this raises questions as to the legitimacy and representativeness of the federal legislature of Ethiopia. The head of government in US is the president who is directly elected by the people. Ethiopia and India on the other hand have the prime minister as the head of government.

Such differences in the arrangement of federal institutions have practical implications in the functioning of federations. For example, though Ethiopian and Indian parliamentary form of government, with the prime minister being the head of government, may be helpful to establish effective executive decision making, there is a problem of executive dominance

¹⁰³ <http://www.queensu.ca/iigr/conf/Watts/papers/majeed.pdf>

¹⁰⁴ Watts, Comparing federal systems, the school of policy studies, Queens University and the McGill-Queens University press, 2nd edition, 1999, p.83.

¹⁰⁵ Ibid

“through party discipline”¹⁰⁶ and the representativeness of the federal government will be questionable. On the other hand, even though there are good checks and balances in the US presidential form of government, there is a risk of standoff while making decisions especially when the president and the Congress are from different parties.¹⁰⁷

Whatever form of government a federation may have, there are shared federal institutions to hold the units together. Such institutions exercise power on areas of common interest like defense, commerce and integrity of the nation. The role of shared federal institutions especially in India and Ethiopia where diversity is so unique is very important to hold the units together as there is high potential for conflicts and disintegration. One way to accommodate regional interests in the federal shared institution is through wise composition of the upper house.

While the US federal system provides two seats uniformly for each state, whether it is large or small, in the Senate,¹⁰⁸ the House of Federation¹⁰⁹ in Ethiopia and the Indian Rajya Sabha¹¹⁰ don’t follow such uniform seat allocation. Indeed such uniform allocation doesn’t work for the two federations as they are composed of societies with high diversity. An inequitable distribution of power among the ethnic, religious and linguistic groups at the federal level is a prominent problem and source of conflicts in Ethiopia and India.

In Ethiopia, the question raised by nationalities to get an equitable share of power at the center is still left unsettled. It is the scuffle between diverse groups to control the power at the

¹⁰⁶ Supra note 104 p. 85

¹⁰⁷ Ibid

¹⁰⁸ Art I section 3 of US constitution.

¹⁰⁹ Art 61 of the constitution of Ethiopia. The House of Federation in Ethiopia is the second chamber or the upper house, a federal shared institution, which is established to represent the interest of nations, nationalities and people as defined under Art 39 of the constitution.

¹¹⁰ Art 80 of the constitution of India. Rajya Sabha is the upper house in India. It is composed of 250 members. 12 of them are appointed by the president and they are experts in specific fields.

center which leads to continuous conflicts and instabilities. Thus, it is obvious that fairly distributed power among the nationalities is a must scheme if the tension among plural societies is to be addressed.

The past government systems in Ethiopia, including the present one, failed to address the questions raised by nationalities and this is the reason for successive conflicts and removal of government systems by war.¹¹¹ The promised power sharing in 1991 during the establishment of the transitional government was incorporated in the current constitution but now has only paper value because of the single party system, TPLF/EPRDF.¹¹² It was the failure to address the question of nationalities which resulted in the removal of the Derg regime.¹¹³ Yet, the TPLF which comes to power by war rely on its military power by setting aside the promises for equitable distribution of power at the federal level among nationalities and thus the tension among ethnic groups remains unsettled.

The same problem is faced by India. As there is high plurality in India, there is high tension among ethnic, religious and linguistic groups. Starting from the period of liberation movements on, the linguistic, religious and ethnic consciousness is developed among groups of Indian society.¹¹⁴ Power sharing and regional autonomy in India is highly asymmetric and most of the time, it is the influence from a religious, ethnic or linguistic groups which

¹¹¹<http://www.google.hu/search?q=www.oromopeoplescongress.org%2Fdocs%2FMerera-OSA-paper>. Merera Gudina (PHD), Associate Prof; Dept. Political Science & International Relations, Addis Ababa University, The Ethiopian State and the Future of the Oromos: The Struggle for 'Self-Rule and Shared-Rule', paper presented to OSA Annual Conference, Minneapolis, USA, 2006, P.2-12

¹¹² Ibid

¹¹³ The socialist Derg regime was removed after a bloody war because of the then conservative policy which exterminates any opposition group.

¹¹⁴ Harihar Bhattacharyya, Federalism and Regionalism in India Institutional Strategies and Political accommodation of identity, May 2005, p.5

determines the level of regional autonomy and sharing of power at the center.¹¹⁵ One can easily understand such political asymmetry between states of India under the constitution itself. In the constitution of India, there are special provisions which are applicable for one or some states but not for others.¹¹⁶ Considering the towering potential for conflicts which is a danger for unity, the constitution has established a strong central government and it highly favors unity than diversity.¹¹⁷ The absence of dual court system (the single judicial system), the centralized public service scheme, the centralized fiscal system and the power given for the federal government to change the federation into a unitary system in case of emergency demonstrate how India is a federal system with a very strong and centralized union.¹¹⁸

The minorities' protection regime in India and Ethiopia needs to be considered here. A mere territorial federal system is not sufficient in these countries to ensure respect for rights of minorities. There are minority groups in both countries which don't occupy a defined territory being scattered over different areas. For example, in Ethiopia there about 80 ethnic groups but only 9 states and two city administrations and that would mean that there are many ethnic groups whose political participation at the center needs to be addressed. Such minority groups are the most vulnerable and most of the time there is systematic exclusion of them by the federal government.

Generally, unless the interests of ethnic, linguistic or religious groups are accommodated through federal shared institutions equitably, there will always be a high potential for conflicts. Here having laws adhering to federal principles is nothing unless there is a share of political power which enable these groups to secure their interest under the federal setup.

¹¹⁵ Robert F. Williams, G. Alan Tarr and Josef Marko, *Federalism, sub national constitutions and minority rights*, Praeger publishers, US, 2004, p. 201-204.

¹¹⁶ Ibid

¹¹⁷ Ibid p. 202

¹¹⁸ Ibid

Failure to establish wisely designed (all inclusive) shared federal institutions, therefore, means that the federation cannot be stable and the union is always at risk.

2.2 Representativeness of the federal legislatures and minorities' protection

Legitimacy or representativeness of the federal legislatures is the first basic element which has to be satisfied in a federal system. It is through laws made by the federal legislature that the practical functioning of the federal system regarding common areas of interest is realized. Thus, as long as the federal legislature lacks legitimacy or is not a genuine representative of different groups within the federation, the federal system cannot function in a stable and efficient manner.

For a federal legislature to be legitimate or genuine representative, it has to satisfy two basic things. Firstly, as federalism is about unity in diversity, the federal legislature has to constitute both elements of unity and diversity. I mean it has to include both the lower and upper houses. The second chamber represents diverse interests and the lower house represents the interest of all citizens in the federation. If one house is excluded, it means that one element of federalism is missing.

The Ethiopian unicameral legislature fails to include both elements as the House of Federation (the upper house) doesn't participate in the law making process. It is only the lower house (House of Peoples representatives) which can make laws.¹¹⁹ This means that it

¹¹⁹ Art 55(1) of the constitution of Ethiopia.

fails to satisfy the yardstick for legitimacy of a federal legislature. Both the US¹²⁰ and India¹²¹ have bicameral legislatures in which both the lower and upper houses together make laws.

The second element that has to be satisfied if the federal legislature is to be legitimate is that each house has to be a genuine representative. Here, I mean that the upper house must represent diversity genuinely and the lower house must represent unity.

In US, the upper house (the Senate) has two members from each state uniformly (Art I section 3) and the members are elected directly by the people (Amendment XVII). Here, the US upper house represents both small and larger states equally and this can avoid domination of large and populous states over small ones. Yet, such a system can ensure only equality between states generally but not diversity particularly. Minority groups within a regional state could be dominated by the majority group in that state though the state is represented equally with other states at the federal level. The existence of a relatively homogenous society which is the result of assimilation for centuries on one hand and the well-established principles including individual liberalism, equality and nondiscrimination which the US gives emphasis to protect individual rights on the other hand, have lowered the attention for diversity and minorities' protection regime.

If a constitution provides a minority rights protection regime, then equality and nondiscrimination between individuals is not sufficient. As I have stated it in chapter one, minority rights are also different from affirmative action. By minority rights, we are talking about special rights given for certain persons because they belong to a certain minority group in addition to their being equal with all individuals regarding all other rights granted to all individuals in a given country. We don't have such rights under the constitution of US. The

¹²⁰ Art I section 1 of the constitution

¹²¹ Art 107 of the constitution of India.

US gives more emphasis for the principle of individual liberalism means that there is no need to provide different rights (minority rights) for some sections of the society as the principle of individual liberalism insists on providing the same autonomy and rights for all individuals. I will elaborate this point under chapter four.

The upper house in India (the Council of State or the House of Representatives of States, Art 80), like the US senate, represents states and not diversities proper. In addition to its failure to represent diversity, the Indian upper house can also be dominated by the largest states as the seats are allocated based on proportional representation principle (i.e. seats are allocated based on population size of constituent units.)¹²²

The House of Federation (the upper house in Ethiopia) represents diversity though the allocation system enables largest states to dominate small ones as each nationality in addition to its one seat right, can have extra seats for each one million population.¹²³ The House of Federation represents diversity as members are representatives of nations, nationalities and peoples of Ethiopia.¹²⁴ But such diversity representation by the House of Federation is meaningless as this house has no law making role. There is very complex diversity in Ethiopia and representation of such diversity through shared federal institutions is compulsive necessary. There are two prominent problems with the Ethiopian upper house. Firstly, it is dominated by few larger nationalities as they can have more seats for every one million extra population in addition to their rights for one seat like any nation. Secondly, it has no power to vote on laws.

¹²² Supra note 110.

¹²³ Art 61 sub article 2 of the constitution of Ethiopia.

¹²⁴ Ibid

The basic reason behind the past conflicts and removal of government systems by war and the present dissatisfaction of different nationalities (ethnic groups) is absence of a genuine share of power at the center. Clapham has rightly explained the pragmatic centralization of the political system. “Real power is exercised in centralized fashion by the Ethiopian People’s Revolutionary Democratic Party and its ethno-national satellites, under the tight control of Meles Zenawi.”¹²⁵

The constitution recognizes equality of nationalities and their right to self-determination even up to secession (which I will elaborate in chapter four) which is not incorporated in other modern federations. Thus, if one takes a look at the constitution without considering what the reality on the ground is, he/she may say nationalities (which are ethnic groups in Ethiopia) are given unlimited rights and are more autonomous than other nationalities anywhere in the world. But to say that is a big mistake. As Merera (PHD), an opposition party leader rightly stated in his speech on a political debate, there is no genuine sharing of power and democracy in Ethiopia.¹²⁶ The democratic system that the government talks about is just on paper. Merera in his famous speech stated that “the EPRDF/ruling party governance system in Ethiopia falls under the category of pseudo democracy.”¹²⁷

Here, the illegitimacy of the federal legislature, a single party system dominated by TPLF and party discipline systems have resulted in a unitary system while the constitution has established a federal system. As I have explained before, the federal legislature of Ethiopia lacks legitimacy because it doesn’t reflect diversity as the upper house which represents

¹²⁵ Book review, J. SHOLA OMOTOLA, Department of Political Science, University of Ilorin, (DAVID TURTON (Ed.). *Ethnic Federalism: the Ethiopian experience in comparative perspective*. Oxford: James Currey (978-085255-897-3.2006, 246 pp.) p.305.

¹²⁶ Ethiopian Television, Feb, 12, 2010, speech y, Dr Merara on the first round debate for the May 2010 election.

¹²⁷ Ibid

nations, nationalities and peoples of Ethiopia has no power to vote on laws. This means that even assuming that the federal principles in the constitution are being implemented; the system cannot adequately resolve the problem of diversity unless a bicameral legislature is established. Ethiopian federal system has to take lessons from US, India and other federal systems to set a genuine legislature suitable to address problems in a federal system.

As I have explained previously, even though the US and India have bicameral legislatures, the question of representation of diversity in the legislature is not sufficiently addressed. Unlike members of the upper house of Ethiopia, representatives in both upper and lower houses of US and India are not elected by reference to factors like language or ethnicity. The reason for such difference between the Ethiopian upper house which represents different ethnic groups on one hand and the US and India on the other seems that both US and India favor unity than diversity.

The federal government in India even can change the federal system into a unitary system in special situations (in case of emergency) as provided by the constitution.¹²⁸ Even though such emergency clause is the most disputed provision under the constitution of India¹²⁹, it has not been amended and has binding force. Other provisions of the constitution of India also favor unity over diversity. Constitutional amendment of most provisions also belongs to the federal parliament¹³⁰ and all this shows a centralized system of federation.

The absence of genuine diversity in the US Senate seems to be the result of a purely territorial federalism. In Ethiopia and India, the federal arrangement is not territorial. Rather, state boundaries are arranged based on language, ethnicity or religion. The political

¹²⁸ Art 352 of the constitution of India.

¹²⁹ <http://www.rajputbrotherhood.com/knowledge-hub/political-science/constitution-of-india-emergency-provisions.html>

¹³⁰ Art 350(1) of the constitution of India.

organization especially in Ethiopia is also based on ethnic identity. There is no such a trend under the US federal system. Therefore, states rather than ethnic groups are represented by the US senate and ethnic or minority protection issues are left to be addressed by each state. Though there is no representation of ethnic, linguistic or religious diversity by the US senate, individual liberty, equality of citizens and nondiscrimination principles under the constitution of US are effectively utilized by the courts to protect minorities or other vulnerable groups.

2.3 The role of the upper house

Second chambers (upper houses) in different federations have different roles. In most of the federations, the basic role of the upper house is to counterbalance the domination of the lower house by larger states or regional units. Only a few federations like US and Australia have equal number of seats for each state in the Senate.¹³¹

When we see the role played by second chambers, in almost all federations except a few like Ethiopia, they have significant say in law making process. Their role in law making may take the form of an absolute veto, suspensive veto or deadlock resolved through joint meeting.¹³² If the law maker is only the lower house like in Ethiopia, then there is no way to represent regional interests in the law making process. That would mean that the federal legislature will be monopolized by some larger states.

In US, Article I section 1 of the constitution has vested all law making powers in the Congress and the Congress is bicameral composed of the House of Representatives and the

¹³¹ Watts, Comparing federal systems, 2nd edition, Queens university, Kingston, Ontario, Canada, 1999, p. 95

¹³² Supra note 130 p.93

Senate.¹³³ Any bill is required to be passed by both the House of Representatives and the Senate before it is submitted to the president and in case the president vetoes it, reconsideration and two third majority vote by each house is necessary if that bill is to have a binding force.¹³⁴ The constitution of US has a list of federal legislative powers under Article 8 and it is the Congress which constitutes the House of Representatives and the Senate that can exercise those powers.¹³⁵

Even though the Senate can represent the interests of states, its members don't represent ethnic, religious or linguistic groups. Unlike in multicultural federations, the share of the federal political power in US is not based on such factors. The US has a "coming together" federation (see footnote 150 for more on coming together and holding together federations) formed by previously autonomous states by consent,¹³⁶ and states have broad power to regulate such diversity matters. By reading Amendment 10, one may come to the conclusion that all reserved powers are left to the states.¹³⁷ But the last phrase under Art I section 8 of the constitution extends the power of congress to all areas as long as it is necessary to make laws to execute its powers under Art I section 8 or any other powers which belong to the federal government and this means that the vertical separation of power under US constitution doesn't have exhaustive list as power not expressly given to the federal government may be granted to it by interpreting Art I section 8.¹³⁸ The US judiciary plays crucial role in determining as to whether some power not expressly granted to congress under the US constitution is necessary to execute powers of the federal government because there is no list

¹³³ Article I section 1 of the constitution of US.

¹³⁴ Article I section 7 of the constitution of US. The Senate also plays similar role regarding orders, resolutions and other questions which need concurrent veto.

¹³⁵ Art 8 of the constitution of US.

¹³⁶ Thomas J. Anton, American federalism and public policy, George Washington University, 1989, P.9

¹³⁷ Ibid, (see Amendment 10 of the constitution of US).

¹³⁸ Ibid, (see Art I section 8 last paragraph of the constitution of US).

of such necessary powers. One can see such an important role by the judiciary in the case *McCulloch V Maryland*.¹³⁹

In federations that separate power between the executive and the legislature like the US, the two houses have almost equal power¹⁴⁰ in which the lower house represents the interest of the nation as a whole and the Senate represents the interests of regions. On the other hand in federations following parliamentary system, the lower house has additional powers. In Ethiopia, the lower house has a monopoly over law making. Yet, there are very strong second chambers in parliamentary federal countries like the German Bundesrat which has absolute veto over all federal legislation associated with administration by the Lander.¹⁴¹

Like the US senate, the second chamber of India (the council of state or Rajya) plays crucial role regarding law making. Yet, it doesn't represent Indian diversity. Despite high degree of plurality in India, Rajya Sabha doesn't represent ethnic, religious or linguistic diversity. It rather represents regional states as I have explained previously. Even though there was high religious and linguistic consciousness during the years of liberty movements, representation in the second chamber is not based on ethnicity or religion. It is difficult to argue that such diversity issues are left to be regulated by states given the fact that Indian federation is highly centralized one. But such a centralized system has been eroded through time and the political practice reveals deviation from the principles set under the constitution. As Sarbani Sen rightly stated it in his book, "alternative and informal patterns of governance and political change seem to have replaced the constitutional norms."¹⁴²

¹³⁹ Supreme Court of the US, 17 U.S. 316, 1819, in Dorsen, Rosenfeld, Sajo and Baer, *Comparative Constitutionalism: Case and Materials* (2003).

¹⁴⁰ Watts, *Comparing federal systems*, 2nd edition, Queens University, Kingston, Ontario, Canada, 1999, P.96.

¹⁴¹ Ibid, P.96 and 97

¹⁴² Sarbani Sen, *Popular sovereignty and democratic transformations, the constitution of India*, Oxford university press, 2007, p.1.

Rajya Sabha, except in case of money bills,¹⁴³ has equal law making power with the lower house. Under Art 107, the constitution of India requires any bill to be passed by both houses if that bill is to have a force of law except in the case of money bills and special cases for joint session under Art 108.¹⁴⁴ But such law making role of the Rajya Sabha seems artificial. Let me explain why. If one house has passed a bill but the other disagrees, then there will be joint session under Art 108 and the bill will become a law if it is approved by a majority vote of such joint session.¹⁴⁵ The lower house has 530 members and that is more than double of the number of members in the Rajya; Rajya has only 250 members.¹⁴⁶ This means that the lower house can easily deny a role for upper house.

Surprisingly, the basic role of the House of Federation (the upper house) in Ethiopia is to interpret the constitution and to resolve disputes between states or between the federal government and states.¹⁴⁷ In addition to interpreting the constitution, the House of Federation has also other powers including the power to decide on division of revenue from joint (state and federal) tax sources and subsidies that the federal government may supply for states as stated under Article 62(7) of the constitution of Ethiopia. Yet it doesn't have the most crucial power that second chambers in other federations have i.e. power to vote on laws. Art 62 (1) of the constitution of Ethiopia grants the power to interpret the constitution for this house. Such judicial role by a political institution is unique. Other federations have an independent constitutional court or a federal supreme court to rule on constitutional disputes.

¹⁴³ Art 109 of the constitution of India. In case of money bills, the Rajya can only forward recommendations and such recommendations can be rejected by the lower house. Therefore, money bills are monopolized by the lower house. Absence of involvement by the Rajya regarding money bills would mean that the economic interest of states is not well represented by the federal shared institutions and that would have significant impact on Indian fiscal federalism.

¹⁴⁴ See Arts 107, 108 and 109 of the constitution of India.

¹⁴⁵ See Art 108 of the constitution of India.

¹⁴⁶ See Arts 80 and 81 of Indian constitution.

¹⁴⁷ See Art 62 of the constitution of Ethiopia.

As it can be observed from the notes of the constitutional assembly, there are two reasons given as justifications to grant the power of constitutional interpretation for the House of Federation.¹⁴⁸ The first is that, as sovereignty is vested in the nationalities under Art 8 of the constitution and as the constitution is reflection of the sovereignty of nationalities, the right institution to interpret such document has to be the upper house which is representative of the nationalities.¹⁴⁹ This argument, therefore, assumes that the Ethiopian federation is a “coming together”¹⁵⁰ type (see the footnote below for more on “coming together” and “holding together” federations). The supporters of this argument make reference to Art 8 of the Ethiopian constitution as I have explained above. The second reason is that, if such power is vested in the judiciary, then judges will give preference to their own legal philosophy and overlook political issues.¹⁵¹ This argument is sound but it doesn’t lead to the conclusion that there has to be a political organization as an umpiring organ. I will provide details in chapter five.

The first argument seems weak. Firstly, it is very difficult to assume that the Ethiopian federation which is established by the 1995 constitution is genuinely an expression of the free will of the nationalities. Reading Art 8 of the constitution, one may say that Ethiopia is a “coming together” federation. But that is misleading. The whole constitutional making process was dominated through a single party system, TPLF/EPRDF like what is happening in the making of other ordinary laws; Lovise Aalen has clarified this: “the process of drafting

¹⁴⁸ Assefa Fiseha, Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HoF), Draft paper presented at African Network of Constitutional Law conference on Fostering Constitutionalism in Africa, Nairobi, April, 2007 p.9-11.

¹⁴⁹ Ibid

¹⁵⁰ There are two types of federations based on the parties to the formation of a given federation. The first one is a “Coming together” federation and it connotes a federal system which is established by previously autonomous states based on their consent. “Holding together” federation on the other hand represents a federal system which creates newly autonomous states from a unitary form of government.

¹⁵¹ Supra note 148

and ratifying the constitution was totally dominated by the ruling party, and hence, the federal project lost legitimacy.”¹⁵² Thus, it is difficult to consider the constitution as a genuine reflection of the will of the people. What is more, there is no even a single autonomous regional state in Ethiopia before the establishment of the federation. Therefore, it is difficult to call Ethiopian federation as a “coming together” one.

Secondly, the House of Federation has no legal experts to interpret the constitution. The constitution has established the Council of Constitutional Inquiry which is composed of experts to assist the house. But the power of the Council of Constitutional Inquiry to investigate constitutional disputes and submit recommendations to the house under Art 84 is limited as the house is free to hold its own position.¹⁵³ The ultimate result will be passing of a political decision by majority vote of the house which is dominated by a single party system in from 1991 on. This cannot be a proper way of dispute settlement mechanism.

Some scholars also argue that the absence of confidence in the courts in Ethiopia (because of an improper historical adjudication system due to the absence of judicial independence) also supports the power of the house of federation to interpret the constitution.¹⁵⁴ But, such argument is not persuasive. People cannot have better confidence on a political institution dominated by one party than the judicial alternative.

In summary, the basic problem of the Ethiopian federal system revolves around the upper house. Even though it represents diversity (nations, nationalities and peoples) as stated under

¹⁵²See Lovise Aalen, *Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991-2000* Report 2002, Chr. Michelsen Institute, Development Studies and Human Rights p.vi. Also see Kassahun Berhanu (Lecturer in the Department of Political Science, College of Social Sciences, Addis Ababa University), *Review of African Political Economy*, Volume 22 Issue 63 March 1995 , pages 129 - 135

¹⁵³ Art 84(1 and 3.b) of the constitution of Ethiopia.

¹⁵⁴ Assefa Fiseha, *Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HoF)*, Draft paper presented at African Network of Constitutional Law conference on Fostering Constitutionalism in Africa, Nairobi, April, 2007 p. 10

Article 62 of the constitution, it lacks the law making power as I have explained before and thus fails to represent the interest of groups regarding law making. Establishing a bicameral federal legislature and a constitutional court or federal Supreme Court with the power to interpret the constitution as in other countries is a more feasible solution than attempting to justify the power of the upper house to interpret the constitution.

2.4 Difference in the manner of selection of members of the upper house

The selection of members of the upper house is an important issue in a federal system. Different federations in the world offer different ways of selection and that has different effects regarding representation of regional or group interests as I will explain in this section. The upper house, as I have explained previously, may represent the interests of regional states of the federation which is the case in most federations. Or it may represent ethnic or linguistic groups like the House of Federation in Ethiopia. Selection of members of second chambers may be by the federal government, by states or through direct election.¹⁵⁵

In the US, members of the senate are elected directly by the people.¹⁵⁶ Before 1913, the members were elected by state legislatures.¹⁵⁷ This is now the case in India for the most members of Rajya Sabha.¹⁵⁸ The constitution provides that 238 out of the total 250 members of the Rajya Sabha are elected by state legislatures.¹⁵⁹ The remaining 12 members are elected by the president of India and they are expected to have experience in science, art or

¹⁵⁵ Watts, Comparing federal systems, 2nd edition, Queens University, Kingston, Ontario, Canada, 1999, p.92-97.

¹⁵⁶ See Amendment 17 of the constitution of US.

¹⁵⁷ See Art 1 section 3 of the constitution of US.

¹⁵⁸ Supra note 155.

¹⁵⁹ Art 80 of the constitution of India.

literature.¹⁶⁰ Here, the figure 238 is the maximum number of members which can be elected by states' legislatures, but currently, there are only 233 members elected by regional legislatures and the members of Rajya Sabha are totally 245.¹⁶¹

The Ethiopian constitution takes a middle position between the US and India regarding selection of members of the upper house. The constitution of Ethiopia under Art 61 sub Article 3 grants the power to elect members of the House of Federation to state councils (state legislatures); but the same provision provides that council of states may decide that members be elected directly by the people. Therefore election of members of this house may be direct or indirect.

When the members of the upper house are elected directly by the people of constituent units, they represent the interests of the regional voters.¹⁶² If election of the members is indirect, then they represent the general interest of states though there may be a problem because of the political party system in some federations.¹⁶³ Selection of members indirectly, especially in parliamentary federations like Ethiopia where there is strong party discipline system and political domination through such party system, will make the second house one wing of the ruling government. This would mean it cannot serve the purpose for which it was established.

In the US, election of members of the Senate directly by the people of constituent states can ensure representation of interests of the people of constituent states as direct election can avoid party influence. What is more, the fact that all states have equal seat in the Senate avoids domination of small states by large ones. Yet, the US minority groups in each state can

¹⁶⁰ Ibid

¹⁶¹ http://finance.indiamart.com/government_india/parliament_india.html

¹⁶² Ronald L. Watts, *Federal second chambers compared*, Queen's University, Canada, 2006, p. 6.

¹⁶³ Ibid

be dominated by the majority through direct election and they are underrepresented in the Senate. Thus, direct election of members of the Senate in US can avoid domination of this second house through a party system. This ensures representation of the interests of the people in each state generally, but cannot properly represent diversity proper.

In most federal systems, second chambers are means of protecting powers of the regional states granted to them under a federal constitution from possible intervention by the federal government.¹⁶⁴ They are also expected to counterbalance domination of smaller states by larger states in the lower house. If the whole appointment process of the members of the second house is controlled by the federal government or the members are elected indirectly while there is a party discipline system which extends its control to the selection of such members, the second house cannot be representative of regional interests. In such cases, there will be a centralized system of federalism in operation though a constitution may contain rigid decentralization principles to avoid intervention by the federal government.

Domination of larger states not only in the lower house but also in the upper house is also an important factor which undermines the interests of smaller states in many federations. One can observe such problem in Indian Rajya Sabha and Ethiopian house of federation. As most (238 out of 250) members of Rajya Sabha are to be elected by state legislatures based on the system of proportional representation (i.e. seats allocated based on population size), larger states can have a better say in this house. That undermines the interests of smaller states. Moreover, indirect elections pave the way for a dominant political party or ruling party to dominate the house through the appointment process. Thus, the interests of regional states

¹⁶⁴ Assefa, Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, revised edition, Addis Ababa: Artistic Printing Enterprise, 2007, P. 163-167.

generally and the interests of smaller states particularly are not well represented in the Rajya Sabha.

In summary, the worst scenario regarding protection of regional or diversity interests is experienced by the Ethiopian upper house for three basic reasons. The first reason is its lack of power to vote on laws. Thus, there is no way to counterbalance the lower house majority which may undermine especially the interest of smaller states. Secondly, though the states are free to conduct direct elections to select members of the upper house using their option under the constitution, they have never used this option¹⁶⁵ and that has allowed the dominant ruling party, EPRDF, to exert influence on this house through its party system. Thirdly, this house, though it is representative of all nations, nationalities and peoples, is dominated by the larger nationalities. Each nationality is entitled to an extra seat for each one million extra population which would mean that larger nationalities can easily dominate this house like the larger say they have in the lower house.

Therefore, this house doesn't function properly and is not genuinely representative of interests of the diverse Ethiopian people. There is a need for fundamental reformation regarding selection of members, composition and roles of the upper house of Ethiopia. As I have stated it previously, the upper houses of India and US are not also free from criticism. But the Ethiopian House of Federation, because of cumulative reasons, is the most problematic one.

¹⁶⁵ National Electoral Board of Ethiopia/<http://www.electionsethiopia.org/Electoral%20System.html>

2.5 Electoral system and its impact on minorities' protection

The type of electoral system followed by federal countries has an impact on representation of diverse interests.¹⁶⁶ Members of the lower house in Ethiopia,¹⁶⁷ India¹⁶⁸ and the US are elected from based on a “single member constituency plurality electoral system.”¹⁶⁹ Other federal systems including like Switzerland employ proportional representation with a view to accommodate minority political parties which in turn can help to incorporate the interests of minority groups properly.¹⁷⁰

There are problems with both types of electoral systems. While the US, Indian and Ethiopian electoral system may enable these federations to establish effective and stable legislative bodies, this happens at the expense of underrepresentation of minority parties¹⁷¹ and ultimately has an impact on representation of diversity within the federal system. To avoid problems of underrepresentation produced by “plurality-majority voting systems”, proportional representation system is introduced and now it is adopted by most (21 out of 28) countries in Western Europe.¹⁷² But, it is difficult to establish a stable legislature and most of the time, there will be coalitions of political parties to form the executive as there is a low

¹⁶⁶ Watts, Comparing federal systems, 2nd edition, Queens University, Kingston, Ontario, Canada, 1999, P. 90.

¹⁶⁷ National Electoral Board of Ethiopia/<http://www.electionsethiopia.org/Electoral%20System%20print.html>

¹⁶⁸ Jayshree Bajoria, India's Electoral Politics, April 15, 2009/
http://www.cfr.org/publication/19105/indias_electoral_politics.html

¹⁶⁹ Supra note 166

¹⁷⁰ Ibid

¹⁷¹ Ibid

¹⁷² <http://www.mtholyoke.edu/acad/polit/damy/BeginnningReading/PRsystems.htm>

chance for one party to form a majority in the house and that in turn leads to frequent disagreements on how to govern a country.¹⁷³

It is obvious that the proportional electoral system is fair and more inclusive than the single member plurality majority electoral system. Especially, in federations like Ethiopia where the second house which represents diversity has no law making power, it is necessary to introduce a more accommodative electoral system to enable different groups to have a say in the lower house.

Yet, the most vulnerable minority groups cannot get appropriate protection through the proportional electoral system as they usually have a low chance to influence the majority vote in the lower house whether constituted by a coalition of parties or a dominant single party. This means that by recognizing their relative incapacity in the lower house to advance their interests during law making, such minorities have to be represented in the upper house properly to counterbalance the domination they face in the lower house. Thus, the upper house should be a shared federal institution free from domination by larger states and it needs to have crucial role to ensure protection of diverse minorities.

As I explained in previous sections, the upper houses of the US, India and Ethiopia lack one or more elements to be genuine representatives of diverse interests. But, the Ethiopian and Indian upper houses are more problematic because they fail both to represent diversity properly and to avoid control of the upper house by larger states. The US Senate escaped from at least the second problem as each state has equal number of seats in this house.

¹⁷³Pippa Norris, Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems, Harvard University, For Contrasting Political Institutions special issue of the International Political Science Review Vol. 18(3) July 1997: 297-312. edited by Jean Laponce and Bernard Saint-Jacques, P. 4-7

Election of members of the second chamber of India (238 out of 250) and Ethiopia is by the legislatures of regional states. This creates an additional problem in the functioning of the federal system as there will be an opportunity for a ruling party to control this house through the party discipline system. In such a case, its members cannot serve as real representatives of either the interests of regional states generally or diverse groups of people in the region.

To ensure that those neglected groups in the past are well represented in the federal lower house, the constitution of India has obliged states to reserve seats for scheduled Tribes and Castes.¹⁷⁴ This is a relevant step to represent a particular group in the lower house as candidates belonging to that particular Caste or Tribe only can be elected to represent that group.¹⁷⁵ But, the reserved seats totally are lower than half of the number of members of the lower house and it is difficult to influence the majority in this house unless such scheme is supported by wisely designed upper house.

Generally, proportional electoral system or reservation of a significant number of seats for marginalized groups together with a genuine representative upper house with a crucial role in the law making process and in matters regarding relations between states and the federal government is necessary for a federal system to function properly and democratically. It is difficult to satisfy all interested groups through other alternative means and failure to address the interests of each group creates potential conflicts that risk the integrity of the federal system.

¹⁷⁴ Supra note 167

¹⁷⁵ Ibid

Chapter three: Asymmetry of power and its impact on balancing unity and diversity

Introduction

As Govinda Rao and Nirvikar Singh stated it clearly, “asymmetric federalism is understood to mean federalism based on unequal powers and relationships in political, administrative and fiscal arrangement spheres between the units constituting a federation.”¹⁷⁶ Asymmetry of power can also exist vertically when the relationship between the center and member states is not based on equality and independence within their own spheres.¹⁷⁷ The reality in each federation is that the center is always dominant over constituent units for practical and political reasons. Sometimes, the constitution of a federal state, like the Indian constitution, may authorize the center to intrude into the regional affairs and to dominate member states in many aspects.

While most federations in the world are constitutionally symmetric in dividing powers among the regional states political asymmetry is the common feature of all federations.¹⁷⁸ Most of the constitutions of federal systems provide uniform legislative, executive and judicial power among regional units within the federation. Yet, as I will explain in this chapter, there are federal systems which have explicit constitutional provisions to add or

¹⁷⁶ M. Govinda Rao and Nirvikar Singh, *Asymmetric federalism in India*, p. 2 / http://www.nipfp.org.in/working_paper/wp04_nipfp_006.pdf

¹⁷⁷ Ibid

¹⁷⁸ Watts, *Comparing federal systems*, the school of policy studies, Queens University and the McGill-Queens University press, 2nd edition, 1999, p. 63.

reduce some powers to/from one or more members of the federation. Such federal systems, therefore, have constitutional asymmetry of power among the regional states.

Formally, a federal system can provide uniform power to its member states under its constitution. Thus, constitutional symmetry of power can be done easily. But it is unthinkable to provide practical (political) symmetry of power. It is impossible to avoid political asymmetry because, as I will provide details later, such asymmetry is the result of pragmatic factors which exist in all federal systems.

3.1 Constitutional asymmetry of power

In most federations, constitutional division of legislative, executive and judicial powers is more or less uniform. Federal systems opt to have a constitution which is symmetric in distributing power to the constituent units. Such symmetry in the division of power is helpful to avoid possible conflicts resulting from difference in treatment within a federation. A member state in a federation will feel left behind if it is placed in a disadvantageous position and that may lead to dispute. Sometimes, Constitutional asymmetry of power among member states may be preferred to constitutional symmetry to avoid potential conflicts. In some federations, there are significant differences between constituent units and that will make it indispensable to treat them differently because absence of such difference in treatment may upset the regional state which is significantly different from others.

The constitutions of US and Ethiopia don't provide any special privilege or power to one or some states within the federation. All residual powers which don't fall under the necessary and proper clause of US constitution are distributed among member states uniformly. There is no a constitutional power which is given for one of the states and not for others. In Ethiopia

too, states have the same constitutional status and power. Article 47(4) of the constitution of Ethiopia expressly declared that “member States of the Federal Democratic Republic of Ethiopia shall have equal rights and powers.”¹⁷⁹ Therefore, there is constitutional symmetry of power among regional states in US and Ethiopia.

Some federal systems like India and Canada have constitutional asymmetry of power among the regional states/provinces and that is to recognize substantial differences among the constituent units.¹⁸⁰ The constitution of India has special provisions concerning some of the constituent units. Art 370 of the constitution, for example, empowers only one of the member states (Kashmir) to have a constitution while others don’t have this power.¹⁸¹ There are also other special provisions concerning specific states within the Indian federation including respect to religious and customary laws and social practices for north eastern states.¹⁸²

Like in India, constitutional asymmetry of power among the members of the federation is deep-rooted in Canada. Political negotiations in 1980s and 1990s resulted in introducing special provisions like “the distinct society and a role in appointing Supreme Court judges for Quebec, an elected Senate for Alberta, a social charter for social democratically-governed Ontario and aboriginal self-government for natives.”¹⁸³ Thus, a federation may have constitutional asymmetry of power among its members. As Edelgard Mahant explained it:

It is especially important to remember the coexistence of federalism and democracy when we talk about asymmetrical federalism because what matters is not that all constituent

¹⁷⁹ Article 47(4) of the constitution of Ethiopia

¹⁸⁰ Watts, Comparing federal systems, the school of policy studies, Queens University and the McGill-Queens University press, 2nd edition, 1999, p.66

¹⁸¹ Ibid

¹⁸² M. Govinda Rao and Nirvikar Singh, Asymmetric federalism in India, p. 10-11/
http://www.nipfp.org.in/working_paper/wp04_nipfp_006.pdf

¹⁸³ Edelgard Mahant Glendon College, York University, p.9
<http://www.glendon.yorku.ca/english/faculty/researchcentres/apidocuments/asymfedm.pdf>

*states within a federation have the same rights, but that all the residents of the federation enjoy the basic political equality which is the hallmark of democracy and, therefore, of majority government.*¹⁸⁴

Thus, constitutional asymmetry of power is a solution to address diversity in order to avoid conflicts when there are substantial differences among members of the federation.

3.2 Political asymmetry of power

Political asymmetry of power among the constituent units of a federation is a common feature of all federations because there are always differences in terms of resource, population and size of territory among the members of the federation¹⁸⁵ and that will in turn result in political asymmetry even when a constitution is perfectly symmetric. For example, Zurich in Switzerland, California in United States, Ontario in Canada, Uttar Pradesh in India¹⁸⁶ and Oromia in Ethiopia are the largest units in terms of population size in the respective federations and that will create political (practical) asymmetry irrespective of the fact that the constitutions of these federations are symmetric or asymmetric in distributing power among the constituent units.

Significant difference in population size will allow larger states to dominate federal institutions like the lower house and that will marginalize smaller states. Such political

¹⁸⁴ Ibid

¹⁸⁵ Watts, Comparing federal systems, the school of policy studies, Queens University and the McGill-Queens University press, 2nd edition, 1999, p 63

¹⁸⁶ Ibid

asymmetry may lead to conflicts in some circumstances especially when a single member state dominates the federal political atmosphere.¹⁸⁷

Difference in terms of resources and wealth is also one reason for political asymmetry of power. States can exercise their constitutionally recognized power only when they have the financial capacity to do so. Therefore, a difference in resources and wealth which exists in all federations is one factor which results in political asymmetry among the members within a federation.

While the US and Ethiopia are constitutionally symmetric, and politically asymmetric, (political asymmetry exists in all federations as I explained it before), Indian federation is asymmetric both constitutionally and politically.¹⁸⁸ Political asymmetry of powers between larger and smaller states may lead to conflicts as what has happened in Nigeria for long years; to avoid such asymmetry, Nigeria has been rearranging states to bring more or less uniform size and that increased Nigerian states from 3 to 36.¹⁸⁹

In most cases, both political and constitutional asymmetries are sources of conflicts than stability. It is practically impossible to avoid political asymmetry because we can't evade factors which are responsible for it. It is natural that states within every federation are different in terms of territorial size, population, resources and wealth and political asymmetry comes from such factors. That means there is political asymmetry in all federations though its degree may differ.

To add constitutional asymmetry of power while there is already de facto (political) asymmetry, like the case in India, may become a reason for conflicts because other members

¹⁸⁷ Ibid

¹⁸⁸ Louise Tillin *United in Diversity? Asymmetry in Indian Federalism* / <http://publius.oxfordjournals.org/cgi/content/abstract/pjl017v1>

¹⁸⁹ Watts, *Comparing federal systems*, the school of policy studies, Queens University and the McGill-Queens University press, 2nd edition, 1999, p. 65

of the federation will feel marginalized. It will also allow privileged states (most of the time the strong ones) to dominate the political system at the expense of rights of smaller states or minorities. For example, there is increasing exclusion and discrimination against minorities in India by the politically dominant class and close to 9000 ethnically motivated murders are officially documented in the second half of the 20th century and communal violence is common in India.¹⁹⁰

To the extent possible, it is better to use constitutional symmetry to reduce the degree of political asymmetry thereby to bring equal political participation and development among the constituent units. To introduce constitutional asymmetry to respond to every question by member states for differential treatment may result in anarchy and, in serious cases, marginalized states may decide to leave the federation and this in turn will lead to conflicts.

Constitutional asymmetry may be employed to accommodate substantial differences; but this must be used as an option only in rare cases when there is irreconcilable difference and there must also be long term constitutional project to minimize such political asymmetry to bring equal power and participation among the members progressively.

3.3 Intergovernmental relations

Though constitutions of federal systems divide powers between the federal government and regional states on one hand and among regional states on the other, interaction between these constitutional actors is inevitable if a federation is to be functional. Thus there are two

¹⁹⁰ Ibid

types of intergovernmental relations in every federation: intergovernmental relation between the federal government and the constituent units and intergovernmental relation among constituent units. Intergovernmental relation in a federal system, therefore, may be bilateral (i.e. between the federal government and one of the constituent units or between two constituent units), or multilateral (i.e. between the federal government and two or more constituent units or among three or more constituent units).

Most of the constitutions of federal systems divide power between the federal government and regional states and among regional states. They also prohibit encroachment by one of these governments into the powers of the other. But they fail to provide sufficient rules as to how these governments have to interact. Therefore, in most federations, intergovernmental relations are based on informal rules. There are some formal rules regarding financial and dispute settlement issues. In other cases, interaction among the governments in most federations is based on informal means including continuous consultation and cooperation.¹⁹¹ Such informal way of interaction may be helpful to meet changing circumstances easily, but it may be disadvantageous for weaker or smaller states as they will have no formal guarantee when they become losers during negotiation because of their weak bargaining power.

Intergovernmental relations in Switzerland and the US encompass a range of linkages between the legislators and executives of different governments and that involves “extensive lobbying of federal legislators by various state and cantonal representatives.”¹⁹² Such intergovernmental relations are developed through political practice as most intergovernmental relation issues are left unregulated in most of the constitutions of

¹⁹¹ Watts, Comparing federal systems, the school of policy studies, Queens University and the McGill-Queens University press, 2nd edition, 1999, p. 57

¹⁹² Ibid p.58

federations. As Bruce D. McDowell explained it, “although the distribution of powers between the states and the federal government is spelled out in the U.S Constitution, the relationships among many governments have never been completely clear.”¹⁹³

Though there are many constitutionally unregulated intergovernmental relation issues in every federation, one can find some or a few constitutional rules regulating intergovernmental relations which may be between the federal government and member states or among member states. The US constitution, for example, under its Full Faith and Credit clause, has regulated intergovernmental relations stating that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”¹⁹⁴ Section 2 of this Article has also regulated the relation of states regarding criminal acts declaring that:

*A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.*¹⁹⁵

Member states of US also can enter into intergovernmental agreements upon the consent of Congress and that is very helpful for effective and joint operation.¹⁹⁶ Yet, intergovernmental relations regarding so many aspects are left untouched under US constitution. As Sarah F. Liebschutz explained it clearly, “intergovernmental relations are dynamic because our (US)

¹⁹³ Bruce D. McDowell, the New Federalism: Current Trends in Intergovernmental Relations, 1995 American Bar Association VOL. 19 NO. 3. P. 12

¹⁹⁴ Article IV Section 1 of the US Constitution

¹⁹⁵ Ibid, Section 2

¹⁹⁶ Watts, Comparing federal systems, the school of policy studies, Queens University and the McGill-Queens University press, 2nd edition, 1999, p.60. (See Article I Section 10 of the US constitution).

local, state, and federal governments must respond to ever changing circumstances and expectations.”¹⁹⁷

Intergovernmental relation in Ethiopia is dominated by a single and centralized political party system. Though the House of Federation is given broad powers under Art 62 of the constitution of Ethiopia to regulate relations between the members of the federation, its role is downplayed by the TPLF/EPRDF centralized party system which controls the legislators and executives of both the federal and state governments.

Article 62 of the constitution of Ethiopia grants powers to the House of Federation to enable it regulate intergovernmental relations regarding important issues including: “solving disputes between states”¹⁹⁸, “determining the division of revenues derived from joint Federal and State tax sources and the subsidies that the Federal Government may provide to the States”¹⁹⁹, “determining civil matters which require the enactment of laws by the House of Peoples’ Representatives”²⁰⁰, and “ordering Federal intervention if any State, in violation of this Constitution, endangers the constitutional order.”²⁰¹

Lovise Aalen, in his Article about TPLF/EPRDF’s control of the whole intergovernmental relations and the federal system in Ethiopia, rightly stated that:

In spite of the extensive constitutional devolution of power to ethnic groups in Ethiopia, the ruling government holds a firm grip on political affairs in the country. Through the centralized party organization of the Ethiopian People's Revolutionary Democratic Front

¹⁹⁷ Sarah F. Liebschutz, *Intergovernmental Relations: The Dynamic Reality of American Federalism*, 1995 American Bar Association, VOL. 19 NO. 3, p. 16

¹⁹⁸ Article 62(6) of the constitution of Ethiopia

¹⁹⁹ Ibid, sub Art 7

²⁰⁰ Ibid, sub Art 8

²⁰¹ Ibid, sub Art 9

*(EPRDF), regional and local autonomy is undermined and opposition party activities are severely restricted.*²⁰²

According to Professor Minasse Haile, “the constitution can justly be viewed as a mere subterfuge for continuing dictatorial rule by TPLF/EPRDF.”²⁰³ He also added “the party in power, in reality the TPLF, controls the legislature, the executive and the judiciary.”²⁰⁴ Therefore, when we see the Ethiopian context, the intergovernmental relations are basically determined by the centralized party system and not by the members of the federation or the constitution.

When we see intergovernmental relations in India, the constituent units are not powerful and autonomous enough to perform crucial intergovernmental relations between themselves. As M. Govinda Rao and Nirvikar Singh described it “the Indian federation is not founded on the principle of equality between the union and states.”²⁰⁵ The Indian parliament is empowered to “create new states from the existing ones, alter their boundaries and change their names.”²⁰⁶

As I have explained in previous chapters, Indian federalism gives much emphasis for unity; there is single judicial and public service system.²⁰⁷ In most cases, states are not consulted regarding amendment of the constitution and state governors are appointed by the union and they work as representatives of the union.²⁰⁸ The union’s power is to the extent that it can

²⁰² Lovise Aalen, Ethnic Federalism and Self-Determination for Nationalities in a Semi-Authoritarian State: the Case of Ethiopia, Int’l J. on Minority & Group Rts. 244 2006, p. 243.

²⁰³ Professor Minasse Haile, The new Ethiopian constitution and its impact up on unity, human rights and development, Suffolk Transnat’l L. Rev. 1 1996-1997, p. 5

²⁰⁴ Ibid, p. 51

²⁰⁵ M.Govinda Rao and Nirvikar Singh, Asymmetric Federalism in India, p. 3/
http://www.nipfp.org.in/working_paper/wp04_nipfp_006.pdf

²⁰⁶ Ibid, (see Article 3 of the constitution of India).

²⁰⁷ Robert F. Williams, Josef Marko and Allan Tarr, Federalism, sub national constitutions, and minority rights, West port, Connecticut, London, 2004, p. 202

²⁰⁸ Ibid

change the federal system into a unitary one in case of emergency. The union's legislature also can enact legislation on any of the areas which belong to the states as long as that serves national interest.²⁰⁹ Strictly speaking, the Indian federation is more close to unitary form of government than federalism proper. As Watts rightly stated it, "as the states in India exist under the shadow of the union, the rights of minorities are very much limited within the premises of liberal democracy and common citizenship."²¹⁰

Generally, minority groups are the losers and most vulnerable sections of a society in intergovernmental relations as long as there are no minimum constitutional guarantees governing such relationships. While flexibility, negotiation and consultation are indispensable in intergovernmental relations to meet changing circumstances, there has to be some constitutional guarantee to protect the interest of groups who otherwise will be losers in every negotiation.

3.4 Cooperative and competitive federal systems

Cooperative and competitive federalism are forms of intergovernmental relations and whether a federal system is cooperative or competitive has an impact on autonomy of members of a federation and stability and effectiveness of the federal system. According to Richard E. Wagner, in competitive federalism, "the relative sizes and spheres of activity of governments as well as of private organizations are all emergent properties of a competitive

²⁰⁹ Ibid

²¹⁰ Ibid

process.”²¹¹ While competitive federalism allows a government in a federation to exercise its power in whatever manner it wants, cooperative federalism may limit such power for the sake of others interest. Cooperative federalism requires consideration of and respect for the interest of other governments or constitutional actors within the federation²¹² and a member of a federation can’t exercise power in whatever manner just because that power belongs to it.

There are advantages and disadvantages with both cooperative and competitive feudalism. Cooperative federalism helps to avoid or reduce conflicts because coordination between members of the federation minimizes rivalry among them.²¹³ Yet it is problematic in that it limits the autonomy of both the federal and regional governments and that has an impact on accountability and effectiveness of public officials and that ultimately limits liberty of citizens.²¹⁴ As Watts explained it, “excessive cooperative federalism may undermine the democratic accountability of each government to its own electorate, a criticism frequently voiced about executive federalism in Germany, Canada and Australia.”²¹⁵

When we see competitive federalism, as Albert Breton clarified it, “just as economic competition produces superior benefits compared to monopolies or oligopolies, so competition between governments serving the same citizens is likely to provide citizens with better service.”²¹⁶ Michael S. Greve also argues that “competition among governments is a crucial advantage of federalism.”²¹⁷ According to Albert Breton, “cooperative federalism is

²¹¹ Richard E. Wagner, *Competitive Federalism in Institutional Perspective*, p.1/
<http://mason.gmu.edu/~rwagner/Federalism.pdf>

²¹² Dorsen, Rosenfeld, Sajo and Baer, *Comparative Constitutionalism: Cases and Materials*, 2003 p. 364

²¹³ Watts, *Comparing federal systems*, the school of policy studies, Queens University and the McGill-Queens University press, 2nd edition, 1999, p.60

²¹⁴ *Ibid* p. 61

²¹⁵ *Ibid*

²¹⁶ *Ibid*

²¹⁷ <http://federalismproject.org/depositary/GreveBookI3Competition.pdf>

collusion directed at serving the interests of governments rather than of citizens.”²¹⁸ But competitive federalism is tricky because an open competition may lead to conflict and that in turn may lead to disintegration of a federation. While competitive federalism may be helpful for freedom and liberty of citizens, cooperative federalism is indispensable for a welfare state to be functional and provide a coordinated service for the public.

Therefore, as both forms of federalism have the above advantages and disadvantages, “a blend of cooperation and competition may in the long run be the most desirable.”²¹⁹ There is cooperative federalism in every federation though the degree may differ. While “cooperative federalism is central and predominant in Germany”²²⁰, it also exists in US and other federations with a different degree. In Germany, there is unwritten constitutional principle which obliges states to cooperate. In the Television I case, the Constitutional Court of Germany decided that “the unwritten constitutional principle of the reciprocal obligation of the federation and the states to behave in a pro-federal manner governs all constitutional relationships between the nation as a whole and its members and the constitutional relationship among members.”²²¹ Thus, the basis for German cooperative federalism is that a government within the federation has to consider the interests of other federated governments while exercising its authority.²²²

When we see cooperative federalism in US, as Philip J. Weiser explained it:

The rhetoric of a dual federalism characterizes many of the Supreme Court's recent statements on the constitutional law of federalism; this vision of federal-state relations

²¹⁸ Watts, Comparing federal systems, the school of policy studies, Queens University and the McGill-Queens University press, 2nd edition, 1999, p. 61

²¹⁹ Ibid

²²⁰ Dorsen, Rosenfeld, Sajo and Baer, Comparative Constitutionalism: Cases and Materials, 2003 p. 364

²²¹ Ibid p. 366

²²² Ibid p. 364

*views each jurisdiction as a separate entity that regulates in its own distinct sphere of authority without coordinating with the other. In reality, however, Congress continues to enact "cooperative federalism" regulatory programs that invite state agencies to implement federal law.*²²³

Michael S. Greve also clarified that “in practice, American federalism has become an administrative cooperative federalism: state and local governments administer and implement federal programs.”²²⁴ Therefore, while there is formal competitive federalism in US, the practice shows that there is cooperative federalism to a substantial level²²⁵ and that is the result of “federal regulatory programs”²²⁶ and agreements between the governments within the federation.

The disproportionate power given for the union of India and the single dominant political party system which exists for 20 years in Ethiopia make it difficult to think about competitive federalism within these two federations. Therefore, there is considerable cooperation in these federations through “an Inter-State Council (ISC) for harmonizing Union-State and interstate relations and for policy coordination”²²⁷ in India and a single dominant political party which controls the legislatures and executives of both the federal and state governments in Ethiopia. In India, there are many “intergovernmental national councils”²²⁸ to coordinate different policies.

²²³ Philip J. Weiser, Towards a Constitutional Architecture for Cooperative Federalism, 79 N.C. L. Rev. 663 2000-2001, p. 665.

²²⁴ Michael S. Greve, Against Cooperative Federalism, 70 Miss. L.J. 557 2000-2001, p. 557.

²²⁵ Supra note 220

²²⁶ Supra note 2223.

²²⁷ Ronald Watts, Constructive and Co-operative Federalism, A Series of Commentaries on the Council of the Federation, institute of intergovernmental relations, IIGR, Queen’s University and IRPP, Montreal, 2003, p. 6 (see Art. 263 of the constitution of India).

²²⁸ Ibid

In Ethiopia, the single dominant political party system and the state's financial dependency on the federal government make cooperative federalism imperative. The main sources of revenue are under the federal government's power of taxation.²²⁹ The subsidy the states get from the federal government and the party structure enabled the ruling government to get the alliance of states easily. As Christophe Van der Beker stated it, "for their expenditure, all states are strongly dependent on the federal government."²³⁰ It means that in the long run, if a party crisis occurs or states become self-sufficient financially, it will be difficult for the federal government to cooperate with states to enforce its policies. There is a Federal Affairs Minister which works to facilitate cooperation between the federal government and states and among states. But, this institution is working through the party structure and it can easily fail at times of party crisis.

The problem with the Ethiopian cooperative federalism is that it totally depends on the political party structure. As Assefa Fiseha rightly stated it, "implementation of federal laws is facilitated by party channels."²³¹ The problem is not with the cooperation itself. The problem is that such cooperation is dependent entirely on integrity of a political party. If the party continues to be strong, then in practice, there will be a centralized government like what TPLF/EPRDF is doing in Ethiopia for the last 20 years and it will be difficult for a federal system to function. What is more, in case the party falls apart, cooperation between members of the federation will be difficult and it may lead to the collapse of the federation. Therefore, a more institutionalized and formalized cooperative federalism which can operate in the long run needs to be established in Ethiopia. The present cooperative federalism which operates

²²⁹ See Arts. 96-99 of the constitution of Ethiopia

²³⁰ Christophe Van der Beker, *Federalism and the Accommodation of Ethnic Diversity: The case of Ethiopia*, 2009, p. 13

²³¹ See Assefa, Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, revised edition, Addis Ababa: Artistic Printing Enterprise, 2007, p. 385.

through a dominant party system takes away the state's constitutional autonomy and that makes the competitive element of federalism zero.

For a federation to be effective, it has to consider diversity (local or regional autonomy) and unity. Diversity or regional autonomy requires competitive federalism and unity requires cooperative federalism (uniform implementation of policies) as relying only on competition may lead to conflict. Therefore, a federal system has to adopt a mixed approach so that both the minority and dominant groups within the federation feel that their interests are protected.

Chapter Four: Dangers to unity in a federal system

Introduction

In every federation, though there may be great difference in terms of degree, there are potential factors which lead to conflict and, in serious cases, total collapse of a federation. As Burgess explained it, “the coexistence of self-rule and shared rule means that conflict, competition and cooperation are institutionalized in a peculiar way that perpetuates problems of great complexity.”²³² There will be more dangers to unity in a federal system if constitutional and political mechanisms are not employed to handle potential sources of conflict and disagreement. As parties to a federal system form a federation to bring both unity and diversity, progressive development to unity or diversity alone may result in the collapse of the federation.

Too much emphasis on unity may gradually and effectively take away the powers of constituent units. In this case, member states may decide to leave the federation and that may result in disintegration of the federation. Excessive emphasis on diversity (regional autonomy) is also equally dangerous to the integrity of a federation. It, in the long run, may make states stronger than the federal government and that may enable them to ignore the federal government and secede from the federation unilaterally. It means that mechanisms to balance the tension between unity and diversity have to be devised if a federation is to be stable.

²³² Burgess, *Success and Failure in Federation: Comparative Perspectives*, p. 18/
<http://www.queensu.ca/igrcconf/Wattspapers/Burgess.pdf>

Most of the time, excessive asymmetry of power, absence of supremacy clause to settle conflicts between federal and state jurisdictions, arranging boundaries of a federation based on ethnicity (Ethnic federalism), constitutional secession clause and failure to represent diversity in federal institutions properly are among the potential sources of conflict which endanger integrity of a federation. This chapter will focus on such potential dangers to unity in a federal system.

4.1 Excessive asymmetry of power

As I explained in the previous chapter, there is asymmetry of power in every federation; at least political asymmetry is inevitable. There is also constitutional asymmetry in some federations. Therefore, what is problematic is not just asymmetry of power. Asymmetry of power becomes source of conflict and instability when it is undesired or excessive. As Govinda Rao and Nirvikar Singh described this:

*Asymmetry in administrative, political and economic spheres in federal systems is unavoidable and in fact, may be necessary not only to 'come together' but also to 'hold together'. However, while transparent asymmetric arrangements that can be justified on grounds of overall gains to the federation contribute to nation building, the discriminatory policies followed purely on short term political gains can be inimical to the long term interests and stability of federalism.*²³³

²³³ M.Govinda Rao and Nirvikar Singh, *Asymmetric Federalism in India*, p. 31/
http://www.nipfp.org.in/working_paper/wp04_nipfp_006.pdf

Asymmetry of power will be more excessive in more centralized federations and the worst scenario will be in case there is/are state/s which is/are stronger than the centralized federal government.²³⁴ In a centralized federation, the central government has more discretionary power than a non-centralized one and that may lead to asymmetrical treatment of constituent units. If such centralized federal system is controlled by only a few states or there is/are state/s which is/are stronger than the centralized federal government, there will be much more room for discrimination against the remaining states and that worsens the asymmetry of power as the stronger states will tend to stand for their own interest. Govinda Rao and Nirvikar Singh have clarified the Indian scenario regarding this problem; “the states ruled by regional parties with significant strength in the parliament (federal parliament) have become pivotal and have been able to secure substantially higher resources relative to other states.”²³⁵ That will result in excessive or undesired asymmetry of power.

In India, there is a growing trend of asymmetry of power. While some constitutional and political asymmetries developed in India are appropriate for smooth functioning of the federation, there is excessive asymmetry of power which is caused by “changing configuration of political power structure, vagaries of coalition and regional party politics”²³⁶ and that is a danger to the integrity of the federation in the long run.²³⁷

I explained in chapter four that political asymmetry of power is unavoidable. It can only be minimized. To do that, we need constitutional or other formal symmetry. Using constitutional asymmetry may be helpful to address challenges from influential constituent units. But, in the long run it has a divisive impact. When a federation grants special rights for one or more

²³⁴ Ibid

²³⁵ Ibid, p. 30

²³⁶ Ibid, p. 32

²³⁷ Ibid

states like in India, others will also claim for different special rights and such competition may lead to conflicts; that is a danger to unity.

As I explained in chapter three, both the US and Ethiopian federations are constitutionally symmetric. The states in these federations have equal rights and powers. But, there is political asymmetry in both federations like all other federations. In US, there are also non state units which are treated asymmetrically. Such units are not states and thus constitutional symmetry of power doesn't work for them. While each state has two representatives in the senate elected by the respective state until 1913 and directly by the people after the adoption the Seventeenth Amendment, the non-state units are not represented in this federal institution.²³⁸

Such asymmetric treatment of non-state units is indispensable because of different factors. As G. Alan Tarr clarified it, "geographical position mattered in the case of island territories; differences in style of life and traditional forms of governance influenced the treatment of Indian tribes; and differences in ethnicity affected the status of Puerto Rico and other islands."²³⁹ What has to be noted here is that, unlike in India and Canada²⁴⁰, asymmetrical treatments in US are not designed for component units (states). Rather, they apply to non-state units including non-state islands, the District of Colombia (where the nation's capital exist) and Indian tribes. Alan Tarr has explained this point stating that:

Typically--particularly in multi-ethnic federations--it is the component units that seek distinctive (asymmetrical) arrangements as a means of recognizing and accommodating diversities. In the United States, in contrast, the asymmetrical arrangements were devised

²³⁸ G. Alan Tarr, Symmetry and Asymmetry in American Federalism, p. 27/<http://www.queensu.ca/igrcconf/Wattspaperstarr.pdf>

²³⁹ Ibid

²⁴⁰ See Watts, Comparing federal systems, the school of policy studies, Queens University and the McGill-Queens University press, 2nd edition, 1999, p.66

*by and imposed by the federal government, and these steps were taken to serve national objectives, not the distinctive needs of the component units.*²⁴¹

Alan Tarr added that such arrangements in the US helped to avoid control of the nation's capital by a state²⁴² and it provide “an orderly procedure whereby sparsely inhabited territories could be governed until population growth qualified them for statehood.”²⁴³

Therefore, asymmetric treatment of non-state units in US is for the healthy functioning of the federation and it doesn't lead to conflict between states. The political asymmetry of power between the federal government and states and among states in US is also relatively less than what one can see in India and Ethiopia. As the US society is relatively homogenous, there are no challenging questions from states for asymmetric (different) treatment.

Though there is constitutional symmetry of power in Ethiopia like in the US, the political party structure has resulted in undesired asymmetry of power. In reality, it is the TPLF which controls the military and executive apparatus in Ethiopia. TPLF represents the people of Tigray which constitutes 6% of over 80 million people of Ethiopia. This party comes to power after it removed the Derg regime through military struggle. The TPLF members have controlled all key positions and others have to show alliance to such individuals if they want to be senior officials.

As Lovise Aalen stated it:

The TPLF was the creator of the coalition (EPRDF) and the architect of the ethnic federal model, and TPLF leaders have since the fall of Mengistu (Derg Regime) had the most powerful positions in the country, including the post of Prime Minister. The TPLF, through

²⁴¹ G. Alan Tarr, Symmetry and Asymmetry in American Federalism, p. 27/<http://www.queensu.ca/igrcconf/Wattspaperstarr.pdf>

²⁴² Ibid

²⁴³ Ibid

*the EPRDF coalition, has not been able to demonstrate a genuine will to share power with other political forces in a democratic manner.*²⁴⁴

Such practical asymmetry has led to the creation of military fronts representing different regions to fight the regime. Therefore, this undesired political asymmetry in Ethiopia has created a danger for the integrity of the federation.

4.2 Constitutional secession clause

While the US and Indian federations have indestructible union²⁴⁵, the present constitution of Ethiopia established a destructible union. The US federation is “indestructible union of indestructible states”²⁴⁶ and the Indian federation is “indestructible union of destructible states.”²⁴⁷ In Ethiopia, both the union and the states are destructible, i.e. in principle, nations, nationalities and peoples of Ethiopia can secede from the federation or form their own state, zone or district within the federation.²⁴⁸ Article 39 (1) of the constitution of Ethiopia provides that “Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession.”²⁴⁹ “Right to self-determination short of secession”²⁵⁰ is used in every federation to give autonomy to regional units or to protect rights

²⁴⁴ Lovise Aalen, Ethnic Federalism and Self-Determination for Nationalities in a Semi-Authoritarian State: the Case of Ethiopia, Int'l J. on Minority & Group Rts. 244 2006, p. 250

²⁴⁵ M. Govinda Rao and Nirvikar Singh, Asymmetric federalism in India, p. 4/
http://www.nipfp.org.in/working_paper/wp04_nipfp_006.pdf

²⁴⁶ Ibid

²⁴⁷ Ibid

²⁴⁸ See Art 39 (1) of the constitution of Ethiopia

²⁴⁹ Ibid

²⁵⁰ Allen Buchanan, Federalism, Secession and the Morality of inclusion, Arizona Law review, Ariz. L. Rev. 53 1995, p. 54

of minorities.²⁵¹ But, what is unique in Ethiopia is that there is a constitutional right to self-determination including secession.

International law is unclear as to whether right to self-determination includes the right to secede. The widely accepted approach is that the right to external self-determination (secession) is an exclusive right of nations “under colonial rule”²⁵² and its application beyond this is only in case of failure to include a nation in a democratic political process or when massive human rights violations occur.²⁵³ As Abate Nikodimos has rightly stated it, “If a government is democratic and inclusive, then the right has less international legitimacy.”²⁵⁴ While the present constitution of Ethiopia is inclusive, the ruling government has undermined the constitutional principles and there is no genuine share of power as I explained elsewhere. This may increase the international legitimacy of nations within Ethiopia as long as the single dominant party TPLF/EPRDF continues to rule the country and until a democratic inclusiveness introduced. Such failure to share power genuinely and the unconditional and unilateral right to secede which is stated under the constitution inspired some opposition groups to form military fronts to fight the present government to effect secession.

The secession clause as stated in the present constitution of Ethiopia, assuming that there is democratic environment to exercise it, is so dangerous for the integrity of the nation. Firstly, its presence under the constitution may create a sense of leaving the federation and that may lead to bloody conflicts. Abate Nikodimos has clarified this point. “The inclusion of the secession clause itself might encourage groups to try the option, and this might consequently

²⁵¹ Ibid

²⁵² Abate Nikodimos Alemayehu, *Ethnic Federalism in Ethiopia: Challenges and Opportunities*, 2004, p. 57

²⁵³ Ibid

²⁵⁴ Ibid p. 58

create distrust and destabilizes the unity of the country.”²⁵⁵ One can recall the bloody war between Eritrea and Ethiopia just some years after the secession of Eritrea.

Secondly, when we see the right under the constitution, it is unconditional and unilateral which would mean that, assuming there is democratic government, it is so easy for any nation, nationality or people to secede as long as the majority of the people concerned opt for it. The federal government or other states within the federation have no say at all regarding the secession process and the nation which requests for secession doesn't have to provide a reason why it wants to secede. It means that, if the people of Afar for example want to secede, it is not required to justify its claim and both the federal government and other states can't stop it from seceding as long as the majority of people in Afar opt for secession.

As clearly stated under Art 39 (1) of the constitution of Ethiopia, the right of nations, nationalities and people to secede is unconditional.²⁵⁶ The federal government is obliged by the constitution to provide referendum for secession within three years after it received the request for secession which is approved by the “Legislative Council of the Nation, Nationality or People concerned.”²⁵⁷ Then, it is up to the people of such Nation, Nationality or People concerned to decide on whether to secede or not through the referendum. Therefore, secession under the constitution of Ethiopia is both unconditional and unilateral. This could lead to unlimited fragmentation which is even against international law.

Almost all federations have no secession clause under their constitutions. Unity, common defense, greater market and economic development and social cooperation are given emphasis

²⁵⁵ Ibid, p. 62

²⁵⁶ Art. 39 (1) of the constitution of Ethiopia

²⁵⁷ Ibid, Art. 39(4)

in every federation. Thus, the secession clause under the constitution of Ethiopia is among the unique features of Ethiopian federation.

Of course, there are instances of secession questions even though federations have no secession clause in their constitutions. The question of secession raised by Quebec can be cited as an example here. But, what is incorporated under the constitution of Ethiopia and what is decided by the Supreme Court of Canada regarding secession are totally different. While the constitution of Ethiopia provides unconditional and unilateral right of secession which endangers the integrity of the federation, the Supreme Court of Canada rejected such unilateral and unconditional right to secede. It stated that, “while unilateral secession would be unconstitutional, a clear expression by the people of Quebec of their will to secede from Canada would impose a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire.”²⁵⁸

To summarize, while the US, Canada, India and other federations don’t have a secession clause in their constitutions, such clause inserted under the Ethiopian constitution has created a danger to the integrity of the federation in the future. It should be noted that “self-determination short of secession”²⁵⁹, if implemented in a democratic way, can bring the desired autonomy. Thus, to establish democratic governance and bring overall economic development to build a great nation with a genuine federal structure is the best way for stability in the long run as resort to the secession clause may lead to instability and continuous conflicts.

²⁵⁸ Reference re Secession of Quebec, 1998, 2S.C.R.217, para.53

²⁵⁹ Allen Buchanan, Federalism, Secession and the Morality of inclusion, *Arizona Law review*, Ariz. L. Rev. 53 1995, p. 54

4.3 Absence of supremacy clause

There is overlap of power between the federal and state governments in every federation though a vertical separation of power clause is provided in constitutions. This may lead to serious conflicts between the federal government and a state or states and that may endanger the integrity of a federation as long as there is no well-established principle to settle such cases of overlap of power. Federalism is all about shared rule and self-rule. To strike the balance between the two is required if both integrity of the federation and regional autonomy is to be ensured as I explained elsewhere. While a centralized federal government undermines regional autonomy and may fail to protect rights of diverse groups, some degree of federal prevalence over regional states is necessary to enable it hold the constituent units together to preserve the integrity of the federation.

It is inevitable that there are some powers in every federation which can legitimately be claimed both by the federal and state governments. Even in the US where powers of the federal governments are exclusively listed and the reserved ones are left for states under the Tenth Amendment, the division of powers between the federal government and states is not absolutely clear and there is a trend of expansion of the powers of the federal government through the “commerce clause”²⁶⁰ and the “necessary and proper clause.”²⁶¹ Thus, the boundary is not totally clear and there can be concurrence or overlap of power.

²⁶⁰ See Art I section 8 of US constitution

²⁶¹ Ibid

The Ethiopian constitution has exclusive list of powers for the federal government.²⁶² There are also concurrent powers of the federal government and states and the reserved powers are left for states.²⁶³ The federal government can also enact civil laws in areas which don't belong to it as long as the House of Federation determines that such power is important to bring "uniform economic community."²⁶⁴ Therefore, there is overlap of power which may lead to conflicts unless there is a principle which governs it.

The Indian constitution too contains a list of concurrent legislative powers and thus there can be overlap of power between the union and states. The constitution of India has a list of exclusive legislative powers for the federal government, exclusive legislative powers for states and concurrent legislative powers for both; and the residual ones are reserved for the federal government.²⁶⁵ "Power of parliament to legislate with respect to a matter in the State List in the national interest"²⁶⁶ is also stated under Art 249 of the constitution. There could not be jurisdictional conflict over judicial power between the union and the states in India as there is no dual court system within the Indian federation. Conflict over executive jurisdictions is also less probable because the states are required to exercise their executive power in compliance with federal laws and even the federal government has the power to direct them under Art 256 of the constitution.²⁶⁷

Though the degree may differ from federation to federation, overlap of power between the federal and state governments is inevitable in all federations. That leads to jurisdictional conflicts and it has to be managed carefully as failure to do so may destabilize a federation. A

²⁶² Art. 51 of the Constitution of Ethiopia

²⁶³ Ibid, Art. 52

²⁶⁴ Ibid, Art. 55 (6)

²⁶⁵ See Arts 246 and 248 of the constitution of India

²⁶⁶ Art. 249 of the constitution of India

²⁶⁷ Art 256 of the constitution of India

federation needs to have well settled constitutional principles to govern such issues. While overlap of power creates conflict of jurisdictions, there is also conflict between federal and state laws even in areas where there is no conflict of jurisdictions. There can be conflict between federal and state laws while the two levels of government are acting within their exclusive jurisdictions. Such conflicts between jurisdictions and laws may undermine unity in the long run unless a federation has federal supremacy principles. It is impossible to draw clear boundaries of power between the two levels of government regarding social and economic aspects. Both levels of government exercise power on such areas to render public service. Here, what has to be noted is that if we leave powers for states in case of conflict or overlap, we will end with creating undesired differences and lack of uniformity within the federation and that ultimately erodes unity.

Well established federal supremacy principles as incorporated under the US constitution and developed by the US judiciary is very much important to ensure the integrity of the federation. Federal supremacy principles help to bring uniform economic and social policies throughout the federation and that minimizes the danger of disintegration by promoting common values. If there is a conflict between federal and state laws in the US, it can be easily solved by making reference to Art VI of the US constitution. Art. VI paragraph 2 declared that “the Federal Constitution, Federal Laws and Treaties made by the federal government”²⁶⁸ are the supreme laws of the land. As I explained previously, the broad interpretative approaches of the commerce and the necessary and proper clauses are also used to ensure federal supremacy in blurry areas.

²⁶⁸ See Art VI paragraph 2 of the US constitution

In India, supremacy of federal laws over state in case of conflict is declared under Art 254 of the constitution²⁶⁹ and all levels of courts are obliged under different provisions of the constitution to ensure the constitutional order. Federal supremacy principles are the most dominant in India than other federations as I explained elsewhere. The Indian federation favors unity and the constitution has so many provisions which ensure supremacy of the federal government.

The constitution of Ethiopia doesn't have federal supremacy clause. The constitution declared its supremacy under Art 9. But, other federal laws are not supreme over state laws. Supremacy of the constitution is different from federal supremacy and thus it can't solve problems arising from conflicts of laws or overlap of powers between the federal and state governments. "The constitution is the supreme law of the land"²⁷⁰ under Art 9 simply means that, as the provision itself clarified it, "any law, customary practice or decision of both the federal and state governments"²⁷¹ is invalid as long as it is in contradiction with the federal constitution. This doesn't give any special position or supremacy for the federal government.

Therefore, in Ethiopian federation, if a dispute regarding conflict of laws between the two levels of government or jurisdictional question on overlapping or concurrent areas of power between them brought before the House of Federation (an institution which is set to solve disputes between the two levels of government or among the states themselves), there are no

²⁶⁹ See Art 254 Sub Art 1 of the Indian constitution. There are scholars who argue that the supremacy of federal laws under Art 254 applies only for cases of concurrent powers. But given the nature of the Indian federation, there is no valid ground which leads to this conclusion. The provision rather refers to all types of conflict. Literally the provision declares that "If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament *which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List ...*" This provision doesn't limit its scope to conflicts in case of concurrence. According to it, the conflict can be between any law made by parliament for which it is competent to enact and state law which it has power to enact or between federal and state laws which the two have competence to enact under the concurrent list.

²⁷⁰ Art 9 of the constitution of Ethiopia

²⁷¹ Ibid

constitutional principles up on which a decision can be passed. Thus, the decision by the house will be purely political though it may bring practical federal supremacy. Partial and discriminatory decisions by the house may upset the constituent units and that in the long run may jeopardize the integrity of the federation.

Unless there is a constitutional federal supremacy clause like in US and India or pragmatic federal prevalence, the integrity of a federation will be at risk promptly. While practical federal prevalence may be flexible and thus helpful to act according to circumstances, it is highly dependent on political party systems and other factors. Thus, it can't serve consistently which would mean that a federation needs well established constitutional federal supremacy principles if it is to be stable.

4.4 Arranging federal boundaries based on ethnicity (Ethnic federalism)

A federation may adopt a form of distributive or ethnic federalism in organizing its constituent units. While the purpose of distributive federalism is to divide power between the federal and regional states to ensure liberty and democracy and thus is organized based on administrative convenience, ethnic federalism is molded based on identity and its aim is to give power (autonomy) for each ethnic group. Thus, states in an ethnic federal system are organized based on ethnicity.

Ethnic identity is not used in structuring the US federation. Thus, a danger to the integrity of a federation which is highly probable in ethnic federal Ethiopia and other ethnic federations (unless reforms are made) is very less probable in US. In Ethiopia, state boundaries are defined along ethnic lines.

India too has reorganized the states along ethnic and religious lines in 1966 as I explained in chapter one. Given the strength and constitutional powers of the union in India, the ethnic federal arrangement which is organized based on linguistic and religious identities is not a threat to the integrity of the federation though the tension it creates between ethnic groups may lead to continuous conflicts among the tribes, casts, provinces or territories. As I explained earlier, the union can reorganize the states, it can merge two or more states into one, it can establish new states from one or more existing states, it can direct states to execute the laws in a manner it deems necessary. What is more, the centralized court system, the federal legislature's power to enact laws in the national interest on any area which belongs to states and the union's power to change the federation into a unitary form of government in case of emergency, all these together, promote unity and minimize the potentials to disintegration of the federation.

As one scholar rightly stated it:

*In view of historical experiences of disruptive and disintegrative sectarian forces and the political context of partition prevailing at the time of independence, the founding fathers of the Indian Constitution wanted to strengthen the Union against possible disintegrative pressures.*²⁷²

Dr Ambedkar one of the Drafters of the constitution had also said the following statement during the discussion on the draft constitution.

Though India was to be a federation, the federation was not the result of an agreement by the states to join in a federation. Not being a result of an agreement, no state has the right to secede from it. Though the country and the people may be divided into different states

²⁷²S.D. Muni, Ethnic conflict, federalism, and democracy in India/
<http://www.unu.edu/unupress/unupbooks/uu12ee/uu12ee0j.htm>

*for convenience of administration, the country is one integral whole, its people a single people living under a single imperium derived from a single source... The Drafting Committee thought it was better to make [this] clear at the outset rather than leave it to speculation...*²⁷³

Therefore, though there is ethnic federalism in India, there are many constitutional and practical factors which can ensure the continuing existence of the federation.

The form of ethnic federalism introduced in Ethiopia is different from what is adopted in India. The Ethiopian ethnic federalism as proclaimed in the constitution is a big danger to the continuing existence of the federation. As Professor Minas Haile indicated it, “although the Indian Constitution of 1950 has been thought to have served as a model emulated by the drafters of the Ethiopian constitution, the similarity between the two constitutions is superficial.”²⁷⁴ According to him, there are conditions in India which can ensure the integrity of the federation and those conditions are lacking in Ethiopia.²⁷⁵ As I clarified previously, the union is strong enough to handle activities which may destabilize integrity of the federation.

When we see the constitution of Ethiopia, it has used ethnicity in organizing the states and every ethnic group which is labeled “nation, nationality and people”²⁷⁶ has the right to self-determination including secession. Though the undemocratic nature of the ruling government has undermined the constitutional provisions, full implementation of the ethnic arrangement introduced in the constitution will be so hazardous for stability of the federation.

²⁷³ Ibid

²⁷⁴ See Professor Minas Haile, The new Ethiopian constitution and its impact up on unity, human rights and development, Suffolk Transnat'l L. Rev. 1 1996-1997, p. 17

²⁷⁵ Ibid

²⁷⁶ See Art 39 (1) of the constitution of Ethiopia. Art 8 of the constitution also declared that the sovereignty is vested in the nations, nationalities and people of Ethiopia. Thus every nation, nationality and people can claim such sovereignty at any time and secede from the federation.

As Professor Minasse Haile indicated, “The dangerous nature of the Ethiopian federation is found mainly in the near total transfer of sovereignty from the center to tribal regions, in the disproportionate powers allocated to the tribal subunits collectively and individually and in the creation of a government of unlimited powers (because of absence of separation of power, see Minasse Haile’s Article on the new Ethiopian Constitution on page 51).”²⁷⁷ According to him, the ethnic federal arrangement established by the present constitution of Ethiopia has introduced perplexing and damaging structures which inspire tribal groups to fight each other and that may lead to disintegration.²⁷⁸

Careful reading of Arts 8 and 39(5) of the constitution of Ethiopia reveals that there is no sovereignty vested in the people of Ethiopia as a whole. Art 8 declared that sovereignty is vested in the “nations, nationalities and people of Ethiopia.”²⁷⁹ And when we see the definition of “nations, nationalities and people of Ethiopia” under Art 39(1), it doesn’t refer to the people of Ethiopia as a whole; rather it refers to ethnic groups²⁸⁰. This is extremely dangerous.

Any individual, even those who have mixed ethnicity or those who are pan Ethiopian have to ascribe themselves to one of ethnic groups in Ethiopia. They can be participants in the political process only if they attribute themselves to one of the ethnic groups. This has eroded the common destiny Ethiopians have for “a millennia.”²⁸¹ It undermines the common historical, religious and social values of all nationalities in Ethiopia including the victory of all nations, nationalities and people against foreign invasions at Adwa and other battle fields.

²⁷⁷ Ibid p. 20

²⁷⁸ Ibid p. 19

²⁷⁹ Art 8 of the constitution of Ethiopia

²⁸⁰ See Professor Minasse Haile, The new Ethiopian constitution and its impact up on unity, human rights and development, Suffolk Transnat’l L. Rev. 1 1996-1997, p. 20 and 21. Also see Art 39 (5) of the constitution of Ethiopia.

²⁸¹ Ibid p. 23

The North ward movement and political domination of the Oromo on areas including Wello and Gondar in the 16 century and the South ward movement of Amhara in the 19 century²⁸² were among the significant historical events which linked the Ethiopian people by blood and culture. Thus, Ethiopian people have common values in many aspects though the present ethnic federal system is eroding those values and creating climate of fear among ethnic groups.

The purely ethnic federal setup in Ethiopia can't even solve the problem of ethnic groups. There is considerable number of Oromo population in Amhara and Benishangul Gumuz states and there is considerable number of Amhara and other ethnic group's population in Oromia and Southern states.²⁸³ There are above 50 ethnic groups in the Southern state. It means that the Oromos will be minorities in Amhara and other states and the Amharas will be minorities in Oromia and other states. We have also so many ethnic groups which don't have their own state. Economically, it will be impossible to establish states for all ethnic groups.²⁸⁴ Thus, some groups can't be influential enough to exercise their right to self-determination. Therefore, the ethnic federal arrangement may benefit only dominant ethnic groups. Even people who belong to such groups may be minorities in other regions and thus may not have the same autonomy as their ethnic group enjoy on the territory it dominates.

²⁸² Merera Gudina (Ph.D), The Ethiopian State and the Future of the Oromos: The Struggle for 'Self-Rule and Shared-Rule' Associate Prof; Dept. Political Science & International Relations, Addis Ababa University A paper presented to OSA Annual Conference July 29 – 30, 2006, Minneapolis, USA, p.3

²⁸³ Lovise Aalen Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991-2000 Report R 2002: 2 Chr. Michelsen Institute Development Studies and Human Rights, p. 44

²⁸⁴ Ibid

As many opposition politicians argue federalism is indispensable for Ethiopia but not ethnic federalism.²⁸⁵ The International Crisis Group has also warned the danger the Ethiopian ethnic federalism creates to the existence of the federation. In its report of 2009, it stated that:

*While the concept has failed to accommodate grievances, it has powerfully promoted ethnic self-awareness among all groups. The international community has ignored or downplayed all these problems. Some donors appear to consider food security more important than democracy in Ethiopia, but they neglect the increased ethnic awareness and tensions created by the regionalization policy and their potentially explosive consequences.*²⁸⁶

Hence, the ethnic federal system Ethiopia follows is a threat to the integrity of the federation. Before the TPLF/EPRDF comes to power, there were provinces in Ethiopia. Such provinces were not organized based on language. There are other common values which the Ethiopian people share though they speak different languages as I explained before. There were interactions between Ethiopian people from different ethnic groups. Thus, using only language as a means of political organization will ignore other important factors. As Assefa Fiseha stated it, “restoration of Ethiopia’s historic provinces and organizing them on a federal basis”²⁸⁷ can bring administrative convenience and it will be more accommodative as “provincialism is one element of diversity that defines Ethiopian society.”²⁸⁸ This also can minimize the tension between ethnic groups which has resulted from purely ethnic federalism.

²⁸⁵ Ibid

²⁸⁶ International Crisis Group report on Ethiopia: Ethnic federalism and its discontents ,Africa Report N°153 – 4 September 2009, p. ii

²⁸⁷ See Assefa, Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, revised edition, Addis Ababa: Artistic Printing Enterprise, 2007, p.248

²⁸⁸ Ibid

Establishing genuine federalism in Ethiopia doesn't need organization of states based on ethnicity. Rather, what matters is the share of power the ethnic group has in shared federal institutions and the language and other rights recognized for that group irrespective of the fact that on which territory the members of such group live. For example, the Oromo people will benefit more if it has genuine share of power in federal institutions based on its population size and if language, religious and cultural rights of its members are recognized irrespective of where they are living than getting unlimited autonomy only within the boundary in which it is organized based on ethnicity.

Presently, the undemocratic nature of the ruling government and the fact that states are structured based on ethnicity have resulted in creating military groups organized along ethnic groups and the fate of the great Ethiopian people who shared common values is at risk unless some genuine federal structure and democratic government is established.

4.5 Failure to represent diversity adequately

As I explained in the first two chapters, accommodation of diversity is one of the purposes of federalism in multicultural federal system like India and Ethiopia. I have also indicated in section 4.4 that accommodation or representation of diversity doesn't need ethnic federal arrangement as a precondition. I mean, there can be a non-ethnic federal system which accommodates diversity.

Accommodation of diversity and establishment of a democratic environment for participation of diverse groups is a crucial means to avoid marginalization of some groups within a multi-cultural federation. If these conditions are lacking in practice, those groups left behind or groups which don't get appropriate share of power will opt to leave the federation

through any means they can as what different military groups from different ethnic groups fight against the ruling government of Ethiopia currently. Thus, failure to represent diversity adequately through shared federal institutions will create real threats to the integrity of a federation.

The principle on which the US federal system based is “liberal democracy.”²⁸⁹ Thus, “individual liberty”²⁹⁰ is what the federation stands for. Thus, as I clarified it in chapter one, ethnic identity is not used as a basis in determining boundaries of the states and in sharing powers within the federation. This would mean that there will not be a question by a particular ethnic group to share power as one identified group within the federation. The assimilation policy used by US for centuries and the relatively homogenous society US has, as I explained in the first chapter, have minimized questions of ethnic identity and that in turn helps the liberal democracy principle to work well.

But what has to be noted here is that the US federalism is based on liberal democracy doesn’t mean that diverse groups have no rights at all. Because of the wide exclusions of and discriminations against the minorities by the majorities in different states, the states have developed their own minority rights protection systems. As Alan Tarr rightly stated this, “state courts have responded with rulings granting protections for rights beyond those afforded by the federal constitution.”²⁹¹ According to him, the state courts and constitutions are playing important roles in protecting minority rights.²⁹²

Unlike the US, the Ethiopian and Indian constitutions are committed to accommodation of diverse groups. The problem in both federations (Ethiopia and India) is absence of

²⁸⁹ <http://www.wisegeek.com/what-is-a-liberal-democracy.htm>

²⁹⁰ Ibid

²⁹¹ Federalism, sub national constitutions, and minority rights, Robert F. Williams and Josef Marko West port, Connecticut, London, 2004, p. 90

²⁹² Ibid, p. 89-99

accommodation in practice. The undemocratic nature of the ruling party in Ethiopia and disproportionate power given for the union of India are among responsible factors which resulted in pragmatic absence of accommodative environment. This has resulted in so many communal conflicts in India²⁹³ and created ethnic military groups fighting against the government in Ethiopia as I indicated earlier.

Generally, failure to accommodate diversity adequately is one potential source of conflict and instability in multi-cultural federal systems. Genuine accommodation of diversity and its democratic implementation is indispensable for the healthy functioning of multicultural federations like Ethiopia and India.

²⁹³ Ibid p. 203-211

Chapter Five: Constitutional review, unity and minorities' protection

Introduction

Federal or quasi federal forms of government are more complex than unitary forms of government. The competition for power and resources among the constitutional actors within federations exposed them to disputes and conflicts. This would mean that federal governments need to have strong and well organized judicial institutions to umpire horizontal and vertical disputes among constitutional actors. As federal constitutions divide power between the two levels of government and such division of power has to be guaranteed for a system to remain federal, neither level of government should have unilateral power to interpret the constitution. I have clarified this point in chapter one. One level of government will be subordinate to the other and the system will no more be a federation once one level of government alone has a final say on constitutional terms.

Therefore, there must be an independent umpiring institution to interpret a federal constitution. Both levels of government must be subordinate to the constitution and in case of dispute this judicial institution should have the final say on the terms of the constitution. To achieve this purpose, different federations have set different institutions as I will explain in this chapter.

5.1 Constitutional review: Who can request for it?

While most countries in the world have a system of constitutional review: a power by a court or other judicial institution to evaluate the laws made by parliament or the executive for their constitutionality, there is a great difference in terms of the type of judicial institution they adopt, the type of claim which can be made before these institutions, the sort of organizations or persons who can bring constitutional complaints and the composition of the institutions.²⁹⁴ Such structural and substantive differences have an impact on protection of minorities and preservation of the integrity of a federal system. This would mean that federal systems need to have umpiring institutions which can keep the spirit of federalism in addition to protection of individual rights and supervision of horizontal separation of powers which are also essential in unitary governments' constitutional review schemes.

The answer to the question who can request for constitutional review depends on the particular spirit or purpose a federal system follows. For example, as the US federalism is based on the principle of liberal democracy, the vertical and horizontal divisions of powers are meant to achieve individual enjoyment, liberty and democracy.²⁹⁵ Group identity is not relevant under the US constitution. This means a group of people or a person belonging to this group has no standing to request for constitutional review before the US Supreme or other federal courts to get a special right based on his identity. Of course, there are state constitutions and courts which have developed minority rights protection systems as I indicated in chapter four and thus there may be minority rights claims in these states. Here, as

²⁹⁴ Tom Ginsburg, Comparative constitutional review, University of Chicago Law School July 30, 2008, p. 1

²⁹⁵ See *New York V United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120, 1992, Para. 16

I explained in chapter one, it has to be noted that affirmative action is different from identity/minority rights.

Ethnic, religious and linguistic groups unlike in the US federation are the central elements in the Indian and Ethiopian federations. Hence, an ethnic, linguistic or religious group or an individual belonging to this group may request for constitutional review to secure a right based on such identity. Thus the issue who has standing in a given federation depends on the particular purposes that federation wishes to achieve. As Tom Ginsburg stated it, “Constitutional review systems differ widely on the question of who is allowed to bring a claim, a concept known as ‘standing’; one can array access to the court on a spectrum from very limited access to very wide access.”²⁹⁶ An example of very narrow access to courts for constitutional review, as Tom Ginsburg indicated, is the right to bring cases for constitutional review only by the federal and state governments in Austria in the 1920’s.²⁹⁷ These days, there is increasing trend of allowing individual complaints for constitutional review and that is to protect fundamental individual rights.²⁹⁸

A federation which can be an example for providing a wider access for constitutional review is Germany. “State bodies of all levels, ordinary courts, Laender, constitutional courts of Laender and any individual (alleging violation of his/her fundamental rights) can bring constitutional complaint before the Constitutional Court and the Constitutional Court have the power of both abstract and concrete review.”²⁹⁹ In US, though there is no abstract review,

²⁹⁶ Supra note 294

²⁹⁷ Ibid

²⁹⁸ See <http://www.concourts.net/lecture/lecture4.html>,

²⁹⁹ Ibid

“anyone who satisfies general ‘standing’ requirements for litigation can raise a constitutional issue in court.”³⁰⁰

In India, part III of the constitution provides fundamental individual rights and minority rights from Art 12-31.³⁰¹ Art 32 provides that the Supreme Court has the power of constitutional review to enforce these rights.³⁰² Therefore, individuals, minority groups or an individual belonging to a minority group may bring constitutional complaint to the Supreme Court of India. But, the problem is that the Supreme Court itself has very limited power of constitutional review. For example, the Supreme Court’s decision on constitutionality can be reversed by the parliament through constitutional amendment in case the parliament is not satisfied with the Court’s decision.³⁰³ From 1967 on, the Supreme Court has reduced such influence from the parliament by passing a famous decision in the *Golaknath* case stating that “fundamental rights cannot be amended.”³⁰⁴

In Ethiopia, any interested party has the right to institute a constitutional complaint.³⁰⁵ But the big problem is that the interpreter of the constitution is a political institution, the House of Federation, which is proved dormant as I will explain in the next section.

³⁰⁰ Supra note 294

³⁰¹ See Part III of the constitution of India

³⁰² See Art 32 of the constitution of India

³⁰³ Judicial review and protection of fundamental rights/ <http://nos.org/317courseE/L-15%20judicial%20review%20and%20protection.pdf> p.190

³⁰⁴ Supra note 303, p. 193

³⁰⁵ Art 37 of the constitution of Ethiopia. The House of Federation has also entertained a case submitted by Ethiopian Women Lawyers Association on behalf of *Kedija Beshir* case and this shows that an individual, organization or association which is an interested party can institute a constitutional complaint to the Council of Constitutional inquiry. The final decision will be passed by the House of Federation as the Council of Constitutional Inquiry has to send only advisory opinion.

5.2 What type of judicial setup best serves protection of minorities and unity through constitutional review?

Historical, political, cultural and social differences among federations have led to the establishment of different institutions vested with the power of constitutional review. Supreme courts in US, Canada, Australia, India and the like have the final say regarding constitutional review.³⁰⁶ We can also find specialized courts vested with this power, like the German Constitutional Court which is currently being followed by many federal and unitary states including Belgium, Comoros, Spain, Bosnia and Herzegovina, South Africa and Hungary.³⁰⁷ Ethiopia has followed a unique model. The power of constitutional review in Ethiopia is vested in a non-judicial political organization, House of Federation.³⁰⁸

There are different reasons forwarded for vesting the power of constitutional review with a political institution in Ethiopia. As I have explained in chapter two, among the reasons the leading ones are:

1) The argument that sovereignty under the Ethiopian constitution is vested in the nations, nationalities and people under Art 8 and as the constitution is a reflection of the sovereignty of nations, nationalities and people, the House of Federation which represents the nations, nationalities and people is the proper organ to interpret the constitution.

³⁰⁶ See Watts, Comparing federal systems, the school of policy studies, Queens University and the McGill-Queens University press, 2nd edition, 1999, p. 100. See Tom Ginsburg, Comparative constitutional review, University of Chicago Law School July 30, 2008, p. 1 Also see <http://www.concourts.net/lecture/lecture4.html>

³⁰⁷ Ibid

³⁰⁸ See Article 62 of the constitution of Ethiopia

But, this is a big fallacy because it assumes that the federation is a “coming together”³⁰⁹ one formed based on the free consent of nations, nationalities and people which would mean that a nation, nationality or people would have the power not to join the federation at the time. As I explained in section 2.3, the constitution making process was under the total control of the TPLF dominated ruling party and thus the constitution cannot be seen as a genuine reflection of the will of nations, nationalities and people. Let me use the words of Lovise Aalen once again. “The process of drafting and ratifying the constitution was totally dominated by the ruling party, and hence, the federal project lost legitimacy.”³¹⁰ This would mean that one cannot assume the Ethiopian federation as a coming together one. Thus, the first reason which justifies the power of constitutional review by the House of Federation is not tenable.

2) The second justification for vesting power of constitutional review on the House of Federation is, some scholars argue, absence of confidence by citizens on ordinary courts as I explained in chapter two. This argument is also very weak as reform can make courts much better and impartial than a single party dominated political institution.

3) The third argument that I indicated in chapter two and which I provide in detail here is the argument that vesting power of constitutional review on the judiciary is inappropriate as judges will give priority to legal values and disregard political elements in constitutional disputes.³¹¹ This argument may be persuasive but it doesn’t lead to the inference that a political institution is a best alternative to adjudicate constitutional cases. Given the diversity

³⁰⁹ See supra note 150

³¹⁰ See Lovise Aalen, *Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991-2000* Report R 2002: 2 Chr. Michelsen Institute Development Studies and Human Rights p.vi.

³¹¹ Assefa Fiseha, *Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HoF)*, Draft paper presented at African Network of Constitutional Law conference on Fostering Constitutionalism in Africa, Nairobi, April, 2007 p.9-11.

in Ethiopia, ordinary courts may not be the right institutions to adjudicate all types of constitutional matters.

Judges in the ordinary courts may give preference to legal viewpoint and fail to consider cultural, ethnic, religious, linguistic and other identities in exercising their power of constitutional review. But this doesn't justify the power of constitutional review by a non-judicial political institution, especially when such political institution is controlled by a dominant party and lacks independence like the Ethiopian House of Federation. It is possible to establish a specialized court with specialized judges who can consider both legal and non-legal factors. Thus, the German Constitutional Court can be adopted in Ethiopia with some modifications.

Ordinary courts may be proper judicial institutions to determine constitutional cases regarding fundamental individual rights as such cases involve more legal than non-legal issues. Fundamental individual rights cases are also too many as they are every day questions of citizens. This would mean that a specialized court will be so busy and ineffective if such cases are to be logged directly to such court for determination. Thus, ordinary courts need to have involvement in determining constitutional disputes concerning fundamental individual rights. But, there are other constitutional disputes which need consideration of non-legal factors which would mean that we need also specialized court and judges to address such constitutional cases. Thus, both ordinary courts and a specialized court need to have power to determine constitutional disputes in such a way that ordinary courts have power to decide on constitutional disputes regarding fundamental individual rights issues and a specialized court regarding other matters.

The constitution is supreme means that there should be an independent adjudicatory organ which is neither part of the federal government nor that of states as federal and state governments themselves are subject to the constitution. The House of federation of Ethiopia is

one of the federal political institutions and thus cannot be impartial in deciding cases if one of the parties in the dispute is the federal government.

4) The other reason mentioned as a justification for constitutional review by the House of Federation is the argument that issues regarding horizontal separation of powers often times involve both legal and political elements and thus courts may lack competence to adjudicate such cases.³¹² Assefa Fiseha has mentioned the US judiciary as one example facing with a problem in adjudicating such cases.³¹³ But this argument seems very feeble. In its earlier decision in *Marbury V Madison*, the US Supreme Court had refused to issue mandamus³¹⁴ against the political departments indicating that this involves political issue while stating that it has power to declare a law or executive action void.³¹⁵ The *Marbury V Madison* case thus established the power of the judiciary to invalidate the laws and executive actions for their unconstitutionality but at the same time constrained the power of the courts when a case involves a political issue. While the power to invalidate laws and executive actions for their unconstitutionality is upheld consistently, the constraining approach which limits the courts power when a constitutional case involves a political issue is transformed. The well-established precedent which is applicable now reveals that what matters is not whether a case involves a political issue or not rather what matters is whether the case can be decided applying the constitution or laws in the country.

The Administrative Procedure Act of 1946 and the judicial precedent have removed the constraint which existed in earlier times.

³¹² Assefa, Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, revised edition, Addis Ababa: Artistic Printing Enterprise, 2007, P. 416-418

³¹³ Ibid

³¹⁴ <http://www.lectlaw.com/def2/m079.htm>

³¹⁵ *Marbury V Madison*, 5 U.S. 137, 1803.

*By statute or by judicial expansion of the writ of mandamus in most of the U.S states, acts of administrative agencies are now subject to judicial review for abuse of discretion. Judicial review of agencies of the United States federal government for abuse of discretion is authorized by the Administrative Procedure Act.*³¹⁶

The Supreme Court's decision in Baker V Carr can make this precise. This decision should not be interpreted in the wrong way. In this case, the apportionment of representatives in the Tennessee legislature for different districts which is determined by the 1901 law was challenged for its constitutionality.³¹⁷ Urban areas whose population size has increased dramatically from 1901 on were under represented and brought a case under the equal protection clause.³¹⁸ The Supreme Court declared that "the case did not involve a 'political question' that prevented judicial review. A court could determine the constitutionality of a State's apportionment decisions without interfering with the legislature's political judgments."³¹⁹

This decision reveals that there is a political issue in the case but that didn't prevent the court from judicial review because the issue is justiciable i.e. the court can decide the case applying the constitution. If the court can decide a case using a law or the constitution, then there is no interference with the political departments. The case is thus non-justiciable only when it is purely political without involving a legal issue which can be decided by a court. In other words, irrespective of the fact that a case involves a political question, there is judicial review as long as the case can be decided based on law or the constitution and using a law or the constitution to render a decision is not an interference with a political department.

³¹⁶ <http://www.wordiq.com/definition/Mandamus>

³¹⁷ Baker V Carr, 1962 <http://www.infoplease.com/us/supreme-court/cases/ar02.html#axzz0z9EhKipA>

³¹⁸ Ibid

³¹⁹ Ibid

If a case is purely political, then it doesn't involve a legal question and thus the problem can be solved only through negotiation, consultation and agreement as there is no legal rule based on which a decision can be passed. In such cases, even political institutions like the House of Federation of Ethiopia cannot play a binding adjudicatory role beyond mediating the disputing organs as purely political cases cannot be solved by using legal rules.

As I indicated elsewhere, the House of Federation (HOF) of Ethiopia which is representative of nations, nationalities and people is assigned to resolve constitutional disputes by interpreting the constitution. Vesting such crucial judicial role to a non-judicial political organ has created so many problems and the house is proved inefficient. This house has a legal advisory body, i.e. the Council of Constitutional Inquiry (CCI). But, the CCI's investigation of the case and its interpretation of the constitution are not binding on HOF as CCI has a mere advisory role. Therefore, the ultimate decision on constitutional disputes is by majority vote of the HOF which would mean that the decision is political. The HOF cannot be impartial and independent organ to handle constitutional disputes. As a recent study rightly stated this:

*The HOF is a political organ operating within the context of a federal government dominated by a ruling party, the EPRDF, which has an excess of power in all branches of government. The HOF lacks complete independence from the EPRDF and the executive branch of government.*³²⁰

Though the HOF was meant to protect nations, nationalities and people most of which are minorities in Ethiopia, it has failed to do so because it is dominated by larger ethnic groups.

³²⁰Chi Mgbako, Sarah Braasch, Aron Degol, Melisa Morgan, Felice Segura, and Teramed Tezera, Report: Silencing the Ethiopian courts: Non-judicial constitutional review and its impact on human rights, Fordham Int'l L.J. 259 2008-2009, p. 285.

Each ethnic group has one representative in this house and additional seats for each extra 1 million population.³²¹ Thus, Oromo and Amhara alone have controlled more than half of the seats out of the total 112³²² which would mean that these two ethnic groups together can decide what they want.

Hence, the HOF is full of problems as long as constitutional review is concerned. The recent study I referred to above has clarified basic problems with the HOF as a constitutional interpreter. The study describes that:

*Non-judicial constitutional review in Ethiopia has created an overly bureaucratic, inefficient system of justice that has negatively impacted access to justice for Ethiopia's citizens. In its entire fifteen year history, the HOF has issued only four decisions.*³²³

To sum up, effectiveness of a constitutional review system in a federation depends on the type of institution vested with this power, the scope of power, independence and impartiality of the umpiring institution and the internal capacity of such institution.

³²¹ See Art 61(2) of the constitution of Ethiopia

³²² Supra note 320

³²³ Ibid

Chapter Six: Conclusion

This thesis has explored the territorial or nation state federal system of US and ethnic or identity based federal systems of India and Ethiopia and their implications on unity and protection of minority groups. The first chapter of the thesis has analyzed theoretical concepts including federalism, ethnic and territorial federalism and protection of minorities. Though there is no universal definition for the term federalism, the writer has indicated that there is no a federal system as long as one level of government is the subject of the other. Thus, constitutionally guaranteed division of power between the center and the constituent units each having significant autonomy and practical implementation of such division of power is at the core of a federal system.

While clarifying the concepts ethnic and territorial federations, the writer has showed that neither the US territorial federal system nor the purely ethnic federal arrangement followed by Ethiopia is a solution for multi-cultural states like India and Ethiopia. This is because the two countries have no a homogenous society to follow territorial federalism and a purely ethnic federal arrangement which ignores historical, economic and social factors in organizing political entities magnifies differences and leads to instability. The forces of unity and diversity should also be balanced properly. The forces of unity should not impose undesired restriction on diversity. Even the US territorial federal system which is based on the principle of individual liberalism, though it helps to sustain unity, is a prison for minorities as long as there are no minority groups' protection regimes at regional levels. Establishing a purely ethnic federal system and giving excessive emphasis for diversity like Ethiopia is also problematic as this would lead to tensions and conflicts. In short, neither purely individual

liberalism nor communalism is a solution for most countries in the world if the rights of all sections of the society and stability are to be addressed.

Chapter one has also explained the salient features of federalism including supreme, written and rigid constitution, constitutionally guaranteed division of power among governments within a federation, and the existence of an independent umpiring organ to decide on constitutional disputes.

The questions who are minorities and what rights they have to claim are also addressed under chapter one. Though the issue who are minorities is highly contested, the writer has indicated that some terminological modifications on the definition given by Francesco Capotorti, a definition which is considered better by most scholars, could be helpful to protect all categories of minority groups. Once minority groups are identified, the rights given to them should enable them to avoid despotism by the dominant group. But minority rights should not be to the degree that a minority group can destabilize the political system.³²⁴

Chapter two of the thesis has addressed the issue representativeness of shared federal institutions. The writer has also indicated some problems associated with the electoral systems and the manner of selection of members of the upper houses of US, Ethiopia and India.

Shared federal institutions are indispensable to work together on areas of common interest and that helps to keep integrity of a federation. For shared federal institutions to be legitimate and effective, they have to accommodate diverse groups in a federation. One way to accommodate regional or diverse interests through shared federal institutions is establishment of a genuinely representative upper house.

³²⁴ Robert F. Williams, Josef Marko and Allan Tarr , Federalism, sub national constitutions, and minority rights, West port, Connecticut, London, 2004, p. 46

Each state in the US has two representatives in the Senate (upper house) and such equal representation of both small and larger states can help to avoid domination of small states by the large ones and to counterbalance the lower house majority as the lower house may favor for larger states because it is composed based on population size. Thus, the US Senate which is a shared federal institution can ensure protection of regional interests. But, equal representation of states doesn't mean equal protection of diverse groups within each state as majority groups in each state can dominate minorities. Therefore, regional minority rights protection systems which are started in some states have to be developed well.

While both the US and Indian federal legislatures are bicameral composed of both lower and upper houses, the Ethiopian legislature lacks legitimacy because the HOF (upper house) which represents diversity doesn't have any involvement in the law making process. Thus, the constitutional protection of diverse groups in Ethiopia is easily paralyzed through the law making policy of the lower house which is dominated by only few ethnic groups. A federal legislature, to be legitimate, has to incorporate both unity (through the lower house) and diversity through the upper house. Thus, the Ethiopian legislature needs reform if it is to be legitimate.

The Indian upper house (Rajya Sabha) is also tricky in that it represents the states and not diverse groups though India has ethnic based federalism. Rajya Sabha has also another problem; it is dominated by larger states because the seats are apportioned based on population size.³²⁵ Same problem is faced by the HOF of Ethiopia as each ethnic group has one extra seat for each one million population which would mean that larger ethnic groups

³²⁵ See Article 107 of the constitution of India

can dominate this house.³²⁶ The biggest problem with the HOF in Ethiopia is that it has no any involvement in the law making process which would mean that there is no means to counter balance domination of the lower house by few nationalities. Second houses of India and Ethiopia are also controlled through political party system as members are elected by state legislatures and not by the people.

Granting power to the Ethiopian second chamber to involve itself in the law making process, to set a limit on the maximum number of seats states or ethnic groups can have in second chambers of India and Ethiopia to avoid domination of such houses by larger ethnic groups or states and to elect members of second chambers directly by the people like in US to avoid control of second chambers by a dominant political party are feasible solutions to minimize complex problems associated with the Indian and Ethiopian second chambers.

Chapter three has explored on asymmetry of power and its implications on balancing the forces of unity and diversity. While political asymmetry is always inevitable because of unavoidable factors like differences in resources and population size, constitutional asymmetry is introduced only in exceptional circumstances to address significant differences. While Ethiopia and the US are constitutionally symmetric in distributing powers among the states within the federation, there some federal systems which have constitutional asymmetry of power; Canada and India can be examples. As excessive political asymmetry itself is one source of conflict in federations, adding constitutional asymmetry will aggravate the problem and may lead to disintegration. Thus, the long run project should be to avoid constitutional symmetry if possible and to minimize the degree of political asymmetry.

³²⁶ See Article 61(2) of the constitution of Ethiopia

Chapter three has also addressed the issue of intergovernmental relations. Factors including excessive domination of Indian states by the union and a single dominant party system in Ethiopia have resulted in undesired political asymmetries and unwarranted intergovernmental relations and the losers in this game are minority groups. In this regard, the constitution of India needs some amendment and the undemocratic nature of the ruling government in Ethiopia has to be changed. Otherwise, regional states in both federations cannot have guarantee of independence within their own spheres. The writer has also indicated that, while both cooperative and competitive federal systems have advantages and disadvantages which would mean that we need the combination of the two, an excessive cooperation through a single party system in Ethiopia and a dominant union in India has created undemocratic environment.

Chapter four has identified some potential dangers to unity in federal systems. Excessive asymmetry of power, failure to accommodate diversity, constitutional secession clause, ethnic federalism and absence of federal supremacy clause are among the primary potential dangers to the integrity of a federation. While asymmetrical treatment of non-state units in US has helped for healthy functioning of the federation as explained in chapter four, asymmetrical treatment in India is given for states and there is an increasing trend of such asymmetry and that has led to some conflicts and may become a serious danger to integration in the long run. In Ethiopia too, an excessive asymmetry which is the result of a single dominant party and undemocratic government system has created serious danger to the integrity of the federation. Hence, the Ethiopian and Indian federations need significant reforms, as I indicated above, if they are to be lasting and effective federal systems.

The constitutional secession clause which is unique feature of Ethiopian federation and the organization of states based on ethnicity has exaggerated differences between Ethiopian people and that has created so serious danger to future Ethiopia. Unlike the US and India,

Ethiopia has no federal supremacy clause and assuming that states become strong enough to challenge the federal government, it will be difficult to resolve conflict of laws and jurisdictions. In serious cases, this may lead to disintegration. It is obvious that the constitution of Ethiopia needs amendment to address these problems.

Failure to accommodate diversity properly is another potential factor for disintegration. As the US federation is territorial and due to its relatively homogenous society, there is no serious group to claim accommodation of diversity at the federal level. But, in multi-cultural federations like India and Ethiopia, genuine accommodation of diversity is indispensable for the integrity of these federations. Though the constitutions of both Ethiopia and India have accommodated diverse groups, the reality on ground is systematic exclusion and discrimination and this trend has become a source of serious conflicts in both federations.

Chapter five has addressed the issue what type of constitutional umpiring institution is feasible to ensure respect for and protection of minorities and integrity of a federation. This chapter has depicted that neither ordinary courts nor political institutions are adequate enough to determine constitutional disputes especially when a federal system is multicultural. Thus, the writer has indicated that involvement of ordinary court in determining constitutional cases regarding fundamental individual rights and establishment of a specialized court for other cases is a feasible way to address constitutional disputes effectively. The writer has also revealed impartiality and incompetence problems associated with the Ethiopian upper house and the risks associated with using ordinary courts only as constitutional umpiring institutions.

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