



LOCAL CHARACTERISTICS UNDER ETHIOPIAN AND SOUTH AFRICA'S  
CONSTITUTION: GADA AS A FOUNDATION OF THE STATE CONSTITUTION OF  
OROMIA

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## Abstract

States have adopted modern constitutions for various reasons among which is to redeem past authoritarianism and progress to democracy. Constitution making process has a vital role in this regard especially where there are added incentives of ethnic and cultural diversity like in the cases of Ethiopia and South Africa. In such scenarios federalism provides the opportunity to organize the state into different tiers of governments to exercise the power of designing a constitution at sub-national level with a better local character. This thesis reviews the potentials of *Gada* system to promote constitutionalism and failure of the State Constitution of Oromia to take *Gada* system as its foundation.

## Contents

Table of Legislations and Court Decisions .....	iii
Introduction .....	1
1. Constitution Making in General .....	3
1.1. The Role of Public Participation.....	5
1.2. Constitution Making and Constitutionalism.....	8
2. Constitution Making in Multicultural Societies: the Case of Ethiopia and the RSA .....	11
2.1. Federalism as a way out? .....	13
2.2. Sub National Constitutions: the case of Oromia and some Remarks on Republic of South Africa's (RSA) 'Provincial Constitutions' .....	18
3. Why <i>Gada</i> system for State Constitution of Oromia? .....	28
3.1. The concept of <i>Qixee</i> and Balance.....	30
3.2. Democratic Election Process .....	31
3.3. Limited Terms of Office .....	32
3.4. Division of Power .....	34
3.5. Sovereignty of the People .....	35
3.6. The Umpiring role of the <i>Qallu</i> .....	36
Conclusion.....	38
Bibliography.....	40

## **Table of Legislations and Court Decisions**

Transitional Period Charter of Ethiopia of 1991

Constitution of the Federal Democratic Republic of Ethiopia of 1995

The Revised Constitution of the State of Oromia, 2001

Constitution of the Republic of South Africa Act 108 of 1996

Certification of the Constitution of the RSA, 1996, Case CCT 23/96

Certification of the Amended Text of the Constitution of Western Cape, 1997, Case CCT 29/97

Certification of the Constitution of the Province of Kwazulu-Natal, 1996, Case CCT 15/96

## Introduction

The task of Constitution making seems ubiquitous but is actually a poorly understood phenomenon.<sup>1</sup> Constitution making is a highest law making since constitution is, *inter alia*, characterized as being the supreme law of a land and as such needs to pass through a special process for its adoption. The people have to take part more actively and directly in the making of a constitution than is required in an ordinary law making. This makes constitutions to have wider local character and respond to the real needs of the people. This is especially crucial for states with authoritarian past or emerging from conflict as well as where the state is a multicultural state.

In multicultural states federalism provides an option for better accommodation of diversity. Through establishing multilayer government it also makes possible the adoption of constitutions manifesting local values and wills of the people. Multicultural states have now realized the significance of integrating local characteristics in their constitutions either through recognition at the national constitution level or by sub-national constitutions specifically meant to address interests peculiar to regional states. Wider public participation in the constitution making process plays a significant role in the success of this objective. The experience of the Republic of South Africa (RSA) in the making of its national constitution is crucial in this regard.

Ethiopia also adopted a federal state structure in total rupture from its earlier histories of highly centralized unitary governments in 1995 by adopting the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution).<sup>2</sup> Unlike in the case of RSA, however, the lack of

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<sup>1</sup> Tom Ginsburg et al., Does the Process of Constitution Making Matter? (Annu. Rev. Law Soc. Sci., 2009), 201-223, accessed March 5, 2013, <http://annualreviews.org>

<sup>2</sup> The Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution), *Federal Negarit Gazette*, Proclamation No. 1/1995. Art 1. In reality, however, the dominance of one party, i.e. Ethiopian People's Revolutionary Democratic Party, has highly centralized power in the center narrowing autonomous exercise of state power. Moreover,

meaningful public participation in its making has eroded its legitimacy outside the sphere of incumbent government. Although the constituent states mainly demarcated on ethnic lines have the power to adopt their own constitutions, they did not use it to design a constitution manifesting local characteristics and rooted on interests specific to their region.<sup>3</sup> In this thesis it has been pointed out how the state constitution of Oromia<sup>4</sup> have failed to take the values of *Gada* system,<sup>5</sup> considered to be the cradle of the identity of the Oromo people, which has various features and values that could serve as a foundation for a democratic state as well as promote and entrench constitutionalism.

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the composition of both houses of the parliament doesn't give equal position for all constituent states in the House of Federation (the Upper House) since the House of Federation is composed of one representative from every Nation, Nationalities and Peoples and one more representative for additional one million population (Art 61 of the FDRE Constitution). The fact that the Upper House lacks legislative power (Art 55(1) of the FDRE Constitution provides that only the House of Peoples Representatives or the Lower house has federal legislative power) has undermined principles of federalism. For a detailed discussion of the Federal State Structure of Ethiopia See, Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study* (Postbus: Wolf Legal Publishers, 2005)

<sup>3</sup> Although the situation is more or less similar for all the nine regional states established by the federal constitution for the purpose of this thesis the case of Oromia regional state have been addressed. For this purpose the regional constitution of Oromia regional state will be assessed.

<sup>4</sup> Oromia is the biggest constituent State with, according to the 2007 Census, a population share of 36.7 % of the whole population of the Country and is a home for the largest ethnic group in the Country, i.e. the Oromo people, which according to the 2007 Census accounts for 34.49% of the whole population of the country. See, Summary and Statistical Report of the 2007 Population and Housing Census, Federal Democratic Republic of Ethiopia Population Census Commission.

<sup>5</sup> Gada system is a cultural institution which encompasses the socio-economic, religious and political life of the Oromo people. The system divides male members of the population into different age-sets which then assume political power in every eight years term. This power transfer was overlooked by the head of a religious institution, *Qallu*, called *Abba Muudaa* and equal representation in the system was made sure by the division of the entire population into different moiety groups. The system incorporates various democratic principles starting from the election of political leaders (*luba*) and the right to recall elected representatives. See, Asmarom Legesse, *Gada: Three Approaches to the Study of African Society* (New York: The Free Press, 1973); and, Asmarom Legesse, *Oromo Democracy: An Indigenous African Political System* (Trenton/Asmara: The Red Sea Press, Inc. 2006). There is also a women specific institution called *Siiqee* meant to counter male dominance within the system and defend the right of women members of the people. See, Kuwee Kumsa, *The Siiqee Institution of the Oromo Women*, *Journal of Oromo Studies*, vol. 4, no. 1 and 2. (1997), accessed on February 14, 2013, <http://oromostudies.org>.

## 1. Constitution Making in General

In modern Constitution making history various reasons have triggered the adoption of a new Constitutions. New constitutions have been adopted with the creation of a new States, with the end of civil conflicts as a document of truce, with the collapse of communism and change of ideology, and/or with the end of colonialism.<sup>6</sup> Elster describes this modern constitution making as a ‘wave’ that followed a given historical occurrence that triggered the adoption of new constitutions.<sup>7</sup> Constitution making in Africa also shows a certain pattern. Some identify three generations of constitutions in Africa: constitutions adopted following independence from colonization; post colonial restructuring of power in the three decades following decolonization; and, post cold war constitution making.<sup>8</sup> However, recent events have brought new causes for constitution making into picture, i.e. newly independent states<sup>9</sup> and following popular revolutions in the North of African States.<sup>10</sup>

The process of constitution making is traditionally ascribed as a power defined as ‘constituent power’ which also implies the power to undo it.<sup>11</sup> Who is responsible for making of the constitution differs based on who the actors are at the time of the constitution making. This process of making

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<sup>6</sup> Michele Brandt, et al., *Constitution Making and Reform: Options for the Process* (Switzerland: Interpeace, 2011), 13-15, accessed on February 28, 2013, <http://interpeace.org>

<sup>7</sup> Elster classifies the history of constitution making into seven waves. According to him this wave of modern constitution making started in the late eighteenth century (1780 and 1791) when constitutions were written for various American States, the US, Poland and France. The Second with the wake of the 1848 revolutions in Europe; the third after the First World War for the newly created states and Weimer Constitution; the fourth after the Second World War which saw new constitutions for the defeated states; the fifth with the end of colonialism; the sixth with the fall of dictatorships in Southern Europe; and, lastly with the fall of communism came the need to adopt a new constitution. See, Jon Elster, “Forces and mechanisms in the Constitution Making Process”, *Duke Law Journal*, vol. 45, No. 2 (1995): 368-369

<sup>8</sup> Issa G. Shivji, “Three Generations of Constitutions and Constitution Making in Africa: An Overview and Assessment in Social and Economic Context”, in Mihaela Serban Roben (ed) “Constitutionalism in Transition: Africa and Eastern Europe”. (Paper presented at the International Conference on Comparative Constitutionalism, Warsaw, Poland, May 17-20, 2001): 74-92

<sup>9</sup> The case of Eritrea and South of Sudan is triggered by the declaration of independence after decades of armed struggle. This makes it different from the rest of constitution making in Africa.

<sup>10</sup> Following the popular revolution, popularly termed as ‘the Arab Spring’, most Northern African States have designed and adopted new constitutions as a response.

<sup>11</sup> Michel Rosenfeld and Andras Sajó, eds., *The Oxford Handbook of Comparative Constitutional Law*. (Oxford: Oxford University Press, 2012), 422

constitution is especially pivotal for States who emerged from conflicts and authoritarian past, like the Republic of South Africa and Ethiopia, for its legitimacy as well as for it to continue as a peace document serve to lead to democracy.<sup>12</sup> In the contemporary world the preferred body for making a constitution that satisfies the criteria of constitutionalism or a democracy is considered to be a Constituent Assembly whose members are elected by the majority and specifically designated with a constitution making power.<sup>13</sup> Traditionally constituent assemblies used to be the representatives of certain portions of the people but modern democratic theories relate constituent bodies to the ultimate holder of state power, i.e. the people,<sup>14</sup> in the process of establishing the Constituent Assembly and finally approving the constitution so drafted through a referendum.<sup>15</sup>

Being a fundamental document the process of constitution making has to follow certain prevailing constitution making process which ultimately contributes for its legitimacy, efficiency, acceptance and foster constitutionalism. The whole process from the initiation stage to the final adoption of the constitution should be geared towards making sure the ultimate state power holders should have a proper say in it. Especially where the constitution is adopted in the aftermath of a civil conflict the need to promote reconciliation necessitates the process of constitution making to be taken seriously in order to create national consensus.<sup>16</sup>

The success of a Constitution in achieving these objectives partly depends on whether the real interest of the public is taken into account in designing the constitution through effective public

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<sup>12</sup> Tsegaye Regassa, "Between Constitutional Design and Constitutional Practice: The Making and Legitimacy of Constitutions in Ethiopia", (paper presented at Conference on Constitutionalism and Human Security in the Horn of Africa, Addis Ababa, August 7, 2008), 16-49

<sup>13</sup> Rosenfeld and Sajo, eds., *The Oxford Handbook of Comparative Constitutional Law*, 423-425.

<sup>14</sup> Yet who are considered as falling within the definition of 'people' has always been controversial and is usually determined based on the ideological preferences of the force behind the whole constitution making.

<sup>15</sup> Rosenfeld and Sajo, eds., *The Oxford Handbook of Comparative Constitutional Law*, 423-424 and 427-431.

<sup>16</sup> Yash Ghai and Guido Galli, *Constitution Building Processes and Democratization* (Stockholm: International IDEA, 2006), 13, accessed on March 5, 2013, [http://idea.int/publications/cbp\\_democratization/](http://idea.int/publications/cbp_democratization/)



participation. This will enable the designers of the constitution to incorporate local characteristics and foster constitutionalism. In the next subsection it would be appropriate to briefly discuss the role of public participation before turning to the discussion of how constitution making process impacts constitutionalism.

### **1.1. The Role of Public Participation**

The participation of the public has been accepted to be crucial in constitution making process only recently. The traditional perception was that constitutions were given by a wise man legislator.<sup>17</sup> There has been a doubt about the direct participation of the public in constitution making mainly due to the perception that the purposes, forms and structure of the state is complex and such task should be done only through a ‘representative democracy’.<sup>18</sup> In a democratic state constitutions are the supreme law of the land and their making should also be different from ordinary legislative process and the public should have much more active and direct participation. In a democratic state the sovereign power is vested and flows from the people and as such it is only logical that they determine how it is exercised and delegated.<sup>19</sup>

Although it may not always be true popular participation in constitution making is also critical for the strength, acceptability and legitimacy of a constitution.<sup>20</sup> On the other hand some argue popular

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<sup>17</sup> Rosenfeld and Sajo, eds., *The Oxford Handbook of Comparative Constitutional Law*, 419-420

<sup>18</sup> Ghai and Galli, *Constitution Building Processes and Democratization*, 13

<sup>19</sup> Ibid

<sup>20</sup> Even though there is a popular participation in the making of the constitution it may lack its legitimacy if it fails to meet the expectation of the people. Sometimes imposed constitutions may get post legitimacy if it becomes effective. See, Rosenfeld and Sajo, eds., *The Oxford Handbook of Comparative Constitutional Law*, 424. It is also possible that even though the constitution making has been participatory there is no guarantee that the results of the participation will be reflected in the final document or even if incorporated its application could be frustrated. The participation of the public might also be manipulated for political gain. Processes widely recognized as participatory has also been seriously manipulated. See, Ghai and Galli, *Constitution Building Processes and Democratization*, 14-15

constitution making has also a danger of leading into constitutional dictatorship.<sup>21</sup> Yet the active participation of the public creates a sense of ownership which is a vital factor for its legitimacy and proper implementation. Unfortunately, popular participation is often absent or if allowed could only be made for the sake of formal legitimacy. For instance, except for some exceptions like in the case of making the 1996 Constitution of the Republic of South Africa (RSA)<sup>22</sup> the overwhelming majority of the African society rarely took part in the building of a constitution and it is mainly a top down document with little participation of the public.<sup>23</sup> Although the series of the negotiations held among the political parties before the adoption of the 1996 Constitution have resulted in the incorporation of various provisions the public had been given ample opportunities to take part in its making.

On the Contrary the participation of the public in the making of the 1995 Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution) was very minimal which explains the current low legitimacy it enjoys outside the sphere of the ruling party. The 1995 FDRE Constitution was foreseen by the Charter of the Transitional Government of Ethiopia (TGE) and most of the contents of this constitution were settled at the conference that adopted the Charter.<sup>24</sup> Hence, the Transitional Charter, which served as an interim constitution of the transitional government, was a negotiated document among Liberation Fronts which toppled the Derg regime.<sup>25</sup>

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<sup>21</sup> William Partlett, "The Dangers of Popular Constitution Making," *Brook. J. Int'l L.* Vol.38:1 (2012): 193-238

<sup>22</sup> The Constitution of the Republic of South Africa of 1996

<sup>23</sup> Francis M. Deng, *Identity, Diversity and Constitutionalism in Africa* (Washington DC: United States Institute of Peace, 2008), 15

<sup>24</sup> The Conference which took part in Addis Ababa from July 1-5, 1991 adopted the Charter of the TGE which laid down a foundation for the subsequent Constitution of 1995 Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution). The Charter was signed by the representatives of some 31 political parties while the main actors being the Tigrean Peoples Liberation Front (TPLF), the main champion of the Eritrean Independence the Eritrean Peoples Liberation Front (EPLF), and, the Oromo Liberation Front (OLF). See, Assefa Fisseha, *Federalism and the Accommodation of Diversity in Ethiopia*, 61-64; and, Tsegaye Regassa, "The Making and Legitimacy of the Ethiopian Constitution: Towards Bridging the Gap Between Constitutional Design and Constitutional Practice," *Afrika Focus*, Vol. 23, No. I (2010): 99-101

<sup>25</sup> Although the Charter was mainly meant as a peace pact after the civil is over, Art 18 of the Charter made the Charter the supreme law of the land and most of its provisions have features of a constitution. Tsegaye Regassa, "The Making and Legitimacy of the Ethiopian Constitution," 99-101

The TGE statutorily established a Constitutional Council<sup>26</sup> which drafted the FDRE Constitution and put it for discussion by the public. According to Markakis the public discussion that followed was largely unanticipated and the publicity was brief not enough to make an informed participation of the majority of the citizens in the countryside.<sup>27</sup> This was crucial given more than 80% of the citizens live in the rural areas. Tsegaye also observed the interest of the public for deliberation on the constitution was minimal making the turnout very low.<sup>28</sup>

The constitution was then presented for deliberation to the Council of Representatives, a unicameral legislature mainly composed of liberation fronts.<sup>29</sup> However, the process was far from being participatory since it was highly dominated by the EPRDF which in turn is controlled by TPLF. This question of who controlled the making of the constitution is significant since like Elazar puts it constitution making is ‘pre-eminently a political act’.<sup>30</sup> The draft constitution was presented to the elected Constitutional Assembly that adopted it without the constitution being presented to the public for referendum.<sup>31</sup> Referendum could have remedied the lack of effective public discussion as its absence has taken any meaningful public participation from the constitutional making process of

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<sup>26</sup> The Constitutional Commission Establishment Proclamation No. 24/1992

<sup>27</sup> John Markakis, *Federalism and Constitutionalism in the Horn of Africa*, (paper presented at conference on constitutionalism and human security in the Horn of Africa, Addis Ababa, October 1, 2007), 58-59.

<sup>28</sup> Tsegaye Regassa, “The Making and Legitimacy of the Ethiopian Constitution,” 104

<sup>29</sup> This was done in light of the provisions of the Transitional Charter. Art 11 and 12 of the Charter, respectively, provide as follows: “The Council of Representatives shall constitute the Constitutional Commission to draw up a draft constitution. The Constitutional Commission shall submit to the Council of Representatives the draft constitution”; and, “Upon adoption of the draft constitution by the Council of Representatives the constitution shall be presented to the people for discussion. The final draft shall be presented for adoption in the constituent assembly to be elected pursuant to the final draft of the constitution”.

<sup>30</sup> Daniel J. Elazar, *Constitution Making: The Pre-eminently Political Act*, accessed on March 14, 2013 <http://jcpa.org/dje/articles3/constisramer.htm>

<sup>31</sup> Tsegaye Regassa, “The Making and Legitimacy of the Ethiopian Constitution,” 104

the FDRE Constitution. Since, irrespective of flaws in the process of framing a constitution people's will can legitimize it subsequently through referendum.<sup>32</sup>

Therefore, one of the notable differences between the RSA and Ethiopia in the process of adopting their constitution was the level of public participation. The former is widely praised for allowing the general public to extensively take part in the process of adopting the constitution. Although prior negotiations among political parties on the contents of the Constitutions makes them similar the FDRE Constitution lacks the level of public participation involved in the making of the Constitution of the RSA. As it will be discussed later this original mistake in the constitution making process in Ethiopia is also reflected in the regional constitutions as well which replicated the federal constitution.

## 1.2. Constitution Making and Constitutionalism

The concept of constitutionalism could be traced back to ancient Greece but constitutionalism as we understand it in the modern day is a much more recent development. The main events that contributed for the development of constitutionalism as we understand it today are, *inter alia*, the English Bill of Rights of 1689, the American Declaration of Independence of 1776 and the subsequently adopted Constitution of 1789 and its amendments, as well as the French Revolution which refined the concept in the French Declaration of the Rights of Man and citizen.<sup>33</sup> Constitutionalism as such is closely linked with western liberal tradition and is a set of principles and institutional arrangements used to limit government.<sup>34</sup> Now there seems a consensus that although

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<sup>32</sup> Andras Sajó, *Limiting Government: An Introduction to Constitutionalism* (Budapest: Central European University Press, 1999), 18-19

<sup>33</sup> Abdullahi Ahmed An-Na'im, *African Constitutionalism and the Role of Islam*. Philadelphia: University of Pennsylvania Press, 2006), 3-5

<sup>34</sup> See, Sajó, *Limiting Government*

having a supreme constitution is one of the main principles for constitutionalism there are also various other factors that determine whether government power is actually limited.

Constitutionalism in diverse societies needs to take into consideration the existing diverse cultural values of the society. Deng argues although the normative differences between countries and cultures should not be overstated and the generic framework of constitutionalism has a universal application it is important to consider the overriding values, norms and cultural patterns of different countries in order to develop principles of constitutionalism.<sup>35</sup> This reflects the understanding of what exactly is constitutionalism requires the need to consider universalism and cultural relativism debate we usually encounter in the human rights sphere.<sup>36</sup> In line of this argument Deng concludes the fact that the African culture generally is based on the notion of collectivity and individuals usually assume duties and obligations should be interpreted to mean that the understanding of constitutionalism in Africa has to aim in the protection of the individual and the society which could at times elevate the interest of the society over the individual.<sup>37</sup>

There is a claim that the understanding of constitutionalism as developed in the Western understanding is not suited for circumstances where there is intense diversity as could be observed in African States.<sup>38</sup> Both An-Na'im and Deng argue the relatively homogenous societies and shared values and traditions in most of Western States is missing in the case of Africa and the transplantation of European model constitutions in the newly emerging African States reinforced or

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<sup>35</sup> Deng, Identity, Diversity and Constitutionalism in Africa, 12-13

<sup>36</sup> The concept of Universalism and cultural relativism is a common debate in the international human rights regime which revolves around whether we need to take into account the difference of values, norms, etc of the world society in the interpretation and application of human rights.

<sup>37</sup> Deng, Identity, Diversity and Constitutionalism in Africa, 12-13

<sup>38</sup> An-Na'im, African Constitutionalism and The Role of Islam, 2-3

aggravated identity struggles.<sup>39</sup> This had also resulted in the marginalization of indigenous values and cultures. Local cultural values that can further the ideals of a democratic society were not considered as a foundation. Rather than building a constitution with the participation of their own public most African states transplanted the constitutions of their prior colonial powers and exploited it for their own interest. Most African states used the constitutions rather only for symbolic purposes and there were no constitutionalism even by the standards of the transplanted documents.<sup>40</sup>

The process of building a constitution has a vital significance for fostering constitutionalism. Public participation enables integration of indigenous values within the constitution of the State and ultimately contributes in building a democratic state where there is a small government in light of the current understanding of constitutionalism. As Tsegaye rightly observed the problem in Africa is not the lack of constitutions rather is the problem associated with implementation. Taking the case of the FDRE Constitution he argues although the constitutions lack original legitimacy in the making of the constitution *expost facto* legitimacy is possible through being loyal to its implementation.<sup>41</sup>

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<sup>39</sup> Deng, Identity, Diversity and Constitutionalism in Africa, 27

<sup>40</sup> Deng, Identity, Diversity and Constitutionalism in Africa, 29

<sup>41</sup> Tsegaye Regassa, "The Making and Legitimacy of the Ethiopian Constitution,"; and, Tsegaye Regassa, "Between Constitutional Design and Constitutional Practice: The Making and Legitimacy of Constitutions in Ethiopia" (paper presented at Conference on Constitutionalism and Human Security in the Horn of Africa, Addis Ababa, August 7, 2008), 16-49

## 2. Constitution Making in Multicultural Societies: the Case of Ethiopia and the RSA

Under the imperial regime<sup>42</sup> and the authoritarian military regime of Derg,<sup>43</sup> Ethiopia had made a futile attempt to create a nation state.<sup>44</sup> In the wake of the 1974 popular revolution Walegn Makonnen<sup>45</sup> in his famous article wrote ‘ask anybody what Ethiopian culture is; ask anybody what Ethiopian language is; ask what Ethiopian Music is; ask about what Ethiopian religion is; ask what the national dress is; it’s either Amhara or Amhara-Tigre’.<sup>46</sup> The identity of the ruling Amhara elite became synonymous with the state identity.<sup>47</sup> This was done through repressive legislations and policies which marginalized other ethnic groups within the country. The consequence was, however, a long armed conflict which triggered the reorganization of Ethiopia as a federal state along ethnic lines.

The Imperial and the Derg regimes in Ethiopia did not request their legitimacy from the people. Rather they claimed their legitimacy from religion and force. The Imperial regime rulers justified their power as a divine origin to which only the descendants of King Solomon can claim.<sup>48</sup> This was

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<sup>42</sup> The Imperial regime started with the reign of Minilik II (1889-1913) and ended with the coming to power of the military regime commonly known as ‘Derg’ in 1974 through a coup d’état.

<sup>43</sup> After leading a successful coup against the Emperor the military regime commonly known as Derg (literally means ‘committee’), later renamed ‘The Provisional Military Administrative Council’, ruled Ethiopia from 1974 to 1991.

<sup>44</sup> The objective was creating a state defined basically under three main pillars of identity: orthodox Christianity, Amharic speaking society and a nation defined under the trio color flag – Green, Yellow and Red. Some authors deny this fact by claiming that the Ethiopian people have been intermingled, shared a common history and the use of Amharic language, and promotion of the Amhara culture is only exploited by the political parties organized on ethnic lines for their own cause. See, Alemante Gebre Selassie, “Ethnic Federalism: Its Promise and Pitfalls for Africa.” 28 Yale J. Int’l L. 51 (2003): 61-63

<sup>45</sup> Walegn Makonnen was one of the main leaders of the student movement that led to the 1974 Ethiopian Revolution. He is known for his articles published in student magazines that stirred the student movement most notably for “On the Question of Nationalities in Ethiopia” published in 1969 on a Student Journal Called ‘Struggle’.

<sup>46</sup> Wallegn Mekonnen, “On the Question of Nationalities in Ethiopia”, *Struggle*, Arts IV, HSIU (1969). See also, Kinfe Abraham (2001) *Ethiopia from Empire to Federation*. EIIPD Press: Addis Ababa. P.347

<sup>47</sup> Deng, *Identity, Diversity and Constitutionalism in Africa*, 35

<sup>48</sup> This started with the legend of Queen Sheba of the Kingdom of Axum who allegedly paid a visit to King Solomon of Israel and gave birth to Minilik I. Subsequent leaders as such had to justify their descent from this line for their legitimacy. See, Assefa Fisseha, *Federalism and the Accommodation of Diversity in Ethiopia*, 27-31

further entrenched with the coming into power of Haile Sillase I adopted the 1931<sup>49</sup> and 1955<sup>50</sup> Constitutions for a mere consolidation of this claim. The public were considered as subjects and their participation in the making of the constitution was not sought. Therefore, these two constitutions were merely the imperial grants by the emperor.<sup>51</sup> The Derg regime had also proclaimed a Constitution in 1987 in a desperate attempt to ease the growing opposition.<sup>52</sup> In this constitution the regime had tried to introduce a federal state structure in its insincere attempt to meet some of the demands raised by insurgents.<sup>53</sup>

Although the South African Case under Apartheid was different from the Ethiopian case being racially motivated, the majority of the population was prohibited from taking part in the political life of the country making it similar with Ethiopia. South Africa under Apartheid institutionalized racial discrimination and the black majority was highly marginalized. The adoption of the 1996 Constitution, however, has opened a new era of democracy and accommodation of diversity in the country. It would be appropriate, therefore, to discuss whether federalism provides a better option for accommodation of diversity and entrenching constitutionalism.

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<sup>49</sup> The 1931 Constitution was the first modern written constitution adopted by the Imperial Regime of Haile Sillase I after the establishment of Ethiopia as it stands today, a process which started at the end of the 19<sup>th</sup> C and the beginning of the 20<sup>th</sup> C by Minilik II. Although it was modeled on the Meiji Japan Constitution of 1889 its prime purpose was to reinforce the status of the emperor as a divine ruler, to consolidate and centralize authority for the Emperor as well as for the purpose of foreign relations. See, Assefa Fisseha, *Federalism and the Accommodation of Diversity in Ethiopia*, 32-33

<sup>50</sup> The 1955 Constitution, which is also known as the Revised Constitution, is proclaimed following the 25<sup>th</sup> anniversary of Emperor Haile Silassie. See, John Markakis, *Ethiopia: Anatomy of Traditional Polity* (Oxford: Clarendon Press, 1974), 275. It was partly a response to the 'federation' of Eritrea with Ethiopia in 1952. The position of the emperor as an absolute and divine ruler was reinforced and as such no major change from the 1931 constitution with regard to separation of power. See, Assefa Fisseha, *Federalism and the Accommodation of Diversity in Ethiopia*, 34-38

<sup>51</sup> Tsegaye Regassa, "The Making and Legitimacy of the Ethiopian Constitution," 98; and, Markakis, "Federalism and Constitutionalism in the Horn of Africa", 57-58

<sup>52</sup> Constitution of the People's Democratic Republic of Ethiopia, Proclamation No. 1/1987, *Negarit Gazeta* 47<sup>th</sup> Year, Addis Ababa, 12 September 1987. The period between 1974 and 1987 saw no constitution and a set of public law legislations were employed to govern the country. The 1987 Constitution, in the words of Tsegaye Regassa, was more like a 'revolutionary manifesto with socialist overtones' in its fundamental values. However, this constitution was hardly influential since the regime was overthrown within four years of its adoption. See, Tsegaye Regassa, "The Making and Legitimacy of the Ethiopian Constitution," 98

<sup>53</sup> Markakis, "Federalism and Constitutionalism in the Horn of Africa," 58



## 2.1. Federalism as a way out?

Every federal state is unique by itself due to the difference of objectives that necessitated their adoption in States that opted for federal state structure. It is possible, however, to identify certain basic features common to genuine federalism.<sup>54</sup> One of these common features is the existence of at least two autonomous tiers of government at the federal and regional level. By sharing power among different tiers of government federalism gives the constituent states the autonomy to exercise their right to self rule. Among other things it enables them to adopt their own constitution within the framework of the federal constitution giving an opportunity for a better public participation in government and building a constitution with higher level of local characteristics.

For multicultural Countries federal state structure provides an alternative to integrate various interests under the same unit by creating a balance between the two apparently conflicting interests. On the one hand it enables the constituent states to protect their distinct identities through the exercise of internal self determination. On the other hand the territorial integrity of the state will also be maintained. The former is interesting for our discussion here since it in a way gives the constituent states the opportunity to rely on local characteristics to design their own level of government. The constituent state will have the opportunity to use important cultural values of the people concerned as a foundation for designing their own constitutions.

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<sup>54</sup> The fact that a state claims to be a federal state or not might not be sufficient for it to be a federal state. Some states do not claim to be federal states, like India but actually function as one. Others only claim to be one but in practice show a highly centralized government resembling a unitary state. There are also variants of unitary states which are highly devolved and share most of the basic features of federal state structure. See, Yonatan Tesfaye Fessha, *Ethnic Diversity and Federalism* (Burlington: Ashgate Publishing Company, 2010), 26-28

The adoption of the 1995 Ethiopian constitution and the 1996 RSA's constitution is done in a total rupture from their former constitutional experience. They had to undo their previous constitutions and come up with totally different underlying ideologies. Both States opted to recognize diversity and devolved power to different tiers of government.<sup>55</sup> The FDRE Constitution explicitly states the state structure as federal<sup>56</sup> while the RSA did not use the term federalism despite the fact that the State so established reflects many features of a federal state.

In this transformation the need to accommodate diversity, mainly ethnicity, has played a significant role although recognition of ethnicity to structure the government is more explicit in the case of Ethiopia.<sup>57</sup> This recognition of ethnic diversity is manifested in various ways. The Constitutions of both Countries have acknowledged multilingualism as an official language of government<sup>58</sup> and for education purposes.<sup>59</sup> The FDRE Constitution has recognized legal pluralism permitting application of religious and customary laws in family and personal law spheres.<sup>60</sup> The Constitution of the RSA

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<sup>55</sup> The Constitution of the 1996 Constitution of the Republic of South Africa provides that the government is constituted of three distinctive, interdependent and interrelated spheres of government, i.e. national, provincial and local governments. See, Art 40(1) of the 1996 Constitution of the Republic of South Africa. Under the FDRE Constitution however only the federal and state governments are given specific powers under the constitution. Art 50(4) states the possibility of establishment of local governments and only speaks of adequate power to be given to them that would entitle the people to participate directly in the administration of these units. The lack of clearly specified powers as well as financial dependence on the regional governments is cited as an obstacle on the autonomy of local governments. See, Zemelak Ayitenew Ayele and Yonatan Tesfaye Fessha, "The Constitutional Status of Local Government in Federal Systems: The Case of Ethiopia", *Africa Today*, Vol. 58, Issue 4 (2012): 89-109.

<sup>56</sup> Art 1 of the FDRE Constitution

<sup>57</sup> Preamble, Art 8, 47 and 39 of the FDRE Constitution are some of the provisions that show the centrality given to the ethnic groups (Nation, Nationalities and peoples/NNP) of Ethiopia. Art 46 of the FDRE Constitution provides that the regional states of the federation shall be delimited on the basis of the settlement patterns, language, identity and consent of the peoples concerned. Following this Art 47 have established nine regional governments mainly organized on ethnic grounds. Sub-Article 2 of the same provision leaves open the possibility by NNP within these regional states to establish regional states of their own

<sup>58</sup> The FDRE Constitution uses the phrase 'working language' as opposed to 'official language'. See, Art 5 of the FDRE Constitution and Section 6 of the Constitution of the RSA

<sup>59</sup> Whereas both Ethiopia and RSA have recognized multilingualism, in Ethiopia the working language at the Federal level is still monolithic. Amharic has continued to be the sole working language although there are persistent requests to introduce multilingualism especially from the Oromo language (Afaan Oromo) speakers, a language with the dominant native speakers within the country. The RSA on the other hand have recognized eleven languages as the official language of the central government. See, Art 6 of the Constitution of the RSA

<sup>60</sup> Art 34 (5) of the 1995 FDRE Constitution

also recognizes the application of traditional laws without restrictions to family and personal matters except for legislations that might provide otherwise.<sup>61</sup>

The most robust recognition with high potential of introducing local characteristics at regional level is guaranteed under Art 39(1) and (2) of the FDRE Constitution. These provisions recognize, respectively, the right to self determination of the NNPs and their right to ‘speak, write and to develop [their] own language; to express, to develop and to promote [their] culture; and to preserve [their] history’. The 1996 RSA’s Constitution has also similar provisions that made an explicit constitutional recognition of the right to establish a traditional leadership and by providing for the establishment of houses of traditional leaders.<sup>62</sup> This Constitution has guaranteed the right to establish traditional monarch through provincial constitutions.<sup>63</sup> In its decision of certification of the Constitution of the RSA the Constitutional Court<sup>64</sup> had noted that the traditional authority is limited to the cultural realm which led to the continued decline of the role of traditional rulers in governance.<sup>65</sup> Obviously these rights are better exercised and guaranteed through sub-national governments with the power to design their own constitutions and wider opportunity of integrating local characteristics. Both Countries have guaranteed in their constitutions their respective regional and provincial governments power to adopt their own constitutions.<sup>66</sup>

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<sup>61</sup> Art 211 of the 1996 Constitution of the RSA

<sup>62</sup> Art 212 of the 1996 Constitution of the RSA

<sup>63</sup> Art 143 of the 1996 Constitution of the RSA. The role of traditional authorities was later defined by the enactment of the Traditional Leadership and Governance Framework Act 41 of 2003. This Act, however, requires the transformation and harmonization of the customary laws and customs with the State Constitution. See, Christina Murray, *South Africa’s Troubled Royalty: Traditional Leaders after Democracy* (Belconne: The Federation Press, 2004).

<sup>64</sup> Certification of the Constitution of the RSA, 1996, Case CCT 23/96. Para 195

<sup>65</sup> Murray, *South Africa’s Troubled Royalty*, 14

<sup>66</sup> Art 50(4) cum Art 52(2) (c) of the 1995 FDRE Constitution.

Ethiopia had opted for federal state structure, *inter alia*, to enable the Nation Nationalities and Peoples (NNP)<sup>67</sup> of the country to exercise their right to self governance which they had been denied for about a century under the previous highly centralized Imperial regime and the military regime of Derg. Hence, the 1995 Constitution established a federal state structure organized on ethnic lines which resulted in the establishment of nine constituent states mainly demarcated on ethnic lines.<sup>68</sup> Federalism was, *inter alia*, adopted to guarantee the freedom and right to self determination of the NNPs.<sup>69</sup>

The same question was raised as to whether federalism is also an option for Post-Apartheid South Africa.<sup>70</sup> With the end of Apartheid<sup>71</sup> the need to rectify race based inequalities was also coupled with the need to respond to the growing need to accommodate ethnic based differences. Under Apartheid the government, in addition to its primarily race oriented division, had also divided the society along ethnic lines in pursuit of the homeland policy.<sup>72</sup> The question of whether ethnicity

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<sup>67</sup> The FDRE Constitution defines what constitutes the Nation Nationalities and Peoples under Art 39(5) as “a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory”.

<sup>68</sup> Art 47 of the FDRE Constitution have established nine regional governments mainly organized in line of ethnic identities. This is mainly why most scholars refer to the Ethiopian federalism as a ethnic federalism. However, this could be misleading since although most of these regional governments have a clear dominant ethnic group they did not escape their own diversity. Some of them, especially, the State of the Southern Nations, Nationalities and Peoples (SNNP) is far from being characterized this way since it is home for more than 45 ethnically diverse population.

<sup>69</sup> The FDRE Constitution incorporates various provisions which illustrate the central role given for the NNPs of the country. The preamble starts with ‘we the NNPs’ implying the Constitution is a pact among them. According to Art 8 of the Constitution all sovereign power resides in the NNP and the Constitution is the expression of their sovereignty. The right to self determination up to secession belongs to the NNPs (Art 39). Although the nine regional governments established under Art 47 did not escape their own diversity as noted above NNPs are used to organize the regional governments. The Upper House of the Parliament, i.e. the House of Federations, is constituted by representatives of the NNPs and they hold the power to interpret the Constitution (Art 61 cum 62).

<sup>70</sup> The demand from political parties based in Zulu and Africaner ethnic groups was strong for highly devolved federal state structure. See, Yonathan, pp. 74-77

<sup>71</sup> The success of the Truth and Reconciliation process has also eased the peaceful transition of the country into a Democracy and the shift of emphasis on diversities other than race. RSA opted to settle the serious human rights oppressions committed under the Apartheid regime through a negotiated process led by the Truth and Reconciliation Commission making the change possible. See, Alex Boraine, Truth and Reconciliation in South Africa: The Third Way, in Andras Sajó, ed., Out of and Into Authoritarian Law (The Hague: Kluwer Law International, 2003), 31-52

<sup>72</sup> The homeland policy came into effect with the enactment of the Promotion of Bantu Self Government Act 42 of 1959. Ten such homelands were established based on ethnic lines. Although the government claimed the policy aimed at

should be taken to restructure the Country was, however, a highly controversial matter. While political parties mainly from Zulu and Afrikaners demanded this line of federal structure, it was not acceptable for the African National Congress which had the backing of the majority of the South African people since for them it raised skepticism that the quest for federalism was a neo-apartheid scheme to maintain the white minority privilege.<sup>73</sup>

The new Constitution, therefore, had to make a compromise between the divergent interests. Although the use of the word 'federalism' is avoided in the constitution the resulting government structure created three spheres of government<sup>74</sup> as well as accommodated ethnic and cultural diversity.<sup>75</sup> However, some argue this is not done in a meaningful way mainly due to the requirement of strict adherence with the national constitution and the decision of the Constitutional Court which described this as 'recognizing a degree of cultural pluralism with legal and cultural, but not necessarily governmental consequences' since, according to the Court, it will be at odds with purely republican government.<sup>76</sup>

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securing the right to self determination of the population various arguments have been forwarded to rebut this. The non equitable division of resources which retained most of the resource of the country to the minority ruling white groups without the consideration of the consent and settlement patterns of the black majority as well as the fact that the policy was only applied to the black community were raised as the main arguments to rebut the claim of the government. See, Yonatan, *Ethnic Diversity and Federalism*, 65-66; and, Desmond Tutu, *The Rainbow People of God: The Making of a Peaceful Revolution* (New York: Doubleday, 1994), 8

<sup>73</sup> See, Christina Murray and Richard Simeon, "Promises Unmet – Multi-level Government in South Africa," *Canadian Journal of African Studies* Vol. 43, No. 3 (2009): 232-260

<sup>74</sup> Art 40 of the 1996 Constitution of the RSA

<sup>75</sup> Art 211 and 212 of the 1996 Constitution of the RSA

<sup>76</sup> See, *Certification of the Constitution of the RSA, 1996*, Case CCT 23/96. Para. 195. Murray argues this is a deliberate choice made to uproot apartheid's ethnic politics. She notes the fact that traditional leadership was also used as a tool of indirect rule of the colonizers creating skepticism against its role in the government. See, Murray, *South Africa's Troubled Royalty*, 9-11

## 2.2. Sub National Constitutions: the case of Oromia and some Remarks on Republic of South Africa's (RSA) 'Provincial Constitutions'<sup>77</sup>

As discussed in the previous subsection one of the advantages of federalism is that it enables two and more tiers of governments to exist within a single Sovereign Country. This in turn gives autonomy for sub national governments to adopt their own constitutions designed to address the special needs of the sub national unit concerned. It has been also pointed out that both the transitional periods of Ethiopia and the RSA had laid conducive background for the adoption of constitutions at sub-national level. In Ethiopia relying on provisions of the federal constitution all of the nine State governments, including the State of Oromia, have adopted their own constitution.<sup>78</sup> In RSA, however, only two provinces, i.e. Western Cape and KwaZulu-Natal had adopted their constitution at the province level and presented it to the Constitutional Court for certification which certified the former with amendments and denied the later.<sup>79</sup>

The FDRE Constitution guarantees the power of the State Council's<sup>80</sup> autonomy to 'draft, adopt and amend' their constitutions pursuant to the reserved powers they enjoy under the constitution.<sup>81</sup> The federal constitution does not provide for supremacy of the federal laws over the state constitution except requesting them to respect the powers of each other.<sup>82</sup> The provincial governments' power under the South African Constitution to adopt their own constitution is, however, dependent on

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<sup>77</sup> Out of the nine provincial governments of the RSA only two of them, i.e. Western Cape and KwaZulu-Natal drafted their own provincial constitutions. However, only the constitution of Western Cape was certified by the Constitutional Court of the RSA after amendment. This sub-section is not meant for a thorough comparison with the constitution of these provinces rather it is intended to reflect on how they designed a constitution by taking the interest of the province concerned in to the center of their constitutional design unlike the Oromia state constitution.

<sup>78</sup> Art 50(4) cum Art 52(2)(c) of the 1995 FDRE Constitution

<sup>79</sup> See, Certification of the Amended Text of the Constitution of Western Cape, 1997, Case CCT 29/97; and, Certification of the Constitution of the Province of Kwazulu-Natal, 1996, Case CCT 15/96

<sup>80</sup> The State Council is a legislative body and is the highest organ of state authority. (Art 50 (3) (5) of the FDRE Constitution) The State Constitution of Oromia established this organ under the name of '*Caffee*'. See, Art 46(1) of the Revised Constitution of Oromia National Regional State (State Constitution of Oromia), *Magalata Oromiya*, Proc. No. 46/2001

<sup>81</sup> Art 52 of the 1995 FDRE Constitution. Powers which are not explicitly given for the Federal government or concurrently held by the federal and state governments belongs to the regional governments.

<sup>82</sup> Art 50(8) of the 1995 FDRE Constitution.

conditions of certification by the Constitutional Court as to its compliance with the conditions under Articles 142 and 143 of the national constitution making clear the supremacy of the national constitution over the province.<sup>83</sup>

The Oromo people constitute the largest ethnic group within Ethiopia.<sup>84</sup> Before the establishment of Ethiopia as it stands today<sup>85</sup> the overriding system of governance of the Oromo people was an egalitarian system called *Gada*<sup>86</sup> with the *Qallu* institution serving as an umpiring body and the *Gummii* (*Caffee*) as the Supreme body through which the people exercises its sovereign power.<sup>87</sup> *Gada* system organized male members of the society into two distinct but cross cutting systems of peer group structures on the basis of chronological age (*Gada Grade*)<sup>88</sup> and genealogical generations (*Gada Class*)<sup>89</sup> which pass from one stage of development to the other every eight years for a full *Gada*

<sup>83</sup> Art 144 of the 1996 Constitution of the RSA

<sup>84</sup> According to the 2007 Ethiopian national Population and Housing Census out of the total population of 73, 750, 932 the Ethnic Oromo constitute 25, 363, 756 which makes it the most populous ethnic group in the country. See, the 2007 Population Census Commission Report, P.91

<sup>85</sup> Ethiopia as it stands today is the result of the conquest of Minilik II which ranged mainly from the last decades of the 19<sup>th</sup> C to the first decade of the 20<sup>th</sup> C over most of the South, South East and South West of Ethiopia. His success is mostly the result of coincidence of his reigning period with the scramble of the European power for the colonization of Africa which secured him modern weapons giving him the upper hand over the conquered people of today's Southern Ethiopian peoples. Because of this historical factor and subsequent exploitation and marginalization of the Oromo under the Ethiopian Empire which continued to this day, the relation between Ethiopia and Oromia (the Country of the Oromo people) is considered as a colonial relationship among the Oromo elites and by the Oromo Liberation Front which has been fighting to liberate and establish an independent State of Oromia since 1973. See, Mohammed Hassen, "Some Aspects of Oromo History that have been Misunderstood," Journal of Oromo Studies, Vol. 1, No. 1 & 2 (1994): 82-87, accessed on February 14, 2013, <http://oromostudies.org>

<sup>86</sup> It should be noted, however, that *Gada* system is not only concerned with the political leadership of the Oromo people. Rather it is comprehensive in its reach in regulating the economic, ritual and other relationships of the society. See, Alemayehu Haile, *Gada System: The Politics of Tulama Oromo* (Finfinnee: Oromiya Culture and Tourism Bureau, 2009), 48-50. Although a lot of scholars have conducted researches on *Gada* system Asmarom Legesse's works are the most comprehensive and authoritative on the subject. Hence, in this paper his two works are used as the main sources regarding *Gada*.

<sup>87</sup> For the discussion of the role of *Qallu* and *Gummii* (*Caffee*) within the *Gada* system see sub-sections 3.5 and 3.6 below.

<sup>88</sup> *Gada Grade* refers to a phenomenon in which the new born male infant is passed through a series of chronological age groups which passes from one Grade to the other every eight years. The names of the Grades differ throughout Oromo segments but in Borana Oromo they are called: *Daballe*, *Junior Gamme*, *Senior Gamme*, *Cusa* (junior warriors), *Raba* (Senior Warriors), *Gada* (the stage of political and ritual leadership), *Yuba* (Grades VII to X: stages of partial retirement), *Gada Moji* (Grade XI: the terminal sacred stage) See, Asmarom, *Gada*, 52-107

<sup>89</sup> *Gada Class* is a group of peers recruited on the basis of genealogical generations who share the same status and perform their rite of passage together every eight year. See, Asmarom, *Gada*, 50-51

*Cycle*<sup>90</sup> of forty years.<sup>91</sup> It is nearly impossible to understand the Oromo identity without understanding Gada system. *Gada* is understood to be the cradle of Oromo identity and at the center of the quest for the right to self determination of the Oromo that is still ongoing in Ethiopia.<sup>92</sup>

Asmarom Legesse describes *Gada* system as containing a genuinely African solution for some of the problems that modern democracies have had to face.<sup>93</sup> Although the system was subjected to systematic destruction in pursuit of assimilation policy under successive Ethiopian governments the Oromo people have preserved the core values even in areas where it is currently not active. Despite the growing challenges against the system under the current government as well, segments of the Oromo such as the *Borana*,<sup>94</sup> *Gujji* and the *Arsi* Oromo<sup>95</sup> have kept the system relatively intact.

The Oromo were one of the main ethnic groups that fought to bring to an end the century old ethnic and cultural marginalization under the Imperial and the Derg regimes mainly under the leadership of the Oromo Liberation Front. With the adoption of the federal structure under the

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<sup>90</sup> *Gada Cycle* refers to a period of forty years during which Gada System makes a full cycle. According to Asmarom the basic rule of the Gada System and the basic distinction between *Gada Class* and *Gada Grade* is the fact that newly born infant boy always enters the system of grades exactly forty years behind the father regardless of the age of the father. This process presumes the difference between the father and the son is exactly 40 years, i.e. five *Gada Grades* at all times. See, Asmarom, *Gada*, 50-52. This age difference is expected mainly because although a man could be married at the age of 32 (Grade IV: *Cusa*) children are not expected before the ritual of fatherhood (*Dannisa*) which is conducted in the *Fifth Gada Grade* (*Raba*). See, Asmarom, *Gada*, 65-74 for the discussion of fatherhood ceremony and 121-134 for the discussion of *Gada Cycle*.

<sup>91</sup> Asmarom, *Gada*, 50-51

<sup>92</sup> Asafa Jalata, *The Struggle for Knowledge: The Case of Emergent Oromo Studies*. University of Tennessee: Knoxville: University of Tennessee, 1996), 113-114. Although the Ethiopian government has proscribed the Oromo Liberation Front as a 'terrorist' organization, the insurgence is the continuation of the struggle that toppled the authoritarian regime of Derg in 1991. As noted elsewhere the OLF was among the strong armed forces that led the overthrow although forced to leave the Transitional Government of Ethiopia of 1991 mainly due to disagreements with the incumbent political party in Ethiopia (EPRDF).

<sup>93</sup> Asmarom Legesse, *Oromo Democracy*, 195-238

<sup>94</sup> The whole Oromo people is divided into halves, i.e. *Borana* and *Barentuma*, which Asmarom refers to as 'moieties' from which all the Oromo kinships are derived. *Borana* is as such the name of an ancient moiety that is considered as a senior (*hangaffa*) to localized moieties throughout the Oromo people. See, Asmarom, *Gada*, 10-11 and Asmarom, *Oromo Democracy*, 134-135

<sup>95</sup> The the *Arsi* are the cradle land of the *Barentuma* moiety of the Oromo people as the *Borana* are the cradle land of the other half of the moiety, '*Borana*'. However, both the institutions of *Gada* and *Qallu* were thoroughly destroyed by the conquest of Minilik II and the subsequent Islamization of the Arsi Oromo compromised the system. Yet the *Arsi* Oromo have relatively conserved the system. See, Asmarom, *Oromo Democracy*, 173-174



1995 FDRE Constitution, therefore, the rational expectation would be that the State Council of the State of Oromia would adopt a Constitution founded on the democratic principles of *Gada*. The State legislature has adopted three constitutions, i.e. in 1993, 1995 and 2001, none of which sought *Gada* as a foundation.<sup>96</sup> Instead the State government adopted a constitution that merely replicated the FDRE Constitution.

The process of adoption of the State Constitutions of Oromia did not follow any special constitution making process. It was simply drafted by the legal standing committee of the State legislature which later adopted it like any other ordinary legislation.<sup>97</sup> By making the State Constitution making participatory, including through referendum, it would have been possible to come up with a constitution that responded to local needs that necessitated a federal state structure for Ethiopia. Instead the State Constitution introduced new limitations to the rights guaranteed under the FDRE Constitution. For instance, the constitution introduced a new condition to the ‘right to unconditional self determination through secession’ guaranteed under Art 39 (1) cum (4) of the FDRE Constitution by stipulating that it will be exercised only when it is impossible for the Oromo people to rectify the factors that necessitated secession within the federal setup.<sup>98</sup>

The State Constitution’s purpose should not be limited to the regulation of the behavior of the State by establishing organs of the state and defining their powers as well as its obligations towards its

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<sup>96</sup> The State of Oromia adopted its first Constitution during the Transitional Period in 1993. This was later revised in 1995 strangely without any reference to such revision by the later. The 1995 Constitution was further revised in 2001 together with the constitutions of the other regional governments. This revision was prompted by the Federal Government which of course was criticized for not following the revision procedure provided by the constitution itself. One of the reasons given for the revision was the absence of clear distinction between the role of the state legislature and the executive. See, Tsegaye Regassa, “State Constitutions in Federal Ethiopia: A Preliminary Observation” (paper presented at the Bellagio Conference on Subnational Constitutions and Federalism: Design and Reform, Bellagio, Italy, March 22-27, 2004), 9. Two more amendments were done in 2003 to change the capital of the State of Oromia from Finfinne (Addis Ababa) to Adama and in 2005 to return the capital to Finfinne. Tsegaye, “Subnational Constitutions in Ethiopia,” 65

<sup>97</sup> Tsegaye, “State Constitutions in Federal Ethiopia,” 7

<sup>98</sup> Art 39(4) of the State Constitution of Oromia. See, Tsegaye, “Sub-national Constitutions in Ethiopia,” 54-55

people.<sup>99</sup> Besides stating that the Constitution of the State government is meant to guarantee the right to self determination of the Oromo people in its preamble, the Constitution of the State of Oromia doesn't mention what specific ethnic and cultural interests peculiar to Oromo that it pursues to fulfill. There is no mention of the *Gada* system or other cultural traits of the people as its foundation. It merely acknowledged that the regional government has the power to adopt its own constitution pursuant to the federal constitution.<sup>100</sup>

Perhaps some of the provisions of the State Constitution could be regarded as entrenching the rights already guaranteed under the FDRE Constitution without any added novelty. The first is the provision dealing with the working language of the region to be Oromo language (*Afaan Oromo*) in accordance with the power to choose regional language guaranteed under Art 5(2) of the FDRE Constitution.<sup>101</sup> The other provision is the one dealing with the recognition of cultural and religious Courts with the competence to deal with family and personal matters with the consent of the parties to the dispute.<sup>102</sup> These are hardly enough to enable the Oromo exercise their right to self determination within the ambit of the new federal state structure and make a real break from the authoritarian past of Ethiopia.

Hence, like the rest of the constitutions adopted by the nine regional states established under Art 47 of the FDRE Constitution, the Oromia State Constitution also replicated the federal constitution

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<sup>99</sup> The State Constitution of Oromia defines the level governments within the region under Art 45. Whereas Art 46 provides the state government has legislative (Art 47-52), executive (Art 53-60) and judicial (Art 61-66) organs. The constitution also reiterates the human rights of individuals and groups guaranteed under Chapter Three of the FDRE Constitution under similar Chapter Three of the State Constitution (Art 14-44). Tsegaye discusses State Constitutions of Ethiopia also serve the purpose of expressing their sovereignty and principles of self-rule as one aspect of federalism. See, Tsegaye, "Sub-national Constitutions in Ethiopia," 36-39

<sup>100</sup> Recital 5 of the Preamble of the 2001 Revised Constitution of the State of Oromia

<sup>101</sup> Art 5 of the 2001 Revised State Constitution of Oromia

<sup>102</sup> Art 62 cum Art 34(5) of the State Constitution of Oromia. This is also guaranteed under Art 34(5) cum Art 78(5) of the 1995 FDRE Constitution.

with minimal attempt of designing a new constitution founded on the culture of the peoples of the region<sup>103</sup> as sought by the federal state structure itself. Besides failing to employ the State Constitution as a means to entrench the right to self determination of the Oromo people as guaranteed under Art 39 (1) and (2) of the FDRE Constitution, this disregards the potential that the already established democratic culture embedded within *Gada* could contribute for entrenching constitutionalism within the region.<sup>104</sup>

The sub-national constitution making experience in the RSA is different from Ethiopia mainly with regard to the sub-national governments attempt to come up with a constitution that aimed to protect the right to self rule of the people concerned by making an explicit constitutional recognition of traditional leadership where necessary. Although the Constitution of the Province of KwaZulu-Natal failed to pass the requirement of certification by the Constitutional Court of South Africa, the province's Draft Constitution shades a light on the role that should be played by the later in protecting interests peculiar to the region and entrenching rights guaranteed under the national constitution.

The question of accommodation of ethnic and cultural diversity was a controversial issue in the RSA during the transition period from Apartheid to the new Democracy. According to Murray while the African National Congress which was a political party with the majority support remained skeptical towards federalism other groups demanded South Africa to be structured this way. Especially the

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<sup>103</sup> Like every state governments established by Art 47 of the FDRE Constitution the State of Oromia did not escape its diversity. The question of minority right protection that could be raised by ethnic groups other than the Oromo could be met by establishing local governments within the region as stated under Art 50(4) of the FDRE Constitution and Art 45 of the State Constitution of Oromia.

<sup>104</sup> The Revised Constitution of the State of Oromia has also brought another challenge with itself: Stringent Amendment Procedures. See, Art 111 cum 112 of the State Constitution of Oromia. Although making the amendment procedures of the Constitution have a positive impact of strengthening rights guaranteed by the constitution, it also creates a challenge on further amendments to make the constitution more responsive to the needs of the people and entrench constitutionalism at the local level.

demand exerted from the Zulu based political party, Inkatha Freedom Party (IFP), for the adoption of federalism to guarantee the right to traditional leadership within the republic was strong.<sup>105</sup> Their demand was largely reflected in the Interim Constitution of South Africa and its Amendments.<sup>106</sup>

Besides permitting the designing and adoption of provincial level constitution the Interim Constitution of RSA and its amendments also had a crucial accommodative feature that envisaged the establishment of a traditional leadership in the provinces.<sup>107</sup> Section 1 of Act 3 of the 1994 Constitution of the RSA even made the establishment of institutions for traditional monarchs in the province of KwaZulu-Natal mandatory.<sup>108</sup> The Interim Constitution had also allowed the traditional authority to continue and entitled them to *ex officio* be members of the local government.<sup>109</sup>

However, with the adoption of the 1996 Constitution and the decision of the Constitutional Court on what recognition of traditional leadership constitutes the role of traditional leadership in the governments of the RSA have considerably diminished.<sup>110</sup> The Constitutional Court in its decision asserted that:

“In the framework of the CPs [constitutional principles] as a whole, CP XIII acknowledges the existence, as part of the South African community, of three elements of traditional African society with noteworthy and continuing cultural relevance. These are institutions of traditional leadership, customary law and, at the provincial level, traditional monarchy. In a purely republican democracy, in which no differentiation of status on grounds of birth is recognized, no constitutional space exists for the official recognition of any traditional leaders, let alone a monarch. Similarly, absent an express authorization for the recognition of indigenous law, the principle of equality before the law in CP VI could be read as

<sup>105</sup> There were of course traditional leaders of Zulu whose position was closer to ANC and there was considerable tension between them. See, Murray, South Africa's Troubled Royalty, 9-10

<sup>106</sup> See, Constitution of the Republic of South Africa Act 200 of 1993; Constitution of the Republic of South Africa Act 2 of 1994; and, Constitution of the Republic of South Africa Act 3 of 1994.

<sup>107</sup> Yonatan, Ethnic Diversity and Federalism, 81

<sup>108</sup> Constitution of the Republic of South Africa Act 3 of 1994

<sup>109</sup> Art 181 and 182 of the Interim Constitution of the Republic of South Africa Act 200 of 1993

<sup>110</sup> See, Yonatan, Ethnic Diversity and Federalism, 106-109. Murray argues this diminished guarantees were partly caused by the refusal of the IFP to participate in the Constitutional Assembly. See, Murray, South Africa's Troubled Royalty, 9-10

presupposing a single and undifferentiated legal regime for all South Africans, with no scope for the application of customary law - hence the need for expressly articulated CPs recognizing a degree of cultural pluralism with legal and cultural, but not necessarily governmental, consequences.”<sup>111</sup> (emphasis added)

Therefore, this decision stripped away the entitlement of the traditional leadership to take part in the local government that was permitted under the Interim Constitution.

The province of KwaZulu-Natal had drafted and adopted its own constitution which sought to establish this traditional monarchy within the RSA.<sup>112</sup> However, the Constitutional Court in its decision on the certification of the constitution of the province of KwaZulu-Natal denied certification mainly on grounds of usurping the functions and powers of the national government as well as a misapprehension of co-supremacy with the national legislature and the Constitutional Assembly.<sup>113</sup> Yet it is worth to note that the province had attempted to maintain the traditional leadership system of the Zulu people by specifically providing a robust constitutional recognition within the sub national constitution unlike the case of Oromia in Ethiopia which failed to at least give a symbolic constitutional recognition for *Gada* system.

As noted earlier the provincial constitution of West-Cape is the only constitution which is successfully certified by the Constitutional Court of RSA.<sup>114</sup> Among the nine provinces of RSA six of them, namely the Eastern Cape, KwaZulu-Natal, the Free State, Mpumalanga, Limpopo and

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<sup>111</sup> Certification of the Constitution of the Republic of South Africa, 1996, Case CCT 23/96, Para. 195

<sup>112</sup> Art 1 of the Draft Constitution of the Province of KwaZulu-Natal. The legislature of the province of KwaZulu-Natal had unanimously adopted this Constitution on 15 march 1996 based on Art 160(1) of the Constitution of the Republic of South Africa, Act 200 of 1993.

<sup>113</sup> See, Certification of the Constitution of the Province of Kwazulu-Natal, 1996, Case CCT 15/96, Para. 14 and 15

<sup>114</sup> The Court had denied certification of the provincial constitution as originally brought before it mainly pointing out, *inter alia*, the inconsistency of electoral system introduced with the one provided under the national constitution and the unconstitutionality of stripping the ceremonial away the power of the president of Constitutional Court to administer oaths of office. See, Certification of the Constitution of the Western Cape, 1997, Case CCT 6/97. The Constitution was only certified after its amendment in light of the former decision of the court. Certification of the Amended Text of the Constitution of the Western Cape, 1997, Case CCT 29/97

North West provinces, have traditional leadership systems.<sup>115</sup> The importance attached to giving constitutional guarantee for traditional leadership, therefore, seems not the primary purpose of the constitution of the province of the West-Cape. However, the provincial constitution includes certain vital provisions that give constitutional recognition for cultures of the people of the region. The first is the provision which accords equal constitutional recognition and accords equal official status to the languages of *Afrikaans*, English and *isiXhosa*.<sup>116</sup> Secondly, the provincial constitution under its Art 70 requires for the adoption of legislation for the establishment of cultural council and provides reasonable funding for communities of the province sharing a common cultural and language heritage.

Despite the decrease of the role of traditional leadership system and authority within the formal government structure of the RSA following the decision of the Constitutional Court noted above, Murray argues various factors seem to revive the importance given to traditional leadership which will help to strengthen their role in government.<sup>117</sup> According to her a new way of accommodating the traditional leadership in the new democracy have proved to be crucial both for the purpose of maintaining their continuation and cooperation with the formal government organs for implementation of various policies at the grass root level.<sup>118</sup> This will also have a positive impact of reviving the role of traditional laws and leadership and entrench the protection of constitutionally guaranteed rights at the local level.

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<sup>115</sup> "Traditional Leadership," accessed on March 15, 2013, <http://info.gov.za/aboutgovt/tradlead.htm>

<sup>116</sup> Art 5 of the 1997 Constitution of the Province of Western Cape. Schedule 3 of the same constitution imposes an additional duty on the provincial government to take reasonable legislative and other measures to achieve the progressive realization of the equal status of the languages specified within its available resources.

<sup>117</sup> Murray, *South Africa's Troubled Royalty*, 19-20

<sup>118</sup> Murray raises three factors, namely: maintaining peace through traditional leaders in KwaZulu-Natal; to secure the support of traditional leaders since they could command who to vote; and, the need to meet expectations of rural communities and to extend proper services as factors that has led the government to increasingly depend on traditional leaders. See, Murray, *South Africa's Troubled Royalty*, 19-20

To conclude, one can obviously note the fact that despite the restriction of the power of provinces of the RSA in designing and adopting their own constitution by the national constitution, which made the adoption of provincial constitution subject to certification by the Constitutional Court, the attempt to come up with a sub national constitution which guarantees the interests of the people of sub national unit concerned is apparent. The case of Ethiopia is different since the federal state structure guarantees the power of the State governments to design and adopt their own constitutions with considerable autonomy from the federal government. The failure of recognition of *Gada* system within the State Constitution of Oromia is, therefore, a clear indication that sub national constitution in Ethiopia was not effectively used to extend constitutional guarantee for the traditional leadership systems of the people of the region.

### 3. Why *Gada* system for State Constitution of Oromia?

In the previous section it has been pointed out that the State Constitution of Oromia makes no reference to *Gada* not alone taking it as its foundation. It is also pointed out that this is not because of lack of such power by the State Council's of the State government. The FDRE Constitution has clearly guaranteed the power of States to adopt their own constitution. The State of Oromia had, therefore, the competence to design a constitution that took the culture of the Oromo as embedded within *Gada* system as its core foundation. By building on the already existing democratic culture of the people inherent in their system of administration, i.e. the *Gada* system, it would have been possible to maximize protection of rights and entrench constitutionalism at the local level.

Despite the inevitable differences among the traditional political systems of African societies it seems there is a consensus that they shared common characteristics of, *inter alia*, being participatory form of democracy even where the system seems hierarchical.<sup>119</sup> The systems enabled broad public participation mainly through group representations and recognized a wide range of collective rights and individual duties to the group in addition to entitlement to rights by the later. This seems, for instance, the main purpose behind the unique recognition of individual duties in the African Charter of Human and Peoples' Rights.<sup>120</sup> *Gada* system could probably be taken as one of the prime examples of the understanding of the notion of rights and duties in Africa. In addition to these shared features of traditional African leadership systems, its democratic nature and the sophistication of *Gada* system in maintaining balance among different political power positions as well as its inbuilt

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<sup>119</sup> Francis Mading Deng, "Human Rights, Universalism and Democracy," in Human Rights: Southern Voices, ed. William Twining (Cambridge: Cambridge University Press, 2009), 30.

<sup>120</sup> Chapter II (Art 27-29) of the African Charter of Human and peoples' Rights provides for duties of individuals towards their family, society and the international society which is absent in other international human rights instruments which basically provide for entitlements rather than duties. For a detailed discussion on this feature of the African Charter see, Makau Wa Mutua, "Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties," Virginia Journal of International Law, Vol. 35: 339 See also, Makau Mutua, The African Human Rights System: A Critical Evaluation (New York: United Nations Development Programme, 2000)



mechanisms of checking these powers by independent institutions makes it mostly compatible with modern democracies and could provide a solid ground to build on.

Herbert Lewis had the following to say on a ‘Symposium on the making of the new Ethiopian Constitution’ held in 1993 while describing the importance of the Oromo political culture and values, more specifically *Gada* system, for the constitution making process in general and the Oromo in particular:

[t]oday the idea of *Gada* holds a central position among Oromo. On the one hand *Gada* represents the epitome of Oromo-ness a distinctive set of institutions seen as uniquely Oromo. On the other, it stands as a statement of ideology and values – egalitarian and democratic – in explicit contrast to the powerful hierarchical and autocratic style of the Amhara, with their emperor, nobles, lords and peasants.<sup>121</sup>

This observation explicitly describes not only the significance of the system to make a clear shift from the authoritarian past of the country but also why it is specifically significant for the Oromo under the newly formulated federal state structure in Ethiopia.

The next legitimate question would be what constitutional values do *Gada* system together with apparently independent institutions of *Qallu* and *Gummii (Caffee)* have to provide.<sup>122</sup> Although there are various crucial points of interaction the *Qallu* institution and the *Gummii (Caffee)* are placed in a distinct position within the whole structure of the Oromo polity (the structure of Oromo polity as illustrated by Asmarom is reproduced under Fig. 3.1. below).<sup>123</sup>

<sup>121</sup> Herbert S. Lewis, “Aspects of Oromo Political Culture,” *The Journal of Oromo Studies*, Vol. 1 No. 2 (1994): 53

<sup>122</sup> Asmarom, *Oromo Democracy*, 108

<sup>123</sup> Asmarom, *Oromo Democracy*, 108

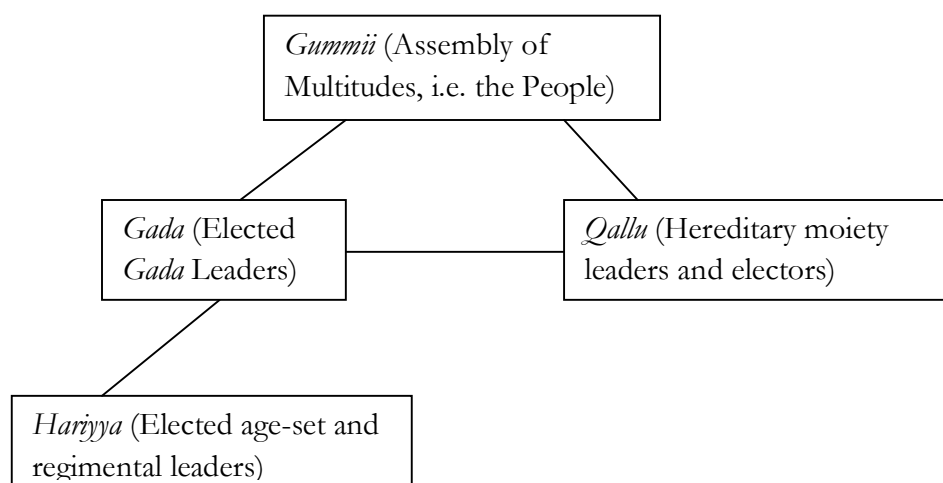


Fig. 3.1. The Structure of Oromo Polity (emphasis added)

The following sub-sections, therefore, will make a brief discussion of some of the constitutionally relevant features *Gada* system.<sup>124</sup>

### 3.1. The concept of *Qixee*<sup>125</sup> and Balance

The traditional Oromo society settles matters of public importance through deliberation on which the public takes part directly and indirectly. Decisions are made after deliberation and every participant is not only encouraged but is also expected to contribute.<sup>126</sup> One of the basic foundations of *Gada* system, therefore, is the notion that everyone who takes part in the *Gada* Councils or any such assemblies addressing matters of public nature is equal (*qixee*) and from this flows equal rights and responsibilities. This notion is crucial because most of the democratic features of the system hinges upon it.

<sup>124</sup> *Gada* system has undergone a tremendous change in its structure, effectiveness, uniformity among various Oromo groups where the system is still active. In this paper it is presumed that there are overriding defining features of the system which includes the concepts selected here as having relevance for constitutionalism.

<sup>125</sup> 'Qixee' literally means 'equal'

<sup>126</sup> Herbert S. Lewis, Aspects of Oromo Political Culture, Journal of Oromo Studies, Vol. 1 No. 2. (1994): 54, accessed on February 14, 2013, <http://oromostudies.org>.

As an extension of this notion of equality political seats of *Gada* are also arranged in a way that guarantees power is fairly distributed among representatives of different moieties.<sup>127</sup> The political power is devolved across various councils and it is required that the representatives of different moieties strike a balance.<sup>128</sup> This mechanism has also enabled to check the power of every represented group. The leader of the System, the *Abba Gada*, may come from one or the other moiety but once elected he serves as the head of the entire society.<sup>129</sup>

### 3.2. Democratic Election Process

The *Gada* system has a sophisticated election process in which the society gets to elect its representative for a seat at different levels of assemblies of the System including for the post of the *Abba Gada*. Posts in various councils of the system are held by candidates who proved to be fit for the position.<sup>130</sup> The elections are administered by *Ya'a Qallu* (*Qallu* Council) which has the authority to convene electoral meetings and evaluate candidates presented to them.<sup>131</sup> From his account of the 1963 election of the Borana Oromo Asmarom noted the *Qallu* Council which is responsible for administering the election consisted of six men from the *Qallu* lineage (the *Oditu* clan) elected by a general meeting of the clan every eight years.<sup>132</sup> This is especially interesting aspect of the election process since the mandate to supervise election is given for an independent institution constituted

<sup>127</sup> Asmarom, Oromo Democracy, 136

<sup>128</sup> According to Asmarom the moiety system, which he refers to as the 'the Oromo Dual Organization' due to the fact that the Oromo as a whole is divided into two major moieties, i.e. the *Borana* and the *Barentuma* which are further divided into various sub-moieties, is a separate form of social formation among the Oromo. Yet it is a crucial means for creating inter-moiety balance in the distribution of power within the Gada system. Asmarom, Oromo Democracy, 133-193

<sup>129</sup> Asmarom, Oromo Democracy, p.136

<sup>130</sup> There are of course groups who are not entitled to hold political office due to their belongingness to the *Qallu* lineage. *Qallu* has a different role within the Oromo society, i.e. spiritual leadership which is hereditary. Despite this exclusion from political office, they do have a crucial role of organizing election, evaluating candidates and supervising the peaceful transition of political power. The last role gives them a supervisory power over the acts of the political office holders. See, Asmarom, Oromo Democracy, 136-137

<sup>131</sup> Asmarom, Oromo Democracy, 136-137

<sup>132</sup> Asmarom, *Gada*, 206-207

by men who could not compete for political office of *Gada* system<sup>133</sup> which ensures there will not be a conflict of interest.

Candidates have to show they deserve offices of the system by taking part in a usually highly competitive campaign. The most important factors that are considered in selection process include personal qualities such as knowledge of traditions and the ability to convey one's thoughts with eloquence, achievements, mystical attributes and their public service.<sup>134</sup> The decisions on which candidate wins the contest is made by consensus of members of the councils of electors (the *Qallu* Council).<sup>135</sup> At times the competition among the candidates could be very intense and may result in conflicts. In such instances the council of electors also has the duty to give precedence to reaffirming the core values of *Gada* system.<sup>136</sup> Besides the qualities of the competing candidate the *Qallu* Councils would also evaluate the contributions of his whole lineage particularly his lineal ancestors since power is considered to be more of collective than individual.<sup>137</sup>

### 3.3. Limited Terms of Office

The common critics against *Gada* system and most other traditional African leadership systems is the fact that they are patriarchal and women are actively excluded from participating in the political life of the society.<sup>138</sup> Deng also notes lifetime stay on power and its hereditary nature as a challenge that

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<sup>133</sup> The *Qallu* are prohibited from assuming political office of the *Gada* system. They cannot also involve in an armed conflict. See, the discussion under sub-section 3.6 below

<sup>134</sup> Asmarom, *Gada*, 208, 220

<sup>135</sup> Asmarom notes the requirement of unanimity often poses a problem of impasse where they are forced to reach a decision due to deadlines mainly motivated by economic constraints of the *Qallu* which has the burden to host the delegates. Asmarom, *Oromo Democracy*, 138-139

<sup>136</sup> A good instance of this situation happened during the 1963 election in the *Gada* system of the Borana Oromo. The qualities of the candidates were questioned, there were allegations of bribery of the *Qallu* Council, etc. which almost resulted in inter clan conflict. The *Qallu* Council had to resort to evaluate the election process in a way that protected the peace and interests of the society as a whole. Asmarom, *Gada*, 202-232

<sup>137</sup> Asmarom, *Gada*, 220

<sup>138</sup> This critics, however, overlooks various inbuilt mechanisms of *Gada* system which are specifically designed to tackle the challenge of male oriented political structure. For instance the *Siigee* institution which is a women exclusive

needs to be tackled while at the same time fostering constitutionalism founded on African values.<sup>139</sup>

However, *Gada* system interestingly doesn't share the later critics of the lifetime power holding and hereditary transfer of power. Transfer of power every eight years is one of the main characteristics of *Gada* system that makes conform with one of the basic principles of constitutionalism of modern democracies through limiting the term of political office.

The time reckoning experts called '*Ayyantu*' who are in charge of keeping the unique 'Oromo Calendar' and determining '*Gada* chronology' have the duty to fix the exact time and place for the transfer of power every eight years.<sup>140</sup> This term limit is supplemented by another mechanism in which the society may recall their representative before the end of the eight year term if they lost confidence through a procedure called *buqissuu* (which literally means to uproot).<sup>141</sup> This is especially crucial for Ethiopia where there is no tradition of transfer of power. Past experience shows leaders stay in office for life, were deposed by force or as in the current government it is a pseudo transfer among individuals from the same political party.<sup>142</sup>

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institution is meant to counter this male domination in the *Gada* system. Moreover, the inherently egalitarian nature of the system gives us the opportunity to remedy these weaknesses by using internally built dynamisms of the system itself, for instance through a decision by the supreme organ of the system called *Gummi* (the multitude of Assemblies). See, Bona Legesse Geshe, "Beyond Universalism and Cultural Relativism Debate: Potentials of the Gada System for Legitimizing the Human Rights of Women" (MA in Human Rights Thesis, Center for Human Rights of Addis Ababa University).

<sup>139</sup> Deng, Identity, Diversity and Constitutionalism in Africa, 80-81

<sup>140</sup> For a detailed discussion of how the 'Oromo Calendar' and 'Gada Chronology' works see, Asmarom, *Gada*, 179-201

<sup>141</sup> Asmarom, *Oromo Democracy*, 126

<sup>142</sup> Leaders of Ethiopia does not have the tradition of term limit. Power was hereditary during the Imperial period, the Derg regime was overthrown by an armed struggle and the late Prime Minister Meles did not leave his office for the sake of transferring power to the new prime Minister. Moreover, this could hardly be termed as transfer of power since it happened between individuals from the sole political party in power, the EPRDF.

### 3.4. Division of Power

The Oromo under the *Gada* system are skeptical of public power concentrated on one institution or one man. As such power is highly distributed across age groups and generations (*Gada Classes*).<sup>143</sup> Every male member of the society passes through different levels of *Gada grades* every eight years assuming different rights and responsibilities.<sup>144</sup> Asmarom argues unlike the western model of democracy this classification enables the youth and the elderly to actively take part within the political life of the society.<sup>145</sup> Moreover, *Gada Classes* arranged based on genealogical generations have made it possible to make every such class participate in the political life of the people. The political posts of *Gada* are held successively by members of *Gada Classes*, which range from five to eleven, every eight years.

Political power under *Gada* system is divided both horizontally and vertically although there are overlaps of mainly legislative and judicial powers. The *Gada* Assemblies at different levels, the *Luba* which is led by the *Abba Gada* being at the top of the hierarchy, exercise both legislative and judicial powers.<sup>146</sup> Every eight year during the power transfer (*baallii dabarsun*) the winning *Gada* Council re-enacts *Gada* laws in a ceremony called *lallaba* (which literally meant proclaiming).<sup>147</sup> As it will be shortly discussed in the next sub-section the ultimate power is, however, retained by the *Gummii* (*Caffee*) through which the people at large exercises its sovereignty including over the ruling *Gada* Council.

More clear division of power is rather seen in what are known to be executive functions in modern democracies. Various distinct public offices of *Gada* system are held by different individuals in order

<sup>143</sup> Asmarom, Oromo Democracy, 235

<sup>144</sup> Asmarom, Oromo Democracy, 117

<sup>145</sup> Asmarom, Oromo Democracy, 235

<sup>146</sup> Asmarom, *Gada*, 63

<sup>147</sup> See, Asmarom, *Gada*, 214-220 for a full account of how the law of the nation is reenacted at the *lallaba* ceremony.

to avoid concentration of power on the hands of one person. While the *Abba Gada*, also known as *Abba Bokun*, functions as the head of the system, *Abba Dula* is responsible for the command of the ‘army’ to conduct ‘war’ and defend the people. *Abba Sa’a* is responsible for the administration of public property.<sup>148</sup> This way the system minimizes the possibility of concentration of power on the hands of individuals or a centralized authority.

### 3.5. Sovereignty of the People

Despite the fact that the Oromo people under *Gada* system democratically elect their leaders and transfer power to successful winners of the election process, they retain the ultimate power to oversee the conduct of the later through the *Gummii* or *Caffee*. Asmarom describes this reluctance of the society towards transferring all public power to officials of the system as follows:

At no point ... does the [Oromo] society [under *Gada* system] wholly transfers authority to any group of people. The society delegates limited kinds of power to the leaders of a *luba*, for a limited period of time, but that power is always subject to the higher authority of the Assembled Multitudes (*Gummii*).<sup>149</sup> (emphasis added)

*Gummii* is the most inclusive of the Oromo traditional polity. According to Asmarom the Assembly which meets once every eight years brings together every important leader, individuals and any interested member of the society who wants to bring matters to the attention of the *Gummii*.<sup>150</sup>

The *Gummii* assembles in the middle of the *Gada* period,<sup>151</sup> *inter alia*, to review the conduct of the elected officials, amend or proclaim new laws if necessary and to settle major disputes

<sup>148</sup> Lemmu Baissa, “Gada Values: The Building Blocks of a Democratic Polity,” *Journal of Oromo Studies*, Vol. 1, No. 1 & 2 (1994): 49. See also, Asmarom, *Oromo Democracy*, 98

<sup>149</sup> Asmarom, *Gada*, 126

<sup>150</sup> Asmarom, *Gada*, 93

<sup>151</sup> *Gada* period refers to the eight years term the elected *luba* stays on power.

referred to it from lower levels.<sup>152</sup> By deciding on cases that has a far reaching consequence on the life of the society at large the *Gummii* as such functions the same way as a Constitutional Court of modern Democracies. In case the dispute brought before the *Gummii* directly or indirectly involves the interest of the incumbent *Abba Gada* he will be replaced by another *Abba Gada* for the purpose of resolving the dispute<sup>153</sup> avoiding the possibility of him being a judge on his own matter. This way the people effectively retains the sovereign power to itself and further limits the power of officials elected to political posts of *Gada* system.

### 3.6. The Umpiring role of the *Qallu*<sup>154</sup>

*Qallu* is an independent institution, led by *Abba Qallu/Abba Muda* or simply *Qallu*, mainly concerned with the ritual life of the Oromo people.<sup>155</sup> In fact the *Abba Gada* and *Abba Muda (Qallu)* only meet in rare occasions throughout the period when the former is active in political office (the *Gada* period).<sup>156</sup> They come across in three main occasions, i.e. at the *Muda*<sup>157</sup> ceremony where the *Abba Gada* together with the rest of the society brings gifts to honor the *Qallu*, at the inauguration of the newly elected officials (*lallaba*) and during the Assembly of the Multitude (*Gummii*) which is held at the middle of the *Gada* period every eight years. Descendents of the *Qallu* lineage are also prohibited from assuming political office of the *Gada* system.<sup>158</sup> This is complemented by a prohibition to take

<sup>152</sup> Alemayehu, *Gada System*, 53

<sup>153</sup> Asmarom, *Gada*, 94

<sup>154</sup> *Qallu* is the spiritual leader of the traditional Oromo people. Before the spread of Islam and Christianity which highly compromised the traditional Oromo religion called '*Waaqefanaa*' (literally meant 'the way of *Waaqa*') the Oromo used to worship '*Waaqa*' which according to Bartels is not equivalent to the understanding of the Western conception of 'God' rather is closer to 'divinity'. See, Lambert Bartels, *Oromo Religion: Myths and Rites of the Western Oromo of Ethiopia – An Attempt to Understand*. (Berlin: Dietrich Reimer Verlag, 1990).

<sup>155</sup> The leadership of the *Qallu* institution is hereditary unlike the *Gada* leadership which changes every eight years from one elected leader to the other. See, Asmarom, *Gada*, 10

<sup>156</sup> Asmarom notes *Abba Gadaa* (leader of the *Gada* system) and *Abba Qallu/Abba Muda* (leader of the *Qallu*) meet only in three occasions. At the *Muda* ceremony where the *Abba Gada* brings gifts to honor the *Qallu*, the inauguration of the newly elected officials (*lallaba*) and the Assembly of the Multitude (*Gummii*) held every eight years. Asmarom, *Oromo Democracy*, 236-237

<sup>157</sup> *Muda* literally meant 'to anoint' which symbolizes gift giving. *Muda* ceremony is one of the rare occasions in which the leaders of the *Gada* Class in power and ritual leaders of the moieties (*Qallu*) come together for the former to offer gifts and pledges to the latter. Asmarom, *Gada*, pp. 90-91

<sup>158</sup> Asmarom, *Oromo Democracy*, 137



arms and involve in conflict making it more an institution which oversees or umpires the proper functioning of *Gada* system.

The *Qallu* performs this task through various mechanisms. Firstly, by acting as an ‘Electoral Board’ through the *Qallu* Council (*Ya’a Qallu*)<sup>159</sup> and monitoring the election process of the *Gada* officials the *Qallu* institution serves as an independent organ that makes sure the election process is conducted in accordance with the established *Gada* laws, values and customs of the people. Secondly, the *Qallu* institution also has the role of supervising peaceful power transfer at the end of the term of political office and shortly after the winner of the new office is known. The transfer is conducted at a ritual called *lallaba/baallii dabarsuu* and the new leaders will receive a blessing from *Abbaa Qallu/Abbaa Mudda*. These vital roles of the *Qallu* institution put it in a position to umpire the healthy function of the System.

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<sup>159</sup> Asmarom, Oromo Democracy, 136

## Conclusion

Constitution making process has a significant impact on the legitimacy of the constitution and entrenchment of constitutionalism. In this process public participation through various ways including referendum boosts the impact of the constitution in a transition to democracy especially in Countries with authoritarian past. With added factor of ethnic and cultural diversity the task of designing a constitution and public participation becomes more demanding.

Ethiopia and South Africa have made a complete rupture from their past constitutional history by adopting Constitutions that accommodated ethnic and cultural diversity. Their Constitutions have also enabled the establishment of different tiers of governments to ensure the right to self determination of their people. The national constitutions of these countries have guaranteed the power of the respective state/provincial governments to design their own constitutions in order to exercise this right. The lack of federal supremacy under the FDRE Constitution has left the sub national units in Ethiopia with better autonomy of designing their own constitution than in the case of the RSA. The practice shows, however, that the States in Ethiopia rather failed to exercise this power and design a constitution which did not simply replicate the federal constitution.

Together with the other ethnic groups in Ethiopia the Oromo had struggled to regain their right to self determination which resulted in the reorganization of the country along ethnic federal structure and guaranteed this right mainly under Art 39 of the FDRE Constitution. The legislature of the State of Oromia was as such expected to design a constitution which is founded on the values and principles of the traditional self administration of the Oromo people, i.e. *Gada* System. Besides providing stronger guarantee for this right this could have enabled the entrenchment of democracy

and constitutionalism at the local level by building on the inherently democratic nature of the system and various inbuilt mechanisms of the system in limiting government power.

Even with strong requirement of compliance with the national constitution the constitution making experience of the West Cape and Kwazulu-Natal in RSA has demonstrated the possibility of using this power to foster constitutionalism by strengthening the role of African traditional leadership systems. The Constitution needs to be the manifestation of the will of the people and not just a transplantation of a system which uproots the culture and tradition of the people mainly when it is inherently compatible with modern democratic principles. This is what the legislatures of the State Constitution of Oromia shall consider about *Gada* if the region is meant to enable the Oromo to fully exercise their right to self determination.

## Bibliography<sup>160</sup>

1. Alemante Gebre Selassie, “*Ethnic Federalism: Its Promise and Pitfalls for Africa.*” 28 Yale J. Int’l L. 51 (2003): 51-107.
2. Alemayehu Haile. *Gada System: The Politics of Tulama Oromo*. Finfinnee: Oromia Culture and Tourism Bureau, 2009.
3. An-Na’im, Abdullahi A. *African Constitutionalism and the Role of Islam*. Philadelphia: University of Pennsylvania Press, 2006.
4. Asafa Jalata, *The Struggle for Knowledge: The Case of Emergent Oromo Studies*. University of Tennessee: Knoxville: University of Tennessee, 1996)
5. Asmarom Legesse. *Gada: Three Approaches to the Study of African Society*. New York: The Free Press, 1973.
6. Asmarom Legesse. *Oromo Democracy: An Indigenous African Political System*. Trenton/Asmara: The Red Sea Press, Inc. 2006.
7. Assefa Fiseha. *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*. Postbus: Wolf Legal Publishers, 2005.
8. Bona Legesse Geshe, “*Beyond Universalism and Cultural Relativism Debate: Potentials of the Gada System for Legitimizing the Human Rights of Women*” (MA in Human Rights Thesis, Center for Human Rights of Addis Ababa University).
9. Boraine, Alex. ‘Truth and Reconciliation in South Africa: The Third Way, in Sajo, Andras, ed., *Out of and Into Authoritarian Law*. The Hague: Kluwer Law International, 2003.
10. Brandt, Michele., Cottrell, Jill., Ghai, Yash., and Regan, Anthony. *Constitution Making and Reform: Options for the Process*. Switzerland: Interpeace, 2011. Accessed on February 28, 2013, <http://interpeace.org>

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<sup>160</sup> There is no tradition of using ‘family name’ in naming in Ethiopia. In order to avoid confusion Ethiopian names are written in this order: First name, Father’s name, Grandfather’s name (if any)

11. Deng, Francis M. *Identity, Diversity and Constitutionalism in Africa*. Washington DC: United States Institute of Peace, 2008.
12. Deng Francis M. "Human Rights, Universalism and Democracy." In *Human Rights: Southern Voices*. Edited by William Twining. Cambridge: Cambridge University Press, 2009.
13. Elazar, Daniel J. *Constitution Making: The Pre-eminently Political Act*. Accessed on March 14, 2013 <http://jcpa.org/dje/articles3/constisramer.htm>
14. Elster, John. "Forces and mechanisms in the Constitution Making Process", *Duke Law Journal*, vol. 45, No. 2 (1995): 364-396
15. Ghai, Yash and Galli, Guido. *Constitution Building Processes and Democratization*. Stockholm: International IDEA, 2006. Accessed on March 5, 2013, [http://idea.int/publications/cbp\\_democratization/](http://idea.int/publications/cbp_democratization/).
16. Ginsburg, Tom., Elkins, Zachary., and Blount, Justin. *Does the Process of Constitution Making Matter?* (Annu. Rev. Law Soc. Sci., 2009), 201-223. Accessed March 5, 2013. <http://annualreviews.org>
17. Lewis, Herbert. "Aspects of Oromo Political Culture." *The Journal of Oromo Studies*, Vol. 1 No. 2 (1994): 53-58. Accessed on February 14, 2013, <http://oromostudies.org>
18. Kuwee Kumsa. "The Süqee Institution of the Oromo Women." *Journal of Oromo Studies*, vol. 4, no. 1 and 2. (1997): 115-152. Accessed on February 14, 2013, <http://oromostudies.org>
19. Markakis, John. *Ethiopia: Anatomy of Traditional Polity*. Oxford: Clarendon Press, 1974.
20. Markakis, John. *Federalism and Constitutionalism in the Horn of Africa*. Paper presented at conference on constitutionalism and human security in the Horn of Africa, Addis Ababa, October 1, 2007.

21. Mohammed Hassen. “*Some Aspects of Oromo History that have been Misunderstood.*” Journal of Oromo Studies, Vol. 1, No. 1 & 2 (1994): 77-90. Accessed on February 14, 2013, <http://oromostudies.org>
22. Murray, Christina. *South Africa’s Troubled Royalty: Traditional Leaders after Democracy.* Belconne: The Federation Press, 2004.
23. Murray, Christina and Simeon, Richard. “*Promises Unmet – Multi-level Government in South Africa.*” Canadian Journal of African Studies Vol. 43, No. 3 (2009): 232-260
24. Mutua, Makau. *Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties.* Virginia Journal of International Law, Vol. 35: 339-380
25. Mutua, Makau. *The African Human Rights System: A Critical Evaluation.* New York: United Nations Development Programme, 2000.
26. Partlett, William. “*The Dangers of Popular Constitution Making.*” Brook. J. Int’l L. Vol.38:1 (2012): 193-238
27. Rosenfeld, Michel and Sajo, Andras, eds. *The Oxford Handbook of Comparative Constitutional Law.* Oxford: Oxford University Press, 2012.
28. Sajo, Andras. *Limiting Government: An Introduction to Constitutionalism.* Budapest: Central European University Press, 1999.
29. Shivji, Issa G. “*Three Generations of Constitutions and Constitution Making in Africa: An Overview and Assessment in Social and Economic Context*”, in Roben, Mihaela Serban (ed.). “Constitutionalism in Transition: Africa and Eastern Europe”. Paper presented at the International Conference on Comparative Constitutionalism, Warsaw, Poland, May 17-20, 2001: 74-92

30. Tsegaye Regassa. *"State Constitutions in Federal Ethiopia: A Preliminary Observation."* Paper presented at the Bellagio Conference on Sub-national Constitutions and Federalism: Design and Reform, Bellagio, Italy, March 22-27, 2004.
31. Tsegaye Regassa, *"Between Constitutional Design and Constitutional Practice: The Making and Legitimacy of Constitutions in Ethiopia."* Paper presented at Conference on Constitutionalism and Human Security in the Horn of Africa, Addis Ababa, August 7, 2008.
32. Tsegaye Regassa. *"The Making and Legitimacy of the Ethiopian Constitution: Towards Bridging the Gap Between Constitutional Design and Constitutional Practice."* Afrika Focus, Vol. 23, No. I (2010): 85-118.
33. Tutu, Desmond. *The Rainbow People of God: The Making of a Peaceful Revolution.* New York: Doubleday, 1994.
34. Wallelign Mekonnen, *"On the Question of Nationalities in Ethiopia"*, Struggle, Arts IV, HSIU (1969).
35. Yonatan Tesfaye Fessha. *Ethnic Diversity and Federalism.* Burlington: Ashgate Publishing Company, 2010.
36. Zemelak Ayitenew Ayele and Yonatan Tesfaye Fessha. *"The Constitutional Status of Local Government in Federal Systems: The Case of Ethiopia."* Africa Today, Vol. 58, Issue 4 (2012): 89-109.