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## Beyond Rights: Legal Process and Ethnic Conflicts

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# BEYOND RIGHTS: LEGAL PROCESS AND ETHNIC CONFLICTS

*Elena A. Baylis\**

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*Editorial note:*

The author performed much of the research for this Article on location in Ethiopia. Many primary sources are on file with the author.

*Unresolved ethnic conflicts threaten the stability and the very existence of multi-ethnic states. Ethnically divided states have struggled to build structural safeguards against such disputes into their political and legal systems, but these safeguards have not been able to prevent all conflict. Accordingly, multi-ethnic states facing persistent ethnic conflicts need to develop effective dispute resolution systems for resolving those conflicts. This presents an important question: what kinds of processes and institutions might enable ethnic groups to resolve their conflicts with each other and the state? This Article explores that question, reviewing the interdisciplinary literature on ethnic conflicts, the legal literature on legal process and conflict resolution, and a case study of ethnic conflicts and conflict resolution in Ethiopia. At crucial moments in the development of an ethnic conflict, legal processes such as mediation, arbitration or constitutional interpretation might play a role in resolving the dispute. But ethnic conflict resolution institutions and processes must be carefully designed to take account of the variety, complexity and dynamics of ethnic conflicts, and to address the substantial number of ethnic groups and interests that diverge from the "minority rights" legal model. Ultimately, the Ethiopian example calls on us to consider whether and how legal processes might be able to ameliorate the threat posed by ethnic conflict.*

## I. INTRODUCTION

### A. *The Persistent Problem of Ethnic Conflict*

The front page of today's newspaper is a maelstrom of ethnic conflict.<sup>1</sup> Unchecked, such conflicts can escalate into genocidal campaigns

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1. The first and most fundamental problem in talking about ethnic conflict is defining ethnicity. This is a task that is well beyond the scope of this Article. Fortunately, for purposes of this discussion, it is enough to rely on a community's self-identification as a single ethnicity in designating it an "ethnic group," and likewise enough to rely on its self-identification of its dispute with another group as an "ethnic conflict" to designate that conflict as "ethnic" as well. Because the concern of this Article is resolving conflicts that arise between peoples who perceive themselves as identifying with a particular ethnicity and who perceive these conflicts as being ethnic in nature, it is these perceptions that matter, and not whether the perceptions are appropriate by an objective standard. Accordingly, I will refer to "ethnic conflict" throughout the Article to describe conflicts that the parties involved consider ethnic, and to "ethnic groups" to describe communities that consider themselves to be of a single ethnicity. The problem of defining ethnic identity is also addressed in the discussion of the Silte conflict, see *infra* II.A.3. See generally BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (rev. ed. 1991); DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* (1985) [hereinafter *ETHNIC GROUPS IN CONFLICT*]; RODOLFO

of violence and threaten the very existence of the state. The problem is especially acute in developing and newly democratic states with nascent formal institutions and legal traditions. In such states, kinship relationships often define the social structure; social, economic and political power are likewise held and exercised on a kinship and ethnic basis; and government by the formal state has infiltrated only weakly, if at all, into local power institutions.<sup>2</sup>

Around the world, multi-ethnic states are struggling to devise structural safeguards within their governments to forestall ethnic disputes. Many of the newly democratic and developing states that have reformed their political systems in recent years have sought to diffuse ethnic power by creating non-ethnic institutions.<sup>3</sup> Others have developed complex, expressly ethnic power-sharing arrangements, designated seats in their legislatures for ethnic groups, and made other efforts to create self-enforcing incentives for inter-ethnic cooperation.<sup>4</sup> A number of states have established protections for the rights of ethnic minority or indigenous groups.<sup>5</sup> Constitutions have often been the vehicle for these efforts.

But none of these state structures, whether or not ethnically neutral, can be expected to create an ideal political balance capable of nullifying the risk of ethnic conflict. Rather, even well designed political systems have been challenged by the tenacity of ethnic identification and the certainty of resultant ethnic conflict. So long as a society is ethnically defined and controlled, many conflicts, whether over resources, political representation, or mere individual disputes, will be perceived and organized as ethnic conflicts.

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STAVENHAGEN, THE ETHNIC QUESTION: CONFLICTS, DEVELOPMENT, AND HUMAN RIGHTS 1–3 (1990); Miriam J. Aukerman, *Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context*, 22 HUM. RTS. Q. 1011 (2000).

2. In the Ivory Coast, for example, Ivoirians reportedly view themselves primarily as “members of regional extended-family and corporate kin groups competing with others for their share of scarce economic resources and political clout,” rather than as members of the Ivorian polity. Jeanne Maddox Toungara, *Ethnicity and Political Crisis in Côte D'Ivoire*, 12 J. DEMOCRACY, July 2001, at 63, 64. Political turmoil has rocked the country as politicians have called upon ethnic loyalties and repressed other ethnic groups in their bids for power. *See id.*

3. For instance, Bulgaria has attempted to eliminate ethnicity from its politics by outlawing ethnic political parties and permitting only ethnically neutral political organizations. A more drastic mechanism for attempting to take the ethnic dynamic out of play in politics is to divide a multi-ethnic state into several primarily single-ethnicity states, as the former Czechoslovakia did. *See* JON ELSTER ET AL., *INSTITUTIONAL DESIGN IN POST-COMMUNIST SOCIETIES: REBUILDING THE SHIP AT SEA* 254–59 (1998).

4. *See* Will Kymlicka, *Federalism and Secession: At Home and Abroad*, 13 CANADIAN J. L. & JURISPRUDENCE 207 (2000). The UN-supported attempt to use traditional Afghan institutions and to acknowledge and incorporate ethnic groups and power structures in constructing a new Afghan government is an example of an expressly ethnic and highly controversial approach. *See, e.g., Loya Jirga*, Guardian Unlimited website (June 14, 2002), at <http://www.guardian.co.uk/afghanistan/comment/story/0,11447,730745,00.html>.

5. *See, e.g., S. AFR. CONST.* arts. 31, 211–12.

Therefore, although establishing non-ethnic political structures to counterbalance ethnic power may be wise, an expectation that political actors will then necessarily behave in an ethnically neutral fashion is simply counterfactual. In good faith or bad, political actors will act in accordance with the underlying ethnic power structure to achieve their ends.<sup>6</sup> Likewise, an expressly ethnic power-sharing arrangement may be the necessary foundation for construction of a multi-ethnic state, but such arrangements cannot be expected consistently to reflect the actual balance of power, either in any individual dispute, or in general as ethnic allegiances and circumstances shift over the long-term.<sup>7</sup> Establishing self-enforcing internal incentives for cooperation between ethnic groups is crucial to long-term stability, but inevitably some quarrels will arise that will not prove responsive to these incentives.<sup>8</sup> And while guaranteeing rights to ethnic minorities or indigenous groups may be effective in states dominated by a single majority group or in which a civic identity predominates, such guarantees are unlikely to provide a basis for distinguishing between competing claims where ethnic identity and conflicts are not limited to certain determinate groups but are ubiquitous.<sup>9</sup>

This is not to say that such efforts are futile. To the contrary, devising a political system that will provide incentives for positive participation in politics by ethnic groups and balance ethnic interests is crucial to promoting inter-ethnic stability. But it is not enough. Multi-

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6. For example, in spite of Bulgaria's rule prohibiting ethnic political parties, its Turk minority is represented by an ethnically defined party, the Movement for Rights and Freedoms, illustrating the resilience of ethnic identification and the failure of fiat to effectively eliminate it from the political realm. Similarly, although Czechoslovakia divided into the Czech Republic and Slovakia in an effort to create single ethnicity states, it could not as a practical matter eliminate all ethnic diversity and therefore could not eliminate all ethnic conflict either. There remains a Hungarian minority in Slovakia, which complains of repression based on ethnicity, such as instances of Hungarians being dismissed from government positions. See ELSTER, *supra* note 3, at 254–59.

7. Of course, there are some longstanding federations that explicitly recognize and distribute power according to ethnicity: Belgium and Switzerland are obvious examples. But these states nonetheless face continued ethnic divisions: Belgium's 2003 elections revealed sharp political differences between Flemings and Walloons and rising electoral support for a pro-independence Flemish candidate. See *A Model for Europe?*, THE ECONOMIST, May 24, 2003, at 53. In addition, Belgium and Switzerland have far less complex ethnic divisions than many of those states, and their political, economic and social conditions differ substantially as well, making it difficult to graft their formal structures into more complex ethnic, political and socio-economic contexts. See *id.*; ELSTER, *supra* note 3, at 253–54; Jack Snyder & Karen Ballentine, *Nationalism and the Marketplace of Ideas*, in NATIONALISM AND ETHNIC CONFLICT 61, 61–63 (Michael E. Brown et al. eds., 2001).

8. See DONALD L. HOROWITZ, *A DEMOCRATIC SOUTH AFRICA? CONSTITUTIONAL ENGINEERING IN A DIVIDED SOCIETY* 154 (1991) [hereinafter *A DEMOCRATIC SOUTH AFRICA*].

9. See Toungara, *supra* note 2, at 65. In this context, it is impossible to provide special “minority” guarantees because almost everyone is by definition a member of a non-majority ethnic group.

ethnic states facing persistent ethnic conflicts need to develop effective systems for coping with those conflicts. This is where legal processes and institutions could be of some use. Ethnic conflict has most often been treated as a political, rather than a legal, problem. But in relying on political solutions, states have failed to exploit the potential of legal processes to resolve conflicts at an early stage, before they become entrenched.

At crucial moments in the development of a conflict, opportunities arise to alleviate tensions and prevent the disagreement from escalating.<sup>10</sup> Structural solutions like those described above are aimed at the first such moment: they address potential catalysts of conflict in advance, in an effort to prevent conflicts from arising at all. Governments have also recognized and acted upon a second crucial moment: the moment at which a conflict becomes contentious enough, and therefore dangerous enough, to pose a crisis meriting political attention. At this point, states rely on ad hoc political responses, such as negotiation by government leaders or intervention by security forces, to push conflicts to an end lest they destabilize the state.

But there is an intermediate moment in the development of ethnic conflicts that has thus far largely been overlooked: the moment when a conflict has arisen but has not yet become a crisis. This is the point at which the law traditionally has played a role in resolving disagreements of other kinds, by providing the parties with legal processes as a credible alternative to self-help for resolving their disputes. By acting on this intermediate moment in ethnic conflicts, legal processes could play a role in resolving these disputes as well.

### B. *Considering Legal Process Solutions*

Thus far, the law and legal scholarship addressing ethnicity have focused primarily on defining the substance of the system of rights and political representation a multi-ethnic state should grant its ethnic groups, if any.<sup>11</sup> This is a necessary and important concern. However, there is another important issue that deserves exploration. Setting aside the question of how ethnic rights and roles should be defined, what kinds of legal processes might enable ethnic groups to resolve their conflicts with each other and the state?

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10. See SUSAN L. CARPENTER & W.L.D. KENNEDY, *MANAGING PUBLIC DISPUTES* 11–17 (1988).

11. See, e.g., James W. Nickel, *Group Agency and Group Rights*, in *ETHNICITY AND GROUP RIGHTS* 235 (Ian Shapiro & Will Kymlicka eds., 1997); Surya P. Subedi, *Constitutional Accommodation of Ethnicity and National Identity*, in *ACCOMMODATING NATIONAL IDENTITY: NEW APPROACHES IN INTERNATIONAL LAW* (Stephen Tierney ed., 2000).

I begin with the idea that legal processes could serve as a useful tool in ethnic dispute resolution, either directly or by serving as a model for dispute resolution strategies.<sup>12</sup> We presume the inevitability of private disputes and the importance of courts to resolve them. Indeed, conflict resolution experts urge parties to long-term contracts to anticipate a series of disagreements in the course of the contract and to agree in advance upon appropriate dispute resolution mechanisms, in addition to using the ordinary courts.<sup>13</sup> But thus far, we have not made a practice of presuming the inevitability of ethnic disputes and agreeing in advance on appropriate dispute resolution systems for them.

The one context in which legal processes have been used regularly to address ethnic concerns is that of minority and indigenous rights. Specifically, the current legal framework in many states forbids discrimination against minority and indigenous groups and carves out some sphere of protected rights for such groups.<sup>14</sup> This is of course an important task: majority-minority contexts have been the setting for horrific and intractable abuses that demand legal responses. My purpose is not to critique the established framework of minority and indigenous rights within a majority-minority setting.

But while this framework serves a vital purpose, it does not address the substantial number of ethnic interests and disputes that diverge from this model. In some multi-ethnic states, there is no majority group, and all ethnic groups could be considered minority or indigenous, rendering those categories irrelevant.<sup>15</sup> Ethnic conflicts arise amongst all sorts of ethnic groups, in all sorts of contexts. If conflict does not limit itself to

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12. While traditional models usually defined legal process by reference to an impartial judge or formal rules of procedure, new legal process theories often take a broader view, characterizing a process as "legal" by virtue of its function in shaping and implementing law as well. Similarly, changes in practice, such as the growth of alternative dispute resolution, have expanded the working conception of legal process. See discussion *infra* Part III.B.2. In national and international contexts, legal processes such as litigation, mediation and arbitration have succeeded in drawing social and political actors into orderly dispute resolution and purposeful group decision-making. See generally Mary Ellen O'Connell, *New International Legal Process*, 93 AM. J. INT'L L. 334 (1999); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

13. See Stephen Goldberg et al., *Designing an Effective Dispute Resolution System*, in DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES 307, 307 (Stephen B. Goldberg et al. eds., 4th ed. 2003).

14. See generally DOCUMENTS ON AUTONOMY AND MINORITY RIGHTS (Hurst Hannum ed., 1993).

15. In Nepal, for example, there are roughly 60 ethnic groups and no majority group. Scholars have struggled to make use of the "minority" and "indigenous" categories to define ethnic rights in this setting, and some have proposed defining minority groups as those that are non-dominant rather than focusing on numbers. See Surya P. Subedi, *Constitutional Accommodation of Ethnicity and National Identity*, in ACCOMMODATING NATIONAL IDENTITY: NEW APPROACHES IN INTERNATIONAL AND DOMESTIC LAW 151, 153-54 (Stephen Tierney ed., 2000).

minority and indigenous groups, legal structures for conflict resolution cannot do so either. Because our current approaches fail to capture the actual variety and complexity of ethnic interrelationships in multi-ethnic states, they do not supply the analytic tools to address the conflicts that arise from those relationships.

This Article focuses on the possibility of developing processes for these other, overlooked conflicts and groups. This concern is most urgent in "ethnic-identified states" like those described above. In such states, people identify primarily with members of their ethnic group, and only secondarily, if at all, with the state. Social communities, public issues, and private life are also defined by ethnicity, and accordingly, social, public, and private disputes all tend to be defined by ethnicity as well.<sup>16</sup> In this context, ethnic disputes are all but inevitable, and when they arise they can threaten the very foundations of the state.

Part II of this Article identifies certain well founded but counterintuitive realities of ethnic conflict in ethnic-identified states: the complexity of ethnic disputes, the catalytic role of democracy and civil liberties, and the failures of ostensibly ethnically neutral systems. Not only are these realities counterintuitive (at least from the perspective of the American approach to race relations), they are also unappealing, in that they make the process of conflict resolution both complicated and difficult. However, these qualities are well established in the interdisciplinary legal and political science literature exploring the dynamics of ethnic relations in ethnic-identified states. To illustrate these qualities, I develop a case study of three recent ethnic conflicts in Ethiopia.

In Part III, I consider whether legal processes have any role to play in responding to these realities. To address this question, I turn to theories of conflict resolution, legal process, and constitutional interpretation,

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16. In contrast, in civic-identified states, there is a strong national identity or popular culture that competes with and counterbalances ethnic identities, and so disputes are also more likely to be understood in non-ethnic terms. It is not that there are no ethnic identities in civic-identified states, but that those identities do not dominate the national identity. Not so in ethnic-identified states, where ethnicity is hegemonic and competes only with other ethnicities and not with a common, non-ethnic popular or political culture. As a result, ethnic relations in ethnic-identified states differ fundamentally from, for example, the American experience. Many individuals in the United States do of course identify closely with their racial and ethnic groups. Without seeking to minimize the extent or significance of these identifications, we can acknowledge that it is rare in the United States for all aspects of a community's life to be defined and governed by ethnicity, and that there is also a vibrant popular and political culture that competes with ethnicity even within relatively insular ethnic communities. Indeed, the closest correlation that can be drawn between American experiences with ethnicity and those in ethnic-identified states is to the most insular and self-governing American ethnic groups: certain Native American and Native Alaskan communities, for example. For a discussion of a range of studies showing distinct differences in the existence and strength of overarching identities, see *ETHNIC GROUPS IN CONFLICT*, *supra* note 1, at 6–7, 18–19.



and return again to the Ethiopian examples introduced above. Ethiopia employs elements of a legal process based, ethnic conflict resolution system within the context of a far more sweeping political approach to accommodating ethnic interests. Preoccupied with the political framework, those scholars who have considered the Ethiopian system have not focused on its dispute resolution elements.<sup>17</sup>

There are three distinctive characteristics to the Ethiopian ethnic conflict resolution system: it establishes a permanent, ethnic-composed institution that grants standing to ethnic groups; it uses both consensual and adjudicative processes; and it gives a fundamental role to constitutional interpretation. These qualities call our attention to essential questions about the role of legal processes in addressing ethnic conflicts: Should states ever give official recognition to ethnic affiliations? If so, how can legal processes be shaped to respond to ethnic concerns? Could constitutional interpretation be used to resolve ethnic conflicts at a national level?

Finally, in Part IV, I propose issues for further consideration. The successes and failures of the Ethiopian system raise five fundamental concerns for the use of legal process in addressing ethnic conflict: (1) providing some measure of legal process for ethnic groups; (2) promoting participation and toleration through constituency building; (3) developing principles for constitutional interpretation; (4) establishing safeguards against misuse; and (5) designing institutions.

This Article is a beginning, not an end. It addresses foundational issues, analyzing the gaps in the current legal framework for ethnic relations and identifying some factors in ethnic conflicts and legal processes that might tend to promote successful resolution of the one by the other. It proposes ideas that merit further exploration. Fundamentally, it is an attempt to look at ethnic conflict in a new way, through a legal process lens.

## II. THREE REALITIES OF ETHNIC CONFLICT

There are three well founded but counterintuitive realities of ethnic conflict in ethnic-identified states that tend to foil efforts at conflict prevention: the complex and dynamic nature of ethnic conflict, the catalytic role of democracy in ethnic conflict, and ethnically neutral policies as a

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17. See Alemante G. Selassie, *Ethnic Federalism: Its Promise and Pitfalls for Africa*, 28 YALE J. INT'L L. 51 (2003); Paul B. Henze, *A Political Success Story*, 9 J. DEMOCRACY, Oct. 1998, at 40; Richard Joseph, *Oldspeak vs. Newspeak*, 9 J. DEMOCRACY, Oct. 1998, at 55; John w. Harbeson, *An Authoritarian, Bureaucratic Regime*, 9 J. DEMOCRACY, Oct. 1998, at 62.

mask for ethnic inequalities.<sup>18</sup> To illustrate these ideas, I will make use of the facts of three ethnic conflicts in Ethiopia, involving the Berta, the Silte, and the Oromo peoples. These examples represent a range of ethnic conflicts and interrelationships. They also express certain distinctive qualities of ethnic conflict in a multi-ethnic, ethnic-identified setting.

Ethiopia is a particularly good subject for study of complex ethnic conflict that does not fit the majority-minority model, because it is extremely ethnically divided. It has no majority ethnic group, over eighty formally recognized ethnic groups ("Nationalities"),<sup>19</sup> and over two hundred smaller ethnic communities within those Nationalities.<sup>20</sup> Ethiopia has experienced centuries of ethnic conflict and conquest, and ethnic divisions defined the opposition groups in the country's seventeen year civil war, which brought the current government into power.<sup>21</sup>

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18. This Section summarizes three vast subjects of political science research in only a few pages, and so this is of necessity a highly truncated account of the literature on the subject. Accordingly, I have tried to offer here an uncontroversial account of well-established research focusing specifically on ethnic conflict in severely divided societies. However, this brief introduction does not allude to internal debates within the literature except as they bear directly on the point in question.

19. In Ethiopia, ethnic groups that have been formally recognized as such by the government are called "Nations, Nationalities and Peoples." See ETH. CONST. art. 39. As this is rather unwieldy, I shall shorten the term to "Nationalities" throughout this Article. In Ethiopian sources, an Ethiopian ethnic group that perceives of itself as an independent ethnic group but that has not been formally recognized as such by the government is variously referred as a "Nation," a "Nationality," a "People," or a "community." In order to distinguish formally recognized from unrecognized groups, I shall use the term "community" to refer to ethnic groups that are as yet unrecognized.

20. See FDRE Parliament website, at <http://www.ethiopar.net/English/basinfo/Basicinfo.htm> (last visited Feb. 1, 2004).

21. For at least a thousand years, the recurrent pattern of Ethiopian history has been for one ethnic group to conquer neighboring tribes and expand the scope of unified Ethiopian territory, followed by a period of division and reconsolidation of territory, followed by expansion again. In the last centuries of the Ethiopian Empire, the Amhara people were ascendant, and this history has not been forgotten by the other Ethiopian Nationalities. In 1974, Emperor Haile Selassie was deposed in a military coup and replaced by a communist military government known as the Derg. For the next 17 years, the country was torn apart by armed struggle between several ethnically defined, communist, opposition armies and the government, as the civil war that had begun in Eritrea during Haile Selassie's regime spread to the neighboring region of Tigray and then to the rest of the country. See HAROLD G. MARCUS, A HISTORY OF ETHIOPIA 185-93 (1994); Embassy of Ethiopia website, *History*, at <http://www.ethiopianembassy.org/history.shtml>. The opposition armies' conflict with the Derg was based both on nationalist claims to independence and on intra-communist ideological differences. See TEKESTE NEGASH & KJETIL TRONVOLL, BROTHERS AT WAR: MAKING SENSE OF THE ERITREAN-ETHIOPIAN WAR 16-17 (2000). The Ethiopian People's Revolutionary Democratic Front ("EPRDF") was a late in the game coalition of the TPLF with smaller and weaker Amhara and Oromo opposition groups at the very end of the civil war, in order to create a multi-ethnic imperative for the new government. See Harbeson, *supra* note 17, at 65. When the long-standing Oromo opposition group and military organization, the Oromo Liberation Front, refused to join forces with the TPLF, the TPLF fostered a new, pro-EPRDF Oromo party so as to have Oromo representatives in the new EPRDF ranks. See *id.* The

Ethiopia shares certain political and historical commonalities with many other ethnic-identified states struggling with ethnic conflict. Ethiopia is a post-communist state with a new constitution and young, weak political and legal institutions; it is a developing state with limited economic resources to implement its conflict resolution program; and it lacks a strong civic identity.<sup>22</sup> Where differences exist with other multi-ethnic states, they tend to make Ethiopia's situation more extreme, more precarious, and therefore less likely to survive serious ethnic conflicts.<sup>23</sup>

Ethiopia has tried to manage its conflicts by implementing political policies that have proved both innovative and controversial. These will be discussed in Section III. For now, it is enough to know that Ethiopia's ethnic groups are engaged in an open competition for social, economic, and political power. Their disputes lay bare the dynamics of ethnic disputes generally.

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current Ethiopian government, which is made up almost entirely of EPRDF members, describes the EPRDF as a "unified force of Ethiopian people." See Embassy of Ethiopia website, *supra*.

22. The ERPFD army defeated the Derg communist government and took power in 1991. See MARCUS, *supra* note 21, at 217. After four years of rule by a transitional government, the current constitution and federal structure entered into effect in 1995. See Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995 (Aug. 21, 1995) (Constitution ratified Dec. 12, 1994 and entered into effect on the date of this proclamation) (on file with author) [hereinafter Constitution Proclamation]. The federal and regional governments have been gradually structuring their institutions and becoming active since that time. Of the institutions particularly relevant to this Article, legislation was passed defining the jurisdiction of the federal courts in 1996, while legislation defining the procedures by which the House of the Federation and the Council of Constitutional Inquiry's should carry out their constitutionally mandated tasks passed only in 2001. See Federal Courts Proclamation No. 25/1996, in Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, 2d Year, No. 13 (Addis Ababa—Feb. 15, 1996) (on file with author); Consolidation of the House of the Federation and Definition of its Powers and Responsibilities Proclamation No. 251/2001, art. 46(1), in Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, 7th Year, No. 41 (Addis Ababa—July 6, 2001) (on file with author) [hereinafter HOF Proclamation]; Council of Constitutional Inquiry Proclamation No. 250/2001, in Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, 7th Year, No. 41 (Addis Ababa—July 6, 2001) (on file with author) [hereinafter CCI Proclamation].

In terms of per capita income, Ethiopia is "the poorest country on earth," with per capita income of less than \$100 per day. For comparison, the average per capita income for "low-income countries" was \$140 and the average for sub-Saharan Africa was \$500. With a Human Development Index of .309, Ethiopia ranks 171st out of 174 countries on this scale (based on 1998 data). See THE ETHIOPIAN ECONOMIC ASSOCIATION/ETHIOPIAN ECONOMIC POLICY RESEARCH INSTITUTE, SECOND ANNUAL REPORT ON THE ETHIOPIAN ECONOMY, VOL. II 2000/2001, at 1–2 (prepared by Befekadu Degefe et al.) (based on World Bank 1999 data. The latest data available for any sector of the economy according to this report was 1999/2000) [hereinafter SECOND ANNUAL REPORT].

23. For example, Ethiopia's poverty is extreme, even by comparison to other developing states. See generally SECOND ANNUAL REPORT, *supra* note 22.

### A. Three Ethnic Conflicts

The Berta Nationality believed that it had been shortchanged. Even though it had a population greater than that of the Gumuz Nationality—117,000 Berta as compared to 105,000 Gumuz—it had only 28 representatives on the Benshangul-Gumuz regional state council, while the Gumuz had 35.<sup>24</sup> This disparity mattered. The other Nationalities in the region (the Shinasha, the Mao and the Como) accounted for less than 12,000 people, so the Berta had almost exactly half the population of the region.<sup>25</sup> They wanted half the representatives as well. The Berta representatives demanded a rebalancing of the representation from the regional state council. The council refused. The Berta walked out, and the regional government's business ground to a halt.<sup>26</sup>

The Silte community is part of the Gurage Nationality.<sup>27</sup> They live in the State of Southern Nations, Nationalities and Peoples ("Southern Nations regional state"), the most ethnically diverse region in the country.<sup>28</sup>

24. On the surface, this was a classic redistricting problem. The number of representatives allocated to each Nationality was determined according to the number of woredas (the local administrative districts) that each occupied. Although the Berta were more numerous than the Gumuz, they occupied only nine woredas to the Gumuz's thirteen. *See* Interview with Ato Musetefa Haj Adew, Member of Committee of Revenue Administration, and Ato Zekarias Megiso, Chair of Committee on States Affairs, House of the Federation Addis Ababa, Ethiopia (June 13, 2002) (on file with author) (interviewees speaking in their personal capacities) [hereinafter Adew/Megiso Interview]. Since the woredas were initially drawn, populations had shifted, but representation had not. *See* Interview with Ato Zekarias Megiso, Chair of Committee on States Affairs, House of the Federation, Addis Ababa, Ethiopia (Dec. 10, 2002) (on file with author) (interviewee speaking in his personal capacity) [hereinafter Megiso Interview].

25. The Mao and the Como have about 4,000 people and the Shinasha have about 3,200. There is also a special district, the Pawe Special District, which is entitled to representation. *See* Adew/Megiso Interview, *supra* note 24; Joint Agreement between the Benshangul Gumuz State Executive Committee and Representatives of the Berta Nationality (Alexandria Translations, trans., June 15, 2001) (original and translation on file with author) [hereinafter Berta Agreement]. However, as discussed below, the population issue turned out to be more complicated than it at first appeared.

26. *See* Interview with Ato Samuel Alemayahu, Head of Secretariat, Council of Constitutional Inquiry, Addis Ababa, Ethiopia (June 6, 2002) (on file with author) (interviewee speaking in his personal capacity) [hereinafter Alemayahu June 6, 2002 Interview]; Megiso Interview, *supra* note 24.

27. *See* DONALD N. LEVINE, *GREATER ETHIOPIA: THE EVOLUTION OF A MULTIETHNIC SOCIETY* app. § VI(A) (2d ed. 2000).

28. *See* Letter from Almaz Meko, Speaker of the House of Federation to the Council of Constitutional Inquiry, No. 0/8K10/31 (Zenebe Adelahu trans., Jan. 17, 1992) (on file with author) [hereinafter House of the Federation Referral Letter, Silte case]; Memo from House of Federation to Council of Constitutional Inquiry re: Request for Constitutional Interpretation and Opinion (Zenebe Adelahu trans., Jan. 16, 1992) (on file with author) [hereinafter Request for Constitutional Interpretation, Silte case]. As the name implies, this region is made up of many Nationalities, without a substantial majority of any particular Nationality. This is in contrast to most of the regions, which generally have a substantial majority of one Nationality, after which the region is named. Thus the region of Tigray is dominated by the Tigreans, the Somali region by the Somali Nationality, and so on.

They are an agricultural community who grow ensete and grains. They are a Muslim community. They live in the Shoa area and speak the East Gurage language.<sup>29</sup> And at least some in the Silte community want to be recognized as their own Nationality, separate from the Gurage Nationality, separate from the other Gurage communities.<sup>30</sup> But who could decide such a question? The Silte petitioned the Southern Nations regional state government, and it petitioned the federal government in its turn to take on the matter instead. But the federal government refused to decide as well, sending the matter back to the regional state.<sup>31</sup> This game of hot potato went on and on, as the petition was passed back and forth from the capital, to the region, and back yet again. In the meantime, the Silte waited, and five years went by.<sup>32</sup>

The Oromo Nationality is the largest in Ethiopia, representing roughly 40% of the population, as compared to the Amhara's 25% and the Tigrean's 10%.<sup>33</sup> It has its own regional state, Oromia, in which most of the people of Oromo Nationality live, and within which the Oromo comprises a majority of the population.<sup>34</sup> But the Oromo Liberation Front (the "OLF") walked out of Ethiopia's post-communist transitional government only a year after it was formed, and the OLF played no role in drafting the current federal constitution.<sup>35</sup> There is now sporadic vio-

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29. See LEVINE, *supra* note 27, app. § VI(A).

30. See House of the Federation Referral Letter, Silte case, *supra* note 28; Request for Constitutional Interpretation, Silte case, *supra* note 28.

31. See Request for Constitutional Interpretation, Silte case, *supra* note 28. Appropriately, a fairly literal translation of the House's letter referring the matter to the Council describes the question as having "stayed long turning around" between the federal and regional governments. See House of the Federation Referral Letter, Silte case, *supra* note 28.

32. See Request for Constitutional Interpretation, Silte case, *supra* note 28.

33. The remaining 25% is composed of roughly 80 small ethnic groups. There are a few other relatively large players, such as the Afar and Somali people, but most of the groups are tiny even by comparison to the Tigreans, much less to the Oromo.

34. See FDRE Parliament website, *supra* note 20 ("According to the 1994 census result, the major ethnic groups within the State [of Oromia] include 85% Oromo, 9.1% Amhara and 1.3% Gurage (some of Sebatbet Guragie, Sodo Gurage and Siltie). The remaining 4.6% constitute other ethnic groups.") Based on the 1994 census numbering the total population of Oromia as 18,732,525, the total Oromo population in Oromia should be nearly 16 million. According to the same census, Oromo also comprise roughly 19% of the population in the independently administered federal and Oromia capital of Addis Ababa, roughly half of the population in the other two cities with the status of separately administered regional states or federal districts, 6% of the tiny state of Gambela, and 3% or less of the population in the remaining states. *Id.* While these figures do not account for the number of Oromo in the diverse Southern Nations regional state nor for the considerable movements of peoples into Addis Ababa since 1994, taking them as a rough guide they indicate that nearly 1.1 million Oromo live outside of the administration of the Oromia regional state (considering Addis Ababa to be outside its administration), as compared to the nearly 16 million who live within it. Oromia is by far the largest state geographically, comprising roughly 32% of Ethiopia's land. *Id.*

35. See Kifle Wodajo, *The Making of the Ethiopian Constitution* 132 (on file with author) (Kifle Wodajo was the chair of the Constitutional Drafting Commission and this text is

lence between the OLF and the government.<sup>36</sup> Although the Oromo appear to have power in terms of number, territory, and even political recognition through the Oromia regional state, many Oromo continue to feel disenfranchised and disempowered.<sup>37</sup> There are calls for an independent state of Oromia, but no official action toward this goal.<sup>38</sup> Rather, the Oromo's concerns remain in the realm of political protest and political violence, never emerging into political process.<sup>39</sup>

The Berta, the Silte, and the Oromo are living examples of the three realities discussed in the introduction. But they demonstrate something more. Not only is ethnic conflict too complex for a one time solution, but there are distinctive qualities to ethnic conflict in a multi-ethnic, ethnic-identified setting. Democracy and civil liberties serve as sparks for ethnic conflict, especially inasmuch as young, weak democracies provide a context in which conflict can spread quickly into national catastrophe. And not only is ethnic neutrality often merely a mask for ethnic divisions, but ordinary, ethnically neutral judicial institutions are rarely organized to resolve ethnic disputes.

### B. *The First Reality: Complex and Dynamic Conflicts*

These three conflicts illustrate the multifarious and pervasive nature of ethnic interaction, and thus of ethnic conflict, in ethnic-identified multi-ethnic states. In scholarly writings on this subject, there seem to be as many different explanations of ethnic conflict as there are conflicts

based on personal knowledge). The OLF also boycotted the 1992 elections, and it has no representatives in the House of People's Representatives, the lower, legislative house of the federal Parliament. See Harbeson, *supra* note 17, at 67; House of the People's Representatives website, *Party Affiliation of Members of The House of Peoples' Representatives Archive 1999–2000*, at <http://www.ethiopar.net/English/archive/2000/hoprep/party.html>.

36. See, e.g., *Two Killed, Four Injured in Student Disturbances*, ETHIOPIAN REP., Apr. 3, 2002, at [http://www.ethiopianreporter.com/eng\\_newspaper/Htm/No291/r291new4.htm](http://www.ethiopianreporter.com/eng_newspaper/Htm/No291/r291new4.htm) (on file with author) (reporting the shooting of Oromo students by "security forces" during a student demonstration concerning fertilizer prices, agriculture taxes and insufficient use of the Oromo language. "The President of Oromia blamed the Oromo Liberation Front" and "denied that these demands had originated from the masses of people and students."); see also Henze, *supra* note 17, at 46–47.

37. See generally BEING AND BECOMING OROMO: HISTORICAL AND ANTHROPOLOGICAL ENQUIRIES (P.T.W. Baxter et al. eds., 1996); Harbeson, *supra* note 17, at 65–67.

38. See, e.g., Mohammed Hassen, *The Development of Oromo Nationalism*, in BEING AND BECOMING OROMO, *supra* note 37, at 67, 77–80; P.T.W. Baxter et al., *Introduction*, in BEING AND BECOMING OROMO, *supra* note 37, at 9.

39. The Oromo have submitted other claims, such as a border dispute with Somalia, to the House of Federation for determination. However, to my knowledge, their central claim to self-determination has not been considered by the House of the Federation or any other institution. Nor do the Oromo tend to participate in the House of the Federation process readily. Rather, the Somalia dispute was only submitted after efforts at direct settlement were utterly stymied. See Megiso Interview, *supra* note 24.

themselves.<sup>40</sup> Ethnic conflict is based in ancient and deeply rooted hatreds that rise phoenix-like from the ashes whenever not brutally repressed by a strong-fisted regime.<sup>41</sup> A nationalist drive for an ethnically defined state, innate in the heart of every person, is the cause and/or the expression of ethnic conflict.<sup>42</sup> Or perhaps ethnic conflict is merely a convenient guise for a modern phenomenon. Rather than expressing an inevitable drive toward self-definition and self-determination whose effect on a state is determined more by the number of nationalities it contains or by those nationalities' willingness to assert those claims, ethnic conflict expresses a modern identity struggle that develops in the face of industrialization and other social tensions.<sup>43</sup> Alternatively, perhaps ethnic conflict is merely one highly visible expression of

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40. Apart from theories of nationalism, there are also a variety of factors that commentators identify as being indicators of a multi-ethnic state's stability. Stability is associated with multiple layers of cultural difference (such as language, religion, and so on), cutting across each other rather than layering directly upon and reinforcing one another. See Joseph Eliot Magnet, *National Minorities and the Multinational State*, 26 QUEEN'S L. J. 397, 419 (2001) (relying on Lijphart's classic study, AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* (1977)); ETHNIC GROUPS IN CONFLICT, *supra* note 1, at 19–21 (citing the “more complex pattern of group loyalties” in ethnically divided Western societies as a reason ethnic conflict is less intense there than in ethnically divided African and Asian societies). In Ethiopia, each ethnic group tends to have its own language, reinforcing division. Religion is a point of coalition between some ethnic groups but an additional line of division between others: the population is roughly equally divided between Ethiopian Orthodox Christians and Muslims, with smaller minorities of other Christian sects and local beliefs. See FDRE Parliament website, *supra* note 20; LEVINE, *supra* note 27, app. § VI(A). Magnet also cites Lijphart for the following stability indicators: “a tradition of elite accommodation; the willingness of present elites to cooperate; the presence of overarching loyalties; a diffusion of power among several communities, rather than between two principal contenders; the overall size of the polity; and the presence of more than two political parties.” Magnet, *supra*, at 419.

41. This theory, however evocative, does not provide an explanation of why some ancient hatreds die out altogether, nor what immediate precipitant spurs the resurgence of a long-dormant feud. Nor are all ethnic conflicts of ancient origin. See ETHNIC GROUPS IN CONFLICT, *supra* note 1, at 96–99.

42. See, e.g., ERNEST GELLNER, *NATIONS AND NATIONALISM* 55 (1983) (“It is nationalism which engenders nations, and not the other way around.”).

43. According to this theory, the familiar face of ethnic relationships, families and enemies, stands in for the otherwise anonymous and inexplicable sufferings and injustices of modern life. See GELLNER, *supra* note 42; ELSTER, *supra* note 3, at 253–54. Another commentator has suggested that Quebec nationalism in Canada has been driven by Québécois' very success in modernizing. As the Quebec middle class grew it developed greater aspirations “to blossom and fulfill not only their traditional cultural identity but also their economic identity through greater provincial control of their economic affairs.” Ronald L. Watts, *Federalism and Diversity in Canada*, in *AUTONOMY AND ETHNICITY: NEGOTIATING COMPETING CLAIMS IN MULTI-ETHNIC STATES* 35 (Yash Ghai ed., 2000) [hereinafter *AUTONOMY AND ETHNICITY*]. In a similar vein, it is interesting to note that the Eritrean sense of nationalism apparently grew out of the modern experience of Italian occupation and Eritrea's corresponding economic development, which created a cultural separation between Eritrea and Tigray. See NEGASH & TRONVOLL, *supra* note 21.

conflict over tangible benefits and resources that are channeled through ethnically defined structures.<sup>44</sup>

No one of these theories seems to explain the source of every ethnic conflict. Indeed, there seem to be as many nationalisms at work in multi-ethnic states as nationalities. In Benshangul-Gumuz, the Berta and the Gumuz have never been friends, and their current conflict wallows in a longstanding mutual distrust that could certainly be characterized as an "ancient hatred" sprung to life.<sup>45</sup> On the other hand, their relationship seems to have evolved more as an unending squabble over the meager resources of the region than as a grand nationalist enterprise for ethnic domination.<sup>46</sup> The Oromo, in contrast, were themselves the ruling peoples of their day, but that day was over 500 years ago.<sup>47</sup> Like other once-upon-a-time imperialists, they seem to hearken back to the days of their empire with some sense of nostalgic fondness and to view their current subjugation not just as an injustice, but as an insulting reversal of fortune, a matter of pride.<sup>48</sup> As for the Silte, they have long lived as one of the many loosely related Gurage tribes.<sup>49</sup> Whatever their substantive differences or similarities with their Gurage cousins, perhaps they would have been forever satisfied to identify themselves as one branch of this

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44. See Magnet, *supra* note 40, at 431 ("[N]ationalism is rational. It is an instrumental adaptation to events that occur when communities are in competition."). Ethiopia is still in the early throes of industrialization, with only a small urban population enjoying modern technological conveniences. See FDRE Parliament website, *General Info (sic)*, *supra* note 20. Other theorists contend that while ethnic conflict can arise over resource disputes, there is not a one-to-one relationship between economic and ethnic interests. See ETHNIC GROUPS IN CONFLICT, *supra* note 1, at 134–35; see also Magnet, *supra* note 40, at 432–36 (summarizing theories that attribute nationalism to cultural and linguistic developments in the transition to the modern industrialized state).

45. See Megiso Interview, *supra* note 24.

46. The Benshangul-Gumuz region is one of the most impoverished and least developed in Ethiopia. See SECOND ANNUAL REPORT, *supra* note 22; see also Tsega Endalew, *Conflict Resolution Through Cultural Tolerance: An Analysis of the Michu Institution in Metekkel Region, Ethiopia*, 25 SOC. SCI. RES. REP. SERIES 2–3 (Organization for Social Science Research in Eastern and Southern Africa 2002). Endalew describes the Metekkel area, which is one zone within Benshangul-Gumuz:

The Gumuz live in the lowlands with primitive agricultural tools, which forces them to experience chronic food shortages. Most of the time they depend on hunting and fishing to supplement the wild berries, roots and the like that they collect from the bushes . . . Another important characteristic of the region is the absence of a well-defined infrastructure . . . Even the most important towns are not joined together with roads mainly in the western part . . . There are no telecommunication and electricity services.

*Id.*

47. See Jan Hultin, *Perceiving Oromo: 'Galla' in the Great Narrative of Ethiopia*, in BEING AND BECOMING OROMO, *supra* note 37, at 81, 84–89.

48. See *id.*

49. See LEVINE, *supra* note 27, app. § VI(A).



far-flung clan had not modern political reality made it suddenly advantageous for them to claim an independent identity.<sup>50</sup>

Not only is it difficult to discern a root cause for any particular ethnic conflict, but these situations also illustrate that conflicts rarely concern purely ethnic interests. Rather, ethnic interests tend to become inextricably intertwined with other concerns. In these cases, both the Berta and the Silte have economic benefits at stake: both will receive substantially more government assistance if they can assert their claims. If ethnic antagonisms are unresolved, such interrelationships can take on a life of their own, fueling further conflicts. It has been suggested, for example, that the popular support behind the rise of the Taliban in Afghanistan was primarily ethnic rather than religious. Apparently the Taliban were primarily Pushtuns and received their support primarily from disaffected Pushtuns acting in opposition to the primarily Tajik and Uzbek government. Once in power, of course, the Taliban's fundamentalist policies spurred unrest on new levels.<sup>51</sup>

As the Taliban example suggests, ethnic affiliation often overlaps with other divisive affiliations, such as religion or geography, intensifying and complicating conflicts and their resolution.<sup>52</sup> In Mozambique, the three broad families of ethnic groups are located in the northern, central, and southern regions respectively, and the alignment of these geographical and ethnic divisions has tended to reinforce regionalism and divisive tendencies.<sup>53</sup> It is interesting, therefore, to note that in the Silte case, religion unites the Silte to the other Gurage communities rather than dividing them: all are predominantly Muslim peoples.<sup>54</sup> In the Oromo case, religion is a source of tension: the historically dominant Amhara and the currently ascendant Tigreans are Ethiopian Orthodox Christians, while the Oromo are Muslim. And while many Ethiopian Nationalities

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50. Because so many resources are distributed by the Ethiopian state or by NGOs rather than being locally created, political recognition is all-important to gaining a piece of the resource pie. Officially recognized Nationalities have the right to self-government and thus to allocations from the regional state. Regional states themselves get a greater allocation from the federal government than similarly sized Nationalities do from regional states, so there is also an advantage to achieving statehood. See Megiso Interview, *supra* note 24. In addition, Ethiopia is a classic example of a donor economy, using foreign aid as a primary resource for public and private development. See SECOND ANNUAL REPORT, *supra* note 22.

51. See Michael McFaul, *Reconstructing Afghanistan*, 13 J. DEMOCRACY, Jan. 2002, at 170, 172 (reviewing and citing AHMED RASHID, *TALIBAN: MILITANT ISLAM, OIL AND FUNDAMENTALISM IN CENTRAL ASIA* (2000)).

52. Indeed, one of the indicators for stability in multi-ethnic states is the existence of affiliations that cut across categories, such as a common religion uniting diverse ethnic groups. See *supra* note 40.

53. See Jeremy M. Weinstein, *Mozambique: A Fading U.N. Success Story*, 13 J. DEMOCRACY, Jan. 2002, at 141, 142-43.

54. See LEVINE, *supra* note 27, app. § VI(A).

do live predominantly in one geographical area, geography operates against the Oromo's interest in self-determination, as they are the most widely dispersed of all the Ethiopian peoples.<sup>55</sup>

That is not to say that ethnic disputes are hopelessly complex. But ethnic conflicts do occur in a variety of forms that defy a single archetype. First, the familiar dynamic of a dispute between a civic-identified majority and an ethnic-identified minority is not necessarily the dominant pattern in multi-ethnic states. Consider the three conflicts discussed above. Not one of these disputes is the story of a minority ethnic group oppressed by a controlling majority.<sup>56</sup> In Benshangul-Gumuz, for example, the Berta are certainly a minority within Ethiopia at large, but so are the Gumuz. Within the scope of the conflict itself, the Gumuz are in the stronger political position, but the Berta have roughly equal numbers and both are major players within their immediate region.<sup>57</sup>

The nature of these relationships has important consequences for the success of structural solutions. The asymmetrical government structures and exceptionalism that can be productive in accommodating a minority group within a majority-dominated state will not likely succeed here.<sup>58</sup> Instead, numerous national identities must somehow be accommodated within the standard state structure. Ethiopia is extreme in the sheer numbers and diversity of its ethnic groups, but many multi-ethnic states share this pattern of numerous small and large ethnic groups with complex, overlapping interrelationships.<sup>59</sup> So whereas a state like Canada that has

55. See *id.*

56. In some states, an ethnic minority dominates the majority. See A DEMOCRATIC SOUTH AFRICA, *supra* note 8, at 86. And in Ethiopia and other highly stratified states, there is no national majority at all. This is not just a matter of semantics. In the United States and other states where consistent majority-minority relationships can be identified, ethnic problems and intra-state nationalist movements are defined as a problem of minority nationalities. But where majority-minority definitions do not correspond to the actual power structure, wherever it may be, attempts to define and protect minority groups will not be an effective structure for resolving ethnic conflict. Of course, the fact that a relationship is not majority-minority does not itself inform us whether there is an unequal power dynamic at play. See, e.g., ETHNIC GROUPS IN CONFLICT, *supra* note 1, at 21–36.

57. Although the Gumuz had the upper hand in terms of local political representation, it turned out that the Berta had a disproportionately high number of representatives on the federal level. See Megiso Interview, *supra* note 24. Similarly, the Silte are one of many small communities in the Southern Nations regional state. While the Oromo do not constitute an absolute majority in Ethiopia as a whole, they are the largest of Ethiopia's ethnic groups. Majority-minority interactions are only one possible relationship among many in multi-ethnic states.

58. See generally WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 12 (1995).

59. Mozambique, for example, has two large ethnic groups that comprise 47% and 23% of its population respectively, but these two groups are broad categories that are sharply internally divided into smaller communities. The remaining 30% of Mozambique's population is also divided among numerous small ethnic communities. Nor has the largest group, the

a majority English population and a relatively geographically discrete French minority may be able to accommodate its French minority with exceptional status for the state of Quebec, Ethiopia and similar states do not have this option, for every community would be exceptional.

The disputes themselves may be over a variety of issues, and not only questions of protected minority or indigenous rights to culture, language, and so on. In the Berta, Silte, and Oromo cases, the disputes are expressed as political claims: representation, recognition, and participation. This is, to some extent, a reflection of the Ethiopian system's openness to such claims, which will be discussed in Section III. But not all claims come packaged in political or legal terms. Nationalities bicker over use of land and other resources, complain of insults and other reputational injuries, and take offense at cultural and religious practices.<sup>60</sup> These are not formally couched claims presented to political leaders, but the source of immediate arguments, fights and riots, and long-term resentments.<sup>61</sup>

Next, the very definition of ethnicity often becomes the subject of dispute, raising difficult questions about who has authority to determine a community's identity and how this can be done.<sup>62</sup> Ethnic self-identification shifts with time and circumstance, as does the significance ascribed to that identification; indeed, some communities may identify

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Macau-Lowme, become ascendant in Mozambique's politics: its political life is as fragmented as its social life. See Weinstein, *supra* note 53, at 142-43. In Nigeria there are three ethnic groups that constitute roughly two-thirds of the population, each dominating one region of the country, but the remaining 25% of the population is made up of over 200 and possibly as many as 400 ethnicities. See ROTIMI N. SUBERU, *FEDERALISM AND ETHNIC CONFLICT IN NIGERIA* 3 (2001).

60. See, e.g., Nita Bhalla, *Conflict Worsens Ethiopia's Food Crisis*, BBC NEWS, July 10, 2002, at <http://news.bbc.co.uk/2/hi/africa/2120656.stm> (on file with author) (reporting that long-standing conflicts between Afaris, Issas, Kereyu and Ittus over resources were exacerbating the effects of the drought in the Afar region); *ICRC and ERCS launch food assistance operation in Afar and Somali regions*, ADDIS TRIB., Oct. 18, 2002, available at <http://www.addistribune.com/Archives/2002/10/18-10-02/ICRC.htm> (on file with author) (drought effects have been "exacerbated by violence and clashes between different ethnic group (sic)"); *Officials, Police Accused of Human Rights Violations in Sheka Zone Arrested*, Aug. 20, 2002, at <http://www.waltainfo.com/EnNews/2002/Aug/20Aug02/Aug20e2.htm> (on file with author) (reporting complaints to the regional government of "serious violations of human and democratic rights by administration officials . . . the police and armed militia, and instigations of inter-ethnic clashes by those elements.").

61. See *Officials, Police Accused of Human Rights Violations in Sheka Zone Arrested*, *supra* note 60.

62. Self-definition is a fundamental but not absolutely determinative approach, particularly as there may be differing opinions within the group and among other interested parties. See Jerome Wilson, *Ethnic Groups and the Right to Self-Determination*, 11 CONN. J. INT'L L. 433, 472-76 (1996). On the related subject of defining minority and indigenous peoples, see generally Aukerman, *supra* note 1.

with multiple groups.<sup>63</sup> The Oromo are perhaps the least discrete of the ethnic groups described above, having expanded to their present 40% of the Ethiopian population through progressive and incomplete assimilation of other ethnic groups, complicating their claims to shared interests and intentions.<sup>64</sup> The Silte conflict is entirely concerned with the question of what constitutes a nationality. When the group does not agree on how it identifies itself, and especially when that identification changes over time, it is not possible to implement enduring structural solutions without some means of answering the fundamental questions about ethnicity that arise periodically.

Finally, it must be acknowledged that however problematic and shifting ethnic identity may be, it is nonetheless this identity that dominates in Ethiopia and other ethnic-identified states. Indeed, civic identity is the exception, not the norm.<sup>65</sup> Because most in Ethiopia identify primarily with their ethnic group rather than with Ethiopian citizenship overall, what could be ordinary political conflicts in a civic setting take on an ethnic identity there. If the names of political parties were substituted for the ethnic groups in the Berta case, it could appear to be an ordinary redistricting case anywhere in the world. Instead, because identification is primarily ethnic, and political and social power are wielded along ethnic lines, disputes are regarded as ethnic.<sup>66</sup>

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63. See SUBERU, *supra* note 59, at 3–4.

64. See Mekuria Bulcha, *The Survival and Reconstruction of Oromo National Identity*, in BEING AND BECOMING OROMO, *supra* note 37, at 48, 53–55.

65. Donald Horowitz noted that surveys in the ethnically divided but politically and economically well-developed states of Switzerland and the Netherlands indicated a predominant identification with the overarching civic state, whereas in the Philippines, Nigeria and Ghana, people identified with their own ethnic group and sought to elect members of their own ethnic group to the political state to represent their primary, ethnic interests. See ETHNIC GROUPS IN CONFLICT, *supra* note 1, at 6–7, 18–19. In states where ethnic groups lead relatively local existences, civic identity tends to be weak and to be constructed through ethnicity, rather than the other way around. After all, in an economically and socially divided society in which everyday tasks are carried out locally, identifying with the state requires an extension of the mind from a tangible, ethnically defined community to a largely theoretical civic one. So the Oromo give credence only to an Oromo-based state, and the Silte seek political power through ethnic identification. See SUBERU, *supra* note 59, at 6 (“[In Nigeria, t]he extent to which the ostensibly innocuous category of ‘statism’ has been able to replace, rather than simply coexist with, the more explosive ethnoregional and religious identities is debatable . . .”).

66. This phenomenon has been noted in other ethnic-identified states as well. For example, Horowitz has described the ethnicization of conflicts over facially neutral issues such as hydroelectric power in the Philippines, the status of private schools in Malaysia, and military court-martials in Nigeria. See ETHNIC GROUPS IN CONFLICT, *supra* note 1, at 8. During Mozambique’s civil war, disfavored officials claimed that a supposedly inter-ethnic opposition army actually favored southern ethnic groups at the expense of the northern Makombe people, and rumors of bias continued throughout the war. See Weinstein, *supra* note 53, at 145.

From these characteristics, the image emerges of ethnic conflicts with numerous causes, interwoven with religious, economic, and other concerns, and shaped by the particular qualities and interrelationships of the involved ethnic communities. Looking ahead to the question of a role for legal process, it would be difficult to use the familiar legal categories to analyze these ethnic disputes. In particular, much as the political solution of asymmetry and exceptionalism does not fit a multi-ethnic setting, the logic of minority or indigenous rights does not fit a situation in which all the parties are minority or indigenous groups. However, the complexity and dynamism of the ethnic interrelationships suggest a need for process based approaches. In the context of active communities defined by ethnicity and ever changing ethnic allegiances and balances of power, it will not be possible for an initial political structure to head off all ethnic conflict.

### *C. The Second Reality: Democracy as Catalyst for Conflict*

It is tempting to suggest that securing a democratic political system and protections for basic civil liberties will allow ethnic disputes to be worked out in time. But the benefits of democracy and liberty are long-term. In the short-term they destabilize.

A transitional period when a state is making its first steps toward democracy and civil rights is often a time of great risk for stirring up ethnic animosities. In the post-communist Central and Eastern European states, for example, "ethnic-nationalist mobilization thrives on the newly won political resources (such as the right to form parties, free elections and freedom of the media) of liberal democracy."<sup>67</sup> And if there has been conflict in some states, in others like Yugoslavia and Rwanda, there has been genocide. In both states, politicians and leaders fomented ethnic violence as a way of maintaining their power in the midst of democratic transitions.<sup>68</sup> And in both Yugoslavia and Rwanda, expressive media fostered by relatively new civil liberties and abused by political leaders provided the means for widespread ethnic appeals to the population and rapid disintegration into ethnic warfare.<sup>69</sup> In the Ethiopian context, the

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67. ELSTER, *supra* note 3, at 254. Elster and Preuss go on to argue that "such mobilization, and through it concomitant spread of fear and distrust, exclusion and repression, is in turn a powerful menace to the maintenance of liberal democracy and its basic principle of equal and 'single status' citizenship, and hence to democratic consolidation in general. In short: Democracy is good for ethnic mobilization, but not so vice versa." *Id.* (emphasis omitted).

68. See SNYDER & BALLENTINE, *supra* note 7, at 88-89; Magnet, *supra* note 40, at 401 (noting the rise of nationalist movements in Central and Eastern Europe after the end of Soviet influence).

69. Jack Snyder and Karen Ballentine argue that because "sudden liberalizations of press freedom have been associated with bloody outbursts of popular nationalism," "promot-

government has repeatedly accused the Oromo press of fomenting unrest, and it has detained Oromo journalists and censored newspapers on the basis of those claims.<sup>70</sup> While the truth of the accusations against the Oromo press has not been independently confirmed or refuted, painful experience in newly opening societies does demonstrate that freedoms of speech, press, and association will be used by ethnic groups to promote nationalist, and conflict producing, agendas.<sup>71</sup>

While civil liberties and free speech are frequently the means of stirring up ethnic conflict, democratic processes such as elections often provide the occasion for ethnic disputes. Because political disputes in ethnic-identified societies tend to be characterized by the participants in ethnic terms, political processes such as elections are often ethnically charged, with candidates campaigning on the basis of ethnic loyalties and animosities.<sup>72</sup> In states such as Zimbabwe, elections have provided both an incentive for political leaders to call on ethnic supporters and a

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ing unconditional freedom of public debate in newly democratizing societies is, in many circumstances, likely to make the problems worse." SNYDER & BALLENTINE, *supra* note 7, at 61. Specifically, they contend that after sudden liberalization of the press in Rwanda in 1990, "'A vibrant press had been born almost overnight,' but its biased commentary was written 'in terrible bad faith.'" *Id.* at 88 (quoting Gérard Prunier). Extremist ethnic nationalist media reports, together with the political threat to the ruling party created by legalization of opposition political parties and democratic elections, caused the 1993 massacres. *Id.* at 88–89. They sharply criticize subsequent appeals by human rights organizations for democratization and liberalization: "the NGOs continue to advocate precisely those measures that their analyses show to have triggered the killings: an increase in political pluralism, the prospect of trials for the guilty, and the promotion of anti-government media." *Id.* at 87. Rather, they contend that the lesson from Rwanda is that "the ideals of democratic rights, uncompromising justice, and free speech must make pragmatic accommodations to recalcitrant reality." *Id.* at 89..

70. See HUMAN RIGHTS WATCH, HUMAN RIGHTS OVERVIEW, ETHIOPIA (Jan. 2004), at <http://hrw.org/english/docs/2004/01/21/ethiop6903.htm> (last viewed June 11, 2004).

71. More than once, a newly liberalized and unregulated marketplace of ideas has spurred immediate exploitation of vulnerable ethnic groups. Veritable Walmarts of ethnic conflict have sprung up where only mom and pop stores eked along before. See SNYDER & BALLENTINE, *supra* note 7, at 62–63.

Just as economic competition produces beneficial results only in a well-institutionalized marketplace, where monopolies and false advertising are counteracted, so too increased debate in the political marketplace leads to better outcomes only when there are mechanisms to correct market imperfections. Many newly democratizing states lack institutions to break up governmental and non-governmental information monopolies, to professionalize journalism, and to create common public forums where diverse ideas engage each other under conditions in which erroneous arguments will be challenged. In the absence of these institutions, an increase in the freedom of speech can create an opening for nationalist mythmakers to hijack public discourse.

*Id.*

72. See AMY CHUA, WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY 161–63 (2003) (reviewing the contribution of democracy to ethnic violence but arguing that capitalism plays an overlooked role).

catalyst for frustrated, long disenfranchised ethnic groups to consider and act upon their grievances against an ethnically-defined elite.<sup>73</sup> Furthermore, any anomalies in democratic processes may well be blamed on ethnic bias.<sup>74</sup> We see this in the Berta's claim that the Gumuz have disproportionate representation in the regional legislature, although in this case the ethnic nature of the apportionment of representatives makes such claims all but inevitable.

Not only do young democracies provide the motive and means for stirring up ethnic conflict by introducing elections and civil liberties, they also provide a hospitable environment for conflict to grow. Indeed, an ethnic conflict in a new democracy can move quickly from being an isolated social dispute to a challenge to the state's very existence. With some combination of weak economies, new political institutions, and shaky social infrastructure, such states suffer both from low credibility with ethnic groups and from vulnerability to the disruption caused by their crises. In Benshangul-Gumuz, the regional and federal governments are less than ten years old, and the economic and social infrastructure is feeble: this region is one of the poorest, most isolated, and most undeveloped regions in Ethiopia.<sup>75</sup> When the Berta could not get what they wanted from the regional legislature, they simply abandoned it, escalating the conflict from an isolated political concern without collateral effects, to a direct challenge to the working and existence of the Benshangul-Gumuz regional state. Likewise, the Oromo Liberation Front simply walked out of the federal constitution-drafting process when it was not to their liking. When structural solutions fail, states need a conflict resolution system that can pull the parties into resolving their dispute within the auspices of state institutions. Otherwise, they may well resort to self-help that at best will undermine the state's authority and at worst may bring it down.

It is important to note, however, that there is considerable variation in the level of threat that each of these disputes poses to the Ethiopian government. While the Berta dispute takes place at the regional level and interweaves ethnic with political identifications and concerns, the Oromo dispute is with the federal government at the highest level. The Berta dispute undermines the authority of the regional government but leaves federal legitimacy intact, while the Oromo dispute questions the integrity of every level of government. Meanwhile, the Silte do not question the legitimacy of any level of government but rather seek to be incorporated into it. The Silte dispute presents primarily a local challenge, the Berta

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73. See *id.* at 123–30.

74. See, e.g., Toungara, *supra* note 2, at 64.

75. See discussion *supra* note 46.

primarily a regional challenge, and the Oromo an all encompassing federal one.

Nonetheless, even conflicts that do not implicate the state's political structure can pose a substantial threat to the young democratic state if they are recurrent or raise underlying concerns. The Silte conflict over their identity in relation to a larger group was certain to be raised again by some other small community even if mediated between the Silte and the Gurage. And in Benshangul-Gumuz, it emerged upon investigation that the Berta's claim of underrepresentation was only the tip of the iceberg: roughly half the residents of the regional state were utterly disenfranchised as members of locally non-indigenous ethnic groups who were not entitled to vote.

Finally, even as participation in democratic institutions may spur ethnic conflicts, those institutions are not necessarily capable of resolving those conflicts. The contention that the Berta's representation is inadequate and the democratically elected legislature unresponsive cannot be answered by the same democratic processes and legislature the Berta challenge as unfair. They require some other arena for resolving the dispute.

Looking to democratically elected legislatures to resolve systemic ethnic conflict is an extremely indirect and gradual approach under the best of circumstances. This strategy depends upon the development of institutional responsiveness to ethnic concerns and the eventual re-channeling of power through ethnically neutral civic institutions. Structural solutions, such as electoral systems that encourage the formation or inter-ethnic political coalitions, do seem to foster long-term stability in ethnically divided states.<sup>76</sup> But without a means for resolving immediate conflicts, the state may not survive long enough for this process to succeed.

#### *D. The Third Reality: Neutrality Fails Ethnic Conflict*

Although ethnic identification is not consistent over time, it is persistent nonetheless. In the context of strong ethnic identifications, formal ethnic neutrality has not proven to be a firm basis for ethnic stability in developing and newly democratic multi-ethnic states. For one thing, formal policies of ethnic neutrality are rarely matched by actual experiences of ethnic equality. In Ethiopia, the Berta in Benshangul-Gumuz are among the most impoverished ethnic groups in the country.<sup>77</sup> The Amharic vernacular for the Oromo people was, until recently, the highly

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76. See generally Donald L. Horowitz, *Electoral Systems: A Primer for Decision Makers*, 14 J. DEMOCRACY, Oct. 2003, at 115.

77. See SECOND ANNUAL REPORT, *supra* note 22.



insulting term "galla," which means "slave."<sup>78</sup> Ethnically neutral policies tend to perpetuate existing inequalities, making it impossible for disadvantaged groups to aspire to an equal role in political and social life, and fostering conflict between advantaged and disadvantaged ethnic groups and between disadvantaged ethnic groups and the state.

In addition, ostensibly ethnically neutral political policies may themselves be only superficially neutral. Often, an ascendant ethnic group has created a purportedly non-ethnic government structure that is actually filled with its own members, and has touted the benefits of ethnic neutrality and equality in order to mask its own monopoly on power and the underlying power and resource imbalances between ethnic groups.<sup>79</sup> Some claim this is the situation in Ethiopia, contending that the government's message of ethnic inclusiveness and self-determination is mere rhetoric masking the ascendancy of the Tigrean nationality.<sup>80</sup>

Not only is ethnic neutrality often merely a mask for ethnic inequalities, the civic state may not have the ability to influence these inequalities, even if it wishes to do so. Ethnic power structures are often better established and more functional than the civic state in newly democratic and transitioning states. Ethiopia's ethnic groups have been developing for over a thousand years, in contrast to the government's mere decade of experience. If the infant civic state tries to compete with longstanding ethnic leaders instead of giving them an opportunity to participate in the system on behalf of their ethnic constituencies, it encourages them either to ignore it or oppose it. Far more rooted in society than relatively new and untrusted state structures, ethnicity has the advantage in these competitions.

Finally, if the state does have some hope of influencing ethnic actors, a policy of formal ethnic blindness may undermine that effort. Such policies idealize the state as a distant, ethnically uninvolved objective actor. At times, this policy is adopted out of admirable ideals of equality among people under the law and the government. A civic government may wish to hold itself above the fray of ethnic conflict. But in the context of actual ethnic strife, such passivity is dangerous.

This is not to deny or diminish the risk that acknowledgement of ethnicity poses. As discussed below in Section III, official recognition of ethnicity historically has been used more often to the detriment of non-dominant ethnic groups than to their benefit. But it is also important to recognize that in ethnically divided settings, apparent ethnic neutrality can also serve as a means to ethnically biased ends. Certainly, ethnic-

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78. See Hultin, *supra* note 47.

79. See A DEMOCRATIC SOUTH AFRICA, *supra* note 8, at 86.

80. See, e.g., Harbeson, *supra* note 17, at 62; Joseph, *supra* note 17, at 55.

identified states cannot rely upon formal blindness to ethnicity in policymaking as a blanket solution for ethnic conflicts, and in some circumstances, taking account of ethnicity will be more effective than ignoring it. The difficult but crucial judgment that ethnic-identified states must make, as discussed below, is under which circumstances they should take account of ethnicity, and how they should do so.

It may also be tempting to suggest that even if ethnically neutral policies fail in preventing conflict, ethnically neutral institutions may be able to resolve them. In particular, ethnic groups could turn to the ordinary, ethnically neutral judicial system to handle their disputes as it does all others, without resorting to special models or theories of legal process. Of course, some multi-ethnic states do rely on the judiciary for resolution of ethnic disputes.<sup>81</sup> The apparent advantages of using courts to address ethnic disputes are obvious: they offer a politically neutral forum and expertise in dispute resolution. The process of litigation requires each party to set forth, substantiate, and permanently record their claims and demands, crystallizing and clarifying the parties' positions and goals. Courts are also authoritative mediators whose legitimacy is pre-established, who can issue binding judgments to resolve nonnegotiable disputes, and who can enforce those judgments with the power of the state.

Or rather, in an idealized state, courts would offer all these benefits. In developing or newly democratic states, often they do not. In Ethiopia, the courts do not have expertise in resolving group or political disputes. Rather, they are used exclusively for criminal prosecutions and individual claims.<sup>82</sup> Far from being politically neutral or legally adept, judges in local trial courts are often simply local bureaucrats or local leaders who are untrained in the law. The narrow focus of the Ethiopian courts upon individual disputes or criminal prosecutions, together with the limited

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81. Yash Ghai points to South Africa, Spain, India, Sri Lanka and Papua New Guinea as states where the judiciary has played a significant role in ethnic disputes, to the former Yugoslavia and Hong Kong as states in which the courts were disempowered from a role in ethnic dispute resolution by political forces, and to Ethiopia as a state at risk of failure due to its weak and disempowered judiciary. See Yash Ghai, *Ethnicity and Autonomy: A Framework for Analysis*, in *AUTONOMY AND ETHNICITY*, *supra* note 43, at 20–21; see also Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts*, 37 CT. REV. 54, 60–62 (2000).

82. See Interview with Justice Sinidu Alemu, Ethiopian Supreme Court, Addis Ababa, Ethiopia (Oct. 18, 2002) (on file with author) (interviewee speaking in her personal capacity) [hereinafter Alemu Interview]. The Council of Constitutional Inquiry has jurisdiction over constitutional claims, and there is no procedural mechanism for instigating class action or public interest litigation.

resources and personnel of such courts, makes them ill suited to, and ill equipped for, ethnic conflict resolution.<sup>83</sup>

Fundamentally, the ordinary courts may be unavailable as a forum for ethnic groups. The law may not grant standing to ethnic groups as parties, or may not recognize group interests or rights.<sup>84</sup> Even if the court system is technically open to ethnic groups as parties, it may lack credibility with them. While the judiciary may be ostensibly ethnically neutral, it is part of the political power structure, which in ethnic-identified states, may well be tacitly ethnically defined. Ostensible ethnic neutrality may mask underlying ethnic domination, or may at least be perceived as doing so.<sup>85</sup>

In addition, the nature of ethnic claims may make use of the ordinary judicial system difficult. Some ethnic conflicts do not involve strictly legal claims at all, but political or social ones ungrounded in any particular law. The Oromo, for example, have not characterized their claims in legal terms. Attempting to shoehorn the parties' non-legal interests into legal claims may well obfuscate the parties' concerns rather than clarifying them. Furthermore, such legal maneuvering may not even be possible. While in common law systems courts may be willing to consider claims based on unwritten common law rights, in civil law systems, judges are reluctant to create rights from past practice or to expansively interpret legal provisions to permit new claims.<sup>86</sup> It would be impossible to bring the Berta's representation case to court without governing legislation for the court to apply.

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83. Even the Ethiopian government itself and commentators sympathetic to the government acknowledge the weakness of the court system as a fundamental problem. See Henze, *supra* note 17, at 52; Embassy of Ethiopia Website, *The Judiciary-Structure and Independence*, at <http://www.ethiopianembassy.org/judiciary.shtml>.

84. Civil law systems have tended to adhere strictly to the idea that "only individual 'persons'—natural or legal—can be participants in the legal and judicial processes" and thus to grant standing only to those groups that have been recognized by the state as "legal persons" generally and not merely for purposes of litigation. MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 296 (1989). An interesting example of such legal recognition was a 1972 French statute that granted standing to bring claims on behalf of racial minorities to "every association that has been duly certified at least five years before the time of the facts, whose purpose, as set out in its charter, is to fight against racism," but not, apparently, to minority groups themselves. *Id.* at 287 n.71. As indicated by this example, ethnic groups and other groups that are either "non-personalized, unincorporated, de facto organizations and other associations" or "organizations . . . seeking access to court . . . to protect the rights of their members or the collective rights of classes or groups" have often found themselves without standing to bring their claims. *Id.* at 297.

85. See A DEMOCRATIC SOUTH AFRICA, *supra* note 8, at 86.

86. See CAPPELLETTI, *supra* note 84, at 294–95 ("[T]he education and training of civil law judges, rooted in many layers of civil law history and in a rigid conception of separation of powers, makes them . . . wary of too evident manifestations of law-making through the courts.")

Civil law systems have historically been inhospitable not only to ethnic claims but to many public interest claims and group claims. Public and private law have typically been strictly divided into separate spheres, and only the state has traditionally had jurisdiction to bring public claims. At times, legislatures have passed laws specifically authorizing certain public claims or granting standing to certain groups, and at times courts have recognized such claims and groups, but by and large the use of the ordinary courts for public interest litigation pushes the civil law processes and judges outside of their usual role.<sup>87</sup>

Practically speaking, litigation on issues of public relevance and group rights is a complex and grinding task even in systems that are set up to accommodate such claims. In any setting, it is difficult for parties to adduce evidence for broad social claims. Likewise, it is difficult for courts to handle complex facts or to oversee complex solutions; rather, such claims take courts far outside the realm of core legal analysis.

Furthermore, in many developing states, far from being authoritative decision-makers, the legitimacy and credibility of the judicial system is low even for the purposes for which it is generally used, much less for the innovative purpose of resolving ethnic conflicts.<sup>88</sup> This makes parties reluctant to bring their claims to court, and also exacerbates the always present problem of enforcing any judgment, particularly in politically or socially charged cases. In Ethiopia, it is common wisdom that taking a case to court is a good way to extend the dispute forever. Through a combination of lack of court resources to address cases in a timely manner, corrupt clerks willing to lose files for a small price, and the availability of repeated appeals, a defendant can avoid judgment for years. And when judgment is finally handed down, who will make the defendant comply?<sup>89</sup>

In states with well respected judicial systems that are equipped and accustomed to handing political claims, resort to the courts to resolve

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The 'proprietary' concept of rights and *locus standi* is very clear and simple in the civil law tradition—indeed much too simple to reflect present realities. . . . Today's reality . . . is much more complex and pluralistic than that abstract dichotomy [between public and private]: between the individual and the state there are numerous groups, communities, and collectivities which forcefully claim the enjoyment and judicial protection of certain rights which are classifiable neither as 'public' nor 'private' in the traditional sense.

*Id.* at 273.

88. See *id.* at 158–59.

89. This assessment of the common wisdom on the court system is based on my conversations with dozens of people and visits to several courts during 2002. Whatever the truth of these claims, the common adherence to these beliefs indicates that the courts' credibility is low.

ethnic disputes might be appropriate. And when ethnic disputes can be narrowed to individual specifically legal claims, such as a claim of false arrest on the basis of ethnicity, courts may be well suited to handle those claims as well. But where ethnic conflict claims fall far outside the norm of the disputes the courts ordinarily handle, or where the courts' credibility and resources are low, relying primarily on the courts to resolve ethnic disputes is not a good option. Furthermore, where there is deep suspicion of ethnic bias within ostensibly neutral state structures, express acknowledgement of ethnicity and ethnic interests offers more hope of inspiring confidence than claims of neutrality.

However, legal process may have a role to play in ethnic disputes, even if the ordinary courts may not be the best place for the resolution of an immediate conflict. Many of the inadequacies of the ordinary judicial system described above stem not from the nature of legal process, but from the blindness of ethnically neutral legal institutions to ethnic concerns. Accordingly, these inadequacies reveal some of the qualities that would promote successful use of legal process in resolving these disputes. If a judicial institution were to acknowledge ethnic groups as proper parties, recognize their interests and claims as genuine communities representing their members, openly admit the ethnic nature of their conflicts, and craft procedures that facilitated consideration of complex group and social concerns, they might be able to address ethnic concerns after all.

### III. LEGAL PROCESS MODELS AT WORK IN ETHNIC CONFLICT RESOLUTION

The grave risk that inter-ethnic conflict poses to multi-ethnic states and the seeming inevitability of periodic disputes arising among ethnic-identified communities together provide states with a powerful incentive to develop methods of conflict resolution. Legal processes present one possible approach.

But the three realities discussed in the last Section warn that an ethnic conflict resolution system will need to be carefully tailored to succeed. Because inter-ethnic relationships and conflicts are legion and variable, legal processes and categories must be flexible enough to accommodate these differences. Because democracy and civil liberties tend to foster rather than to resolve immediate ethnic conflicts, legal processes cannot rely on these characteristics as stabilizing elements. Because ethnic-blind policies and institutions are often ineffective, legal processes must find appropriate ways of taking account of ethnicity.

What advantages can legal processes bring to ethnic conflict resolution? The Ethiopian system provides a useful context for considering this question, because it blends legal and political processes to create a hybrid conflict resolution system aimed specifically at ethnic conflict.

The Ethiopian system has three distinctive qualities: it establishes a permanent, ethnic focused institution that grants some measure of standing to all ethnic groups; it is structured to employ complementary consensual and adjudicative processes; and it relies on constitutional interpretation to resolve national disputes. Each of these qualities reflects a concern for the realities discussed in the last Section. Each also raises a fundamental question about the appropriate role of legal process in ethnic conflicts that deserves further consideration: Should states ever recognize ethnic groups? Which aspects of legal process might be effective in resolving ethnic conflicts? And what kinds of constitutional principles and standing will be appropriate for the ethnic conflict context?

Part A of this Section will provide an introduction to the Ethiopian system and describe how that system addressed the problems of the Berta, the Silte, and the Oromo. Part B will consider the distinctive qualities of the Ethiopian system in turn, discussing their relationship to the realities discussed in the last Section, their effectiveness in the context of the Berta, Silte, and Oromo conflicts, and the questions they raise about the potential for legal process to resolve ethnic conflicts.

### A. *The Ethiopian System*

#### 1. Structure

Ethiopia is a place of extremes. It is an ancient nation with a young government, and a vast nation that is deeply impoverished.<sup>90</sup> Several million people have crowded into the capital city of Addis Ababa, but ninety percent of Ethiopians still make their living as subsistence farmers or pastoralists across the country's dry mountain highlands, parched desert lowlands, and damp agricultural plains.<sup>91</sup> Ethiopia has been racked by wars during the last thirty years, but it has thus far avoided the gruesome mob marauding and genocides that have engulfed so many states.<sup>92</sup>

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90. The Axumite state, the earliest cognizable predecessor to present-day Ethiopia and the foundation of its national identity, was established in approximately 100 A.D., so by this measure Ethiopia is nearly 2,000 years old. See ABERRA JEMBERE, AN INTRODUCTION TO THE LEGAL HISTORY OF ETHIOPIA: 1434–1974 (2000); MARCUS, *supra* note 21, at 5. In contrast, the current government is only about ten years old. See Constitution Proclamation, *supra* note 22. Regarding Ethiopia's economic condition, see discussion *supra* note 22.

91. See FDRE Parliament website, *supra* note 20.

92. Ethiopia has suffered a military coup, 17 years of civil war and 12 years of border wars since 1974. See discussion *supra* notes 21–22.

Ethiopia calls itself a "Nation of Nations," and with hundreds of small, discrete ethnic communities, it has good claim to that title.<sup>93</sup>

The extremity of Ethiopia's circumstances has fostered a willingness to adopt extreme political strategies. Foremost among these is its policy toward its ethnic groups. When it established its new government in 1994, Ethiopia adopted a political structure that it calls "ethnic federalism." It organized the regional states of its federation as nearly as possible along ethnic lines.<sup>94</sup> All ethnic groups, not just minority or indigenous groups, have the constitutional right of self-determination. That right is nearly absolute, including not only cultural rights, but self-government, statehood, and even secession.<sup>95</sup>

In the broadest sense, this is a classic political structural solution to ethnicity: Ethiopia has designed the framework of its political institutions with the express purpose of defusing ethnic tensions and preventing ethnic conflicts. But unlike most such solutions, it incorporates and emphasizes ethnicity rather than attempting to counterbalance or ignore it. Other countries have structured at least some regional states along ethnic lines, but only rarely is this the exclusive method of drawing borders.<sup>96</sup>

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93. See, e.g., ETH. CONST. pmbl. (opening with "We, the Nations, Nationalities and Peoples of Ethiopia."); see also FDRE Parliament website, *supra* note 20; Embassy of Ethiopia website, *Population*, *supra* note 21 (describing the country as "a mosaic of diverse people who live peacefully, side-by-side speaking a multitude of different tongues, practicing different religions and customs, and celebrating a rich and eclectic history.").

94. See ETH. CONST. art. 47.

95. *Id.* art. 39.

96. There are a number of federations that have at least some ethnically defined semi-autonomous federal units. Kymlicka lists Canada, Switzerland, Belgium, Nigeria, India, Malaysia, Ethiopia, Spain and Russia. See KYMLICKA, *supra* note 58, at 211 and 211 n.8. In addition, China has a unitary state structure with semi-autonomous territories for recognized minority ethnic groups. See Yash Ghai, *Autonomy Regimes in China: Coping with Ethnic and Economic Diversity*, in AUTONOMY AND ETHNICITY, *supra* note 43, at 78, 82-84.

But these federations are different from Ethiopia in one of two important respects. First, many of these states have majority ethnic groups, and their primary subdivisions as a federation are not ethnic in nature but are simply regional administrative subdivisions. Canada, Spain, and Russia are examples of this primarily administrative structure. See KYMLICKA, *supra* note 58, at 212 n.9. In these states, the ethnic subdivisions are anomalous among the federal subdivisions and therefore do not transform national politics as a whole into an ethnically determined arena by virtue of their existence. So one would not regard the Canadian federation, for example, as being one primarily determined by ethnicity although the state of Quebec is ethnically defined, nor would one describe Canadian national politics as being driven primarily by ethnicity by virtue of the existence of Quebec. See generally Watts, *supra* note 43, at 29.

Also, the federations in which the federal subdivisions are primarily or absolutely ethnic or ethno-linguistic in nature tend to have substantially simpler political structures than Ethiopia does. Both Belgium and Switzerland, for example, are composed of only a few primary linguistic groups, each with its own federal subdivision, within a relatively small total geographical area. In contrast, Ethiopia has over 80 ethnic groups divided between 11 federal subdivisions defined by the dominant ethnic group in that territory, within a relatively large total geographical area. There are also, of course, differences in resources and development, as

And the universal and virtually unqualified right of secession held by Ethiopia's Nationalities is, to my knowledge, unprecedented.

Ethnic federalism is controversial. Critics charge that using ethnicity as a building block for the government feeds nationalist fervor and sets the stage for inter-ethnic violence. Some argue that the right of secession in particular is a catalyst for conflict, and that its guarantees of self-government are hopelessly divisive and complex. Others claim that ethnic federalism is a mere sham to disguise the hegemony of a single ethnic group.<sup>97</sup>

These criticisms may be well founded. Certainly there is no consensus on an appropriate design for political structures in ethnic-identified states.<sup>98</sup> But ethnic federalism is not the whole of the Ethiopian approach to ethnicity. Ethiopia has also established a conflict resolution system directed specifically at ethnic disputes. Amidst the hubbub over the ethnic federalist structure, the conflict resolution aspect of the Ethiopian system has been neglected. It deserves consideration on its own merits.

Ethiopia's conflict resolution system is centered in the institution of the House of the Federation, the upper house of Parliament. While the lower house has legislative powers and its members are elected from districts within each regional state, the House of the Federation has a different composition and role. It is composed of representatives from each of the Nationalities.<sup>99</sup> It does not have traditional legislative powers

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well as differences in the comparative development of a unifying national culture and civic society, and in the strength of federal institutions. In sum, Ethiopia's ethnic federalism differs from other federations in being so complexly and completely ethnically defined.

97. For competing views on the questions of Ethiopia's ethnic federalism and whether it represents true democracy or one-party rule, compare Henze, *supra* note 17, with Joseph, *supra* note 17, and Harbeson, *supra* note 17. See also Selassie, *supra* note 17. The EPRDF, the ruling party, is a coalition of four ethnic parties, the TPLF, the Amhara National Democratic Movement, the Oromo Peoples Democratic Organization ("OPDO"), and the Southern Ethiopia Peoples Democratic Organization ("SEPDO"). See Ethiopian Embassy website, *Political Parties*, *supra* note 21. Opponents contend this coalition is in fact controlled by the TPLF; see, e.g., Harbeson, *supra* note 17, at 65–67. According to the Ethiopian Parliament website, the EPRDF currently controls 481 of the 547 seats in the House of Peoples' Representatives, the lower, legislative house of the federal Parliament. See House of the People's Representatives website, *Party Affiliation of Members of The House of Peoples' Representatives*, at <http://www.ethiobar.net/English/hopre/politi.htm> (last viewed May 23, 2004).

98. See ETHNIC GROUPS IN CONFLICT, *supra* note 1, at 601–02.

99. Each Nationality is entitled to one representative, plus an additional representative for each one million of its population. See ETH. CONST. art. 61, §§ 1–2. Representatives are not elected directly by each Nationality en masse, however. Rather, each regional state council selects the representatives for the Nationalities that comprise it. See *id.* art. 62, § 3. While the constitution permits the regional state councils to organize direct elections within their region, none have done so. Rather, all have maintained the power to choose the representatives themselves. Because representation is organized by regional state, even if the regional states were to hold direct elections, a Nationality that was spread across two or more regional states would



but rather is charged by the constitution with maintaining the country's ethnic, regional and federal relationships.<sup>100</sup> This includes the roles of dispute resolution and constitutional interpretation.<sup>101</sup>

Under the auspices of this constitutional authority, the House of the Federation effectively has jurisdiction over all ethnic disputes, whether formal or informal, legal or political, big or small. Because the regional states are defined by their ethnic composition, the House of the Federation's powers with respect to the regional states are interrelated with its powers with respect to Nationalities, and inter-state disputes are often ethnic disputes as well.<sup>102</sup> Similarly, because the constitution establishes Nationalities rather than individuals as the fundamental constituents of the Ethiopian federation, many aspects of the constitution and constitutional interpretation will have at least some ethnic aspect, well beyond the express Nationality rights themselves.<sup>103</sup>

Apart from the constitutionally prescribed procedures for handling Nationalities' petitions for statehood or secession, the House has discretion under the constitution to create whatever procedures it sees fit for adjudicating these disputes.<sup>104</sup> When the Berta and Silte cases were first taken under consideration, the House was still developing its procedures and no law had yet been passed governing its activities. Under a more recent law consolidating the House's authority, the House maintains considerable flexibility.<sup>105</sup> The procedures set forth in this law to some extent represent the prior practice of the House. Certain elements, however, are aspirational, such as specific deadlines for issuing decisions, and stricter exhaustion, standing, and other admissibility requirements.

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elect its representatives separately within each regional state. *See* Megiso Interview, *supra* note 24.

100. It has other powers as well, including allocating tax revenues between the federal and regional state governments. *See* ETH. CONST. art. 62.

101. For a discussion of the decision to give the power of constitutional interpretation to a house of the Parliament, *see* discussion *infra* Part III.A.1.

102. Similarly, many local communities are defined by ethnicity and so local political disputes may be ethnic in character. In considering the Ethiopian constitution, and especially the role of the House of the Federation, it is essential to keep in mind that strong ethnic identifications are at play in many matters of public concern. The House of the Federation has the responsibility of resolving disputes between Nationalities both directly by intervening or mediating in disputes and indirectly by "promoting unity" and deciding underlying constitutional issues. *See* ETH. CONST. art. 62.

103. *See id.* art. 8 ("All sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia.").

104. *See id.* arts. 39, 47.

105. The law lists categories of disputes and very general descriptions of the processes for each. In the catch-all category of "miscellaneous misunderstandings and disputes," the House has authority to "strive to find a solution in any mechanism possible." HOF Proclamation, *supra* note 22, art. 32(2).

Most cases are intended to move through a multi-stage process. Upon receiving a petition, the House initially encourages direct negotiation between the parties. If this fails, the case progresses to mediation by House representatives, and then to adjudication by the House as a final measure. The exceptions to this pattern are cases that call for constitutional interpretation, claims by Nationalities for enforcement of constitutional rights, and border disputes: in these cases the House's role is adjudicative.<sup>106</sup>

Ethiopia's conflict resolution system is thus a blend of the legal and the political on several levels. At the institutional level, the House of the Federation is a quintessentially political body, but one that has been designated for adjudicative purposes. At the process level, the act of constitutional interpretation is a trademark legal process, but one that is fraught with political concerns, while processes of mediation and adjudication are used in both legal and political settings. Finally, ethnic conflicts are themselves often an unstable combination of the legal and the political. The procedures set forth in the constitution and the relevant law are described in extremely broad terms, and could be carried out in ways that pushed the House's adjudicative style either more toward the political or toward the legal aspects of its role. Accordingly, it is through

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106. Specifically, in any dispute concerning a Nationality's constitutional rights, the Nationality itself has standing to petition the House directly. The Nationality must first exhaust state-level procedures, and its representatives must meet certain requirements to demonstrate genuine agency. This part of the law is silent on the question of negotiation or mediation, stating simply that the House "shall make [a] decision." It is interesting to note that while the subject of Nationality claims is limited to implementation of constitutional rights, the law does not presume that this would necessarily fall under the House's general power of constitutional interpretation and the related procedures. *See id.* arts. 19–22.

In cases of border disputes, the law also does not mandate negotiation or mediation. Rather, the House is to hold a popular referendum of the affected communities and gather evidence of settlement patterns before adjudicating the matter. The law does not state who has standing to bring a border dispute nor what procedure the petitioner should follow. *See id.* arts. 27–31.

In all other cases, the process moves from consensual to adjudicative methods. In disputes between states or between states and the federal government, the law calls for facilitation and mediation of direct discussions between the parties, followed by submission of the dispute to the House if those negotiations fail. If submitted, the House must either facilitate further discussions between the parties or take arguments and evidence in writing from them to adjudicate the case. It can put into place a preliminary solution in the interim. The text of the law is ambiguous as to whether this category comprises only disputes exclusively between government entities, or whether it also includes disputes between Nationalities or individuals and government entities. *See id.* arts. 23–26. In cases of other "miscellaneous disputes," the House has absolute discretion to use any means to resolve the disputes, although there is again an emphasis on consensual resolution if possible. *See id.* art. 32.

Finally, as a general matter, the House is directed to study and institutionalize traditional mechanisms of conflict prevention and resolution. *See id.* art. 33.

the practices that the House is developing to carry out its hybrid role that the balance between the legal and the political will be drawn.<sup>107</sup>

Implementation of this program has not been a panacea for Ethiopia's ethnic conflict.<sup>108</sup> Indeed, it is too early to assess the system's ultimate success. Ten years into the existence of the new constitution and its conflict resolution system, implementation is just beginning. But the preliminary successes and failures in the Berta, Silte, and Oromo cases offer insight into the potential of processes focused specifically on ethnic conflict, point to concerns that should be addressed in determining whether and how to offer such processes, and suggest factors that may weigh on their ultimate effectiveness.

## 2. The Berta: Mediation

When the Berta Nationality walked out of the Benshangul-Gumuz regional parliament over the issue of proportionate representation, they brought it to a halt. The Benshangul-Gumuz government asked the Prime Minister's Office to intervene, but the Berta reportedly rejected the proffered negotiators as likely to favor the regional government. The Benshangul-Gumuz government and the Berta then jointly appealed to the House of the Federation to consider the case under the auspices of its constitutional authority over inter-ethnic and regional conflicts.<sup>109</sup>

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107. The distinction between legal and political processes in matters of public dispute is not well-defined even in theory. Although they are to some extent adjudicative, Ethiopia's processes are certainly not judicial, as they do not meet the core requirements of an independent, neutral judge and of an adjudicative process with established procedures that meet basic due process standards. However, while traditional legal process theory might marry the judicial and the legal, modern practice and theory often take a broader view, characterizing certain non-judicial processes as nonetheless legal. See discussion *infra* Part III.B.2.

108. Conflicts between ethnic groups and the government, and amongst ethnic groups themselves, continue in various regions of the country, and these conflicts are sometimes violent. See *EHRCO Condemns Recent Attack Committed in Gambella*, ADDIS TRIB. (Jan. 16, 2004), at <http://www.addisbureau.com/Archives/2004/01/16-01-04/EHRCO.htm> (last visited July 21, 2004); *Ethnic Violence Leaves 18 Dead in the East*, AFRICA NEWS (Feb. 6, 2004), available at <http://allafrica.com/stories/200402060003.html>; *Ethiopia: Rights Organization Condemns Arrests of Oromo Students* (Mar. 3, 2004), at [http://www.irinnews.org/report.asp?ReportID=39804&SelectRegion=Horn\\_of\\_Africa&SelectCountry=ETHIOPIA](http://www.irinnews.org/report.asp?ReportID=39804&SelectRegion=Horn_of_Africa&SelectCountry=ETHIOPIA) (on file with author); *More than 30 Said Dead, 100 Wounded in Awassa*, ETH. REP. No. 299 (May 29, 2002), available at [http://www.ethiopianreporter.com/eng\\_newspaper/Htm/No299/r299new2.htm](http://www.ethiopianreporter.com/eng_newspaper/Htm/No299/r299new2.htm) (last visited June 9, 2004) (on file with author); *ETHIOPIA: Interview with President of Southern Nations Region (SNNPR)*, Jul. 19, 2002, at [http://www.irinnews.org/report.asp?ReportID=28902&SelectRegion=Horn\\_of\\_Africa](http://www.irinnews.org/report.asp?ReportID=28902&SelectRegion=Horn_of_Africa) (last visited Aug. 21, 2002) (on file with author).

109. The Prime Minister's Office has established regional desks for each regional state, and this was the first line of recourse taken by the Benshangul-Gumuz state government. But the Prime Minister's Office met with no success. The Berta refused to even discuss the issue. Appointments to the regional desks at the Prime Minister's Office are made by the regional governments, and so the Berta apparently viewed the Prime Minister's officials as representatives of regional interests. See Adew/Megiso Interview, *supra* note 24; Alemayehu June 6, 2002 Interview, *supra* note 26; Megiso Interview, *supra* note 24. It is interesting to note that

The House of the Federation has established a Committee for States' Affairs to mediate conflicts between Nationalities and between regional states, and to address ethnic and regional concerns.<sup>110</sup> This committee will accept a case upon the request of both parties, or upon the request of one party if they have failed to resolve the problem between themselves after two years.<sup>111</sup> As both the Berta and the regional government had requested its participation, the committee delegated mediators from among its members to meet with them.<sup>112</sup>

The mediators' preliminary goal was to negotiate a framework for resolving the representation issue. The first step was to persuade Berta representatives to return to the regional parliament. To change the Berta's representation—even if an agreement were reached—the regional state would have to amend its constitution.<sup>113</sup> This would not happen overnight. In the meantime, what would keep this conflict from becoming a crisis would be to enable the regional parliament to begin governing again. The mediators achieved this goal: the parties agreed to a temporary compromise provisionally allocating additional representatives to the Berta in return for their agreement to return to the legislature. The second step was to develop a procedure for moving forward. To this end, the mediators created an independent commission to study the parliamentary representation in the region and provide a recommendation that would be binding on both parties.<sup>114</sup>

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the Benshangul-Gumuz government went first to the Prime Minister's Office for help rather than to the House. There are a variety of reasons this might have come about ranging from the practical (for example, the House is only in session at certain times, whereas the Prime Minister's office operates year-round) to the political motives discussed above.

110. Of course, in light of the ethnic federalist structure of the regional states, there is substantial overlap between inter-ethnic and regional concerns. See FDRE Parliament website, *Committee for States' Affairs: Introduction*, *supra* note 20.

111. The law governing the House of the Federation's activities sets a slightly different exhaustion requirement and establishes certain formal requirements for establishing a Nationality's standing in a case involving its constitutional rights, but that law took effect after the Berta case began. I am told that the practice that had developed before the law was passed is as described here. See *id.*; Adew/Megiso Interview, *supra* note 24; Alemayehu June 6, 2002 Interview, *supra* note 26; Megiso Interview, *supra* note 24.

112. The committee's procedural rules do not outline the processes to be used in considering cases with any specificity, but its practice has been to delegate committee members, as well as other members of the House, as mediators. These delegates have met with disputing parties in an attempt to mediate a resolution and also have participated directly in the implementation of the agreed upon solution. See Megiso Interview, *supra* note 24.

113. See Alemayehu June 6, 2002 Interview, *supra* note 26.

114. The Benshangul-Gumuz government also agreed to implement the committee's recommendations immediately. The provisional allocation of regional representatives to the Berta was done in proportion to the Gumuz's representation, and additional regional representatives were also given to the Shinasha, another local ethnic group. See Berta Agreement, *supra* note 25. This agreement was the result of a fruitless month of meetings in

With this framework in place, the Berta returned to participate in the regional government and the immediate crisis, together with its immediate and escalating costs, was resolved.<sup>115</sup> But the basic conflict carried on.

The commission's study of regional representation unearthed more complexities. While the Berta might have been underrepresented in the regional government, the Nationalities that were not indigenous to that region—comprising 47 percent of the population—were not entitled to any political representation at all.<sup>116</sup> In addition, the question of political representation overlapped with issues of resource allocation by the regional government, of the proportionality of representation in the federal government, and of the use of regional languages.<sup>117</sup> These factors, as well as mundane procedural delays, led to an extension of the study period from 45 days to over two years.<sup>118</sup> The mediators referred the legal questions to the House's Legal Committee. Debate on the study's purportedly binding recommendations continues to date, and at the time this was written, no solution had yet been implemented.<sup>119</sup>

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Benshangul-Gumuz and a final, successful meeting with the Speaker and Deputy Speaker of the House of the Federation in Addis Ababa. *See* Adew/Megiso Interview, *supra* note 24.

115. *See* Megiso Interview, *supra* note 24.

116. While the Berta, the Gumuz and the smaller ethnic groups comprise 100% of the Benshangul-Gumuz population with political recognition and regional government representation, they constitute only 53% of the total population of the area. The other 47% are "non-indigenous" ethnic groups who apparently have no political recognition or representation in Benshangul-Gumuz at all. These are Nationalities that are "non-indigenous" to Benshangul-Gumuz but indigenous to Ethiopia, such as the Oromo, Amhara, Tigreans and Hadiya. Their core populations live in other regions of the country. They are generally spread throughout the woredas of the region, although some groups do constitute a majority in certain woredas. Although the House of the Federation delegates have submitted their recommendations to the regional government on the narrower Berta-Gumuz representation question, this overarching issue has yet to be resolved. The House of the Federation's States' Affairs Committee and Legal Affairs Committee are both reviewing the problem. *See id.* It is not clear whether the lack of representation was due to a deliberate distinction between regionally indigenous and non-indigenous Nationalities, a failure to properly conduct the census, a sudden population shift between censuses, or some other reason.

117. *See* Megiso Interview, *supra* note 24.

118. With control of the regional government had come control of regional allocation of resources, so that the Berta claimed that they had not received their proper share of funding and government facilities for a number of years. The House of the Federation delegates therefore undertook to study not just population patterns but also issues of economic bias and electoral inconsistencies in each zone and woreda. They compared, for example, the numbers of teachers and doctors allocated by the regional government to different areas. *See id.* Although at the regional level the Berta appeared to be underrepresented in the government, at the federal level they had five representatives to the Gumuz's two, requiring an assessment of federal representation and election districts and practices as well.

119. *See* Berta Agreement, *supra* note 25; Megiso Interview, *supra* note 24.

### 3. The Silte: Constitutional Interpretation

The Silte community's appeal for recognition as a Nationality, independent of the larger Gurage Nationality, raised basic questions about ethnicity. What defines a cognizable ethnic group? Should ethnicity be determined by self-definition or are there objective factors that should be considered? Who should decide: the group seeking independence, the larger ethnic group, or some third party? These were vital questions not only for the Silte and the Gurage, but also for the many other ethnic communities that were part of larger, recognized Nationalities, and therefore for the country as a whole.<sup>120</sup>

The Ethiopian constitution provides a substantive definition of a Nationality and sets forth Nationality rights, but does not delegate authority or create a process for recognizing Nationalities.<sup>121</sup> Until the Silte's petition, the government had relied on long established ethnic categories used under previous governments in carrying out the census to define its Nationalities. When the Silte formally petitioned for new recognition as a Nationality, they forced the government to confront these jurisdictional and procedural questions.<sup>122</sup>

As required by the constitution, the House had established an advisory body, the Council of Constitutional Inquiry ("the Council"), to carry out the actual work of interpreting the constitution.<sup>123</sup> The Council is composed of legal experts, including the President and Vice President of the Federal Supreme Court, and also includes three members of the

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120. See LEVINE, *supra* note 27.

121. The federal constitution does set forth the substantive rights of Nations, Nationalities and Peoples, the basic procedures by which recognized Nations, Nationalities and Peoples can exercise their rights to secession and statehood, and, as discussed above, it establishes the five substantive factors that define a cognizable Nation, Nationality or People. Nationality rights include self-determination, secession, use of own language, protection of own culture and history, and self-government (including the right to establish solely national institutions and equitable representation in regional and federal institutions). See ETH. CONST. arts. 39, §§ 1-3, art. 47, § 2. In order to form its own regional state, a Nationality must receive approval from its legislative council, present a written demand to the regional council, and receive approval from its people in a referendum organized by the region, upon which the region must transfer the relevant powers to the Nationality and the Nationality automatically becomes a regional state of the federation. See *id.* art. 47, § 3. Similarly, in order to secede, a Nationality must first become a regional state; then receive approval from its legislative council; and finally, win a vote of its people in a referendum organized by the federal government; whereupon the federal government must transfer the appropriate powers and assets to the Nationality. See *id.* art. 39, § 4.

122. In the absence of constitutional guidance, the House insisted that the Southern Nations regional state should take the lead in determining the proper procedure over a matter entirely internal to the regional state. The Southern Nations council contended this was an issue for the House as the body empowered to decide Nationality issues. Neither one appeared eager to claim responsibility for the issue. See Request for Constitutional Interpretation, Silte case, *supra* note 28.

123. See ETH. CONST. art. 83.

House who are not required to have any legal expertise.<sup>124</sup> The House and the Council have the authority to accept petitions for interpretation directly from a wide range of parties.<sup>125</sup> Upon accepting a petition for constitutional interpretation, the Council performs the legal analysis and presents a recommendation to the House, and the House considers the recommendation and issues a final decision.<sup>126</sup>

The process of constitutional interpretation is accessible enough on paper, but in reality it required some tenacity for the Silte's claim to be heard. Although at the time there were no formal legal barriers to submitting a petition, the House's decision to exercise its jurisdiction is discretionary.<sup>127</sup> The Southern Nations' government did not want to take any action in the Silte case until it had obtained an authoritative judgment on its jurisdiction and the procedure it should follow. The House, however, refused to consider the petition until the Southern Nations government had issued its own final decision in the matter. Between the Southern Nations' repeated attempts to persuade the House to accept the petition, and the regional process of reaching a decision after it abandoned these efforts, several years elapsed.<sup>128</sup>

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124. See *id.* art. 82.

125. At the time of this case, there were no laws governing the procedures of the Council or the House, but they had developed certain practices. The laws passed after the Silte case provide that the Council can entertain issues arising in court cases upon the petition of the court or a party; it can accept petitions from anyone alleging a violation of his or her fundamental rights and freedoms (which include the rights of ethnic groups, although the language of the relevant law refers here to "persons" rather than "persons and Nationalities") upon exhaustion of other remedies; and it can accept petitions from a federal or state legislative or executive council by the vote of only one-third of the members. The law governing the House's authority also specifically authorizes Nationalities to petition the House concerning alleged violations of their constitutional rights, and the House could then pass claims requiring constitutional interpretation to the Council itself. See CCI Proclamation, *supra* note 22, arts. 21–23; HOF Proclamation, *supra* note 22; see also Alemayehu June 6, 2002 Interview, *supra* note 26.

126. See CCI Proclamation, *supra* note 22.

127. In practice, it appears that the Council has accepted as presenting admissible constitutional questions only certain petitions that have been referred to it by the House, and not petitions that have been submitted to it by Nationalities or individuals directly. In addition, there are substantial delays in the Council's process of considering even those petitions that have been passed on to it by the House, because the Council meets only rarely due to shortages of staff and resources, as well as the fact that all of its members hold at least one other full-time job and are located in distant locations across the country. See Alemu Interview, *supra* note 82.

128. See Request for Constitutional Interpretation, Silte case, *supra* note 28. The laws passed after the Silte case require exhaustion of state remedies before a person or Nationality can petition, but do not expressly require any exhaustion or decision by the state government for the state itself to refer a constitutional claim. Rather, the state is merely required to muster a 1/3 vote of its legislature or executive. See CCI Proclamation, *supra* note 22, arts. 21–23; HOF Proclamation, *supra* note 22, art. 20.

When the Council at last turned to the Silte case, it focused its opinion on the jurisdictional and procedural questions, affirming the substantive constitutional definition of a Nationality with little comment.<sup>129</sup> In the absence of direct constitutional guidance, the Council turned to latent constitutional principles for guidance. From the central place that ethnic rights of self-determination occupy in the Ethiopian constitution, the Council discerned a constitutional intent to give unrecognized ethnic communities control of the process of determining their status. Accordingly, the Council granted the primary authority for determining identity to the petitioning community, and created a four step process. First, community representatives must present a petition for recognition as a Nationality to the regional state government. In response, the regional state must conduct a study of whether the community has met the constitutional definition of a Nationality and present the study to the petitioning community. That community must then vote on the issue through a popular referendum. If the results of the referendum and the study are in agreement, then the decision is final. But if either party is aggrieved, it can petition the House for review. However, the House's review will be limited to determining whether the *process* followed was constitutional, and it apparently will not review the merits. Notably absent in this structure is any role for the larger concerned community, in this case the Gurage Nationality from whom the Silte were seeking to separate.<sup>130</sup>

This process was immediately put into use. The House of the Federation adopted and promulgated the Council's recommendation. The Silte council petitioned for recognition, the regional state conducted its study, and the Silte people voted for independent Nationality status. None of the parties appealed to the House of Federation for reconsideration of the result, so the matter was at last at a close. The Silte were recognized as a Nationality, received the related political benefits, and set up their own independent self-administration. The immediate dispute between the Silte, the Gurage and the regional government was resolved.

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129. The first question—what is a nationality?—had a definite, if unsatisfying, constitutional answer. The Council adopted the five factors listed in the constitution without attempting to make the categories more determinate or to provide any guidance on how they should be applied. See Presentation of Proposal for a Decision to the House of Federation, ref. no. h/te/m-fe15/40/3/1 (Alexandria Translations trans., Jan. 26, 2000) (on file with author) [hereinafter Proposed Decision, Silte case].

130. This raises interesting questions: Do the other Gurage communities have any cognizable interest or self-determination right in determining the members of the Gurage Nationality as a whole? And how does one determine who is Silte for purposes of the vote? After all, self-identification is the whole of the issue at stake. See Proposed Decision, Silte case, *supra* note 129.



Since then, other communities seeking recognition have done the same.<sup>131</sup>

#### 4. The Oromo: The Limits of the System

The Oromo ruled Ethiopia and its many peoples for several centuries, until they were superseded by the Amhara Nationality. Since then, the Oromo have been dominated by smaller ethnic groups, first the Amhara, and now the Tigreans. The Oromo Liberation Front ("OLF") was a secondary player in the war against the communist Derg regime in the 1970s and 1980s, which was eventually won by a coalition of ethnically defined militia dominated by the Tigrean military forces. In the post-war political process of developing the current government, the OLF felt itself shut out by the Tigrean political party. The OLF walked out of the constitution drafting process and has since refused to participate in elections.<sup>132</sup>

The Oromo are now represented in the regional and federal governments by a new political party, which critics allege is a mere sham propped up by the Tigreans so as to be able to claim participation by all ethnic groups. The OLF is active as an opposition group operating in the sphere of protest and sometimes violence. It complains of political oppression and politically motivated arrests of Oromo, as well as pervasive social bias against them. The situation is volatile: there were demonstrations, property destruction, and mass arrests of Oromo students at Addis Ababa University in January 2004 when the university refused permission for an on-campus Oromo cultural event.<sup>133</sup>

Although the Ethiopian constitution provides for all recognized Nationalities like the Oromo to have the right to secede, the OLF has not instigated the political process for secession. Although the constitution also guarantees rights of equal treatment and self-government, the OLF also has not brought its claims to the House of the Federation either for mediation or as constitutional claims.<sup>134</sup> Rather, they have continued to protest outside the established ethnic conflict resolution process.

#### 5. Key Factors in the Berta, Silte and Oromo Cases

Underlying the differences between the Berta, the Silte, and the Oromo's experiences with the Ethiopian conflict resolution system are certain key factors that seem to have played a role in shaping those ex-

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131. See Alemayahu June 6, 2002 Interview, *supra* note 26.

132. See generally BEING AND BECOMING OROMO, *supra* note 37.

133. See Ethiopia: Rights Organization condemns arrests of Oromo students, *supra* note 108; Hultin, *supra* note 47.

134. See Alemayahu June 6, 2002 Interview, *supra* note 26.

periences. In each case, both the nature of the dispute and the identity of the group affected the group's perception of and reaction to the available dispute resolution mechanisms. And in each case, that reaction created dynamic relationships with broader effects beyond the resolution of the immediate dispute.

There are two distinctive aspects to the nature of the disputes themselves. First, each dispute is embedded in complex, ongoing interrelationships, both amongst the ethnic groups themselves, and between those groups and the political and legal systems. Even when the dispute seemed initially to present a simple either/or question, the process of dispute resolution peeled away that superficial dichotomy and exposed layers of legal and political concerns.<sup>135</sup> In the Berta case, the initial question about proportional representation revealed underlying inequities and questions about rights to representation for non-indigenous groups. In the Silte case, their demand to the regional state government for recognition revealed ambiguities in the substantive definition of a Nationality and the need for a process and criteria for addressing their demand. This revelatory effect complicates the task of bringing the immediate dispute to a conclusion, but raises the possibility that the process could have a fundamental effect on the relationship between the parties by providing a forum for addressing those underlying tensions.

Second, while none of these disputes presents itself as a candidate for a simple solution, some are a better fit with the remedies available under this system than others. The Berta and Silte's claims are for allocation of rights and benefits that are defined by the Ethiopian federal system and could be provided within it. In contrast, the OLF is challenging the underlying legitimacy of the system, including the House's authority over dispute resolution.<sup>136</sup>

These differences in the fit between the system and the claims affected the groups' participation in the conflict resolution system in several ways: by influencing their interest in participating in the system, by shaping how they expressed their claims, and by affecting the ability of the system to respond to those claims. The Berta and Silte, whose interests corresponded to those recognized by the system, naturally had a greater interest in participating than the Oromo, whose interests fell outside the system. This in turn gave the Berta and the Silte an incentive to

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135. See CARPENTER & KENNEDY, *supra* note 10, at 9.

136. The Berta and Silte's claims are also clearly defined, and both sought specific remedies: the Berta wanted more regional representatives, and the Silte wanted recognition and self-government. The nature of the Oromo's claims is not conducive to mediation or judgment by the House. Rather than having specific, limited claims and desired remedies, they have generalized claims of oppression, disenfranchisement and maltreatment.

express their interests in the terms understood by the system. There were likely some underlying concerns that drove the Berta and Silte to seek greater political power, whether economic, reputational, cultural, or something else entirely. Enticed by the rewards for participating in the system, those various underlying concerns were transformed into claims for the legal rights recognized in the system: proportionate representation and formal recognition. The Berta and Silte then found the system generally, if imperfectly, responsive to their concerns: both groups' claims were accepted into the system and considered by it.

Next, not only the character of the disputes, but also the identity of the groups themselves affected their participation in the conflict resolution process. The first important characteristic is the group's internal organization. Attempts to define group rights and pursue group claims are often plagued by problems of defining group membership and agency.<sup>137</sup> The Berta and Silte are cohesive social groups with pre-established members and leadership, minimizing these problems.<sup>138</sup> The Oromo, in contrast, are a diffuse group without reliable internal leadership structure or group consensus on the OLF's cause. It would be difficult for the OLF to claim to represent the entire Oromo Nationality or to identify its actual members.<sup>139</sup>

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137. See generally James W. Nickel, *Group Agency and Group Rights*, in *ETHNICITY AND GROUP RIGHTS*, *supra* note 11 (rebutting the criticism that ethnic minorities are deficient rights holders due to agency and membership ambiguities).

138. Although it is not clear whether this external presentation represents true internal group consensus, for purposes of participating in an external conflict resolution process as a group, the Berta and Silte were both able to muster a single, consistent group identity and position on the matter.

139. To participate effectively in a dispute resolution process, a group must be able to define representation on several levels: it must be able to define its membership, that is, who it represents, and it must designate agents to represent that membership. A group must also develop a reasonably cohesive position on the issues in dispute. If intra-group conflict cannot be resolved either before or during the dispute resolution process it will be impossible to implement a resolution. See LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* 105-07 (1987). According to these criteria, the Silte, the Berta, and the Gumuz are well-organized as groups to participate in dispute resolution. Their membership and agency seem to have been well-established before the dispute arose, as they are discrete ethnic communities with clear leadership structures in place. Although it is impossible to be certain from public records and third-party reports, it appears that there is also a single group position on the claims they present, with no splinter groups contesting the group's position on the issue. In contrast, the Oromo are a diffuse community spread across several regional states, incorporating numerous smaller ethnic groups that identify to varying degrees with the larger group, and lacking definitive leadership structures. The Oromo as a people are not coalesced behind the OLF position, and it is not clear to what extent the OLF represent the views of the Oromo as a whole. Obviously, I am relying here on the available information in public records and the accounts of the decision makers involved in the process. The internal group processes may well be more complex than I indicate here, but there is in any event a clear contrast between

Of course, it is not by chance that the Berta and Silte do not suffer from the agency and membership problems that are common to group claims. Rather, just as the system's recognition of certain rights has encouraged ethnic groups to shape their claims to match those rights, so the availability of opportunities for Nationalities to claim those rights has encouraged ethnic groups to establish internal leadership structures and processes that will permit them to do so. As small ethnic groups that gain disproportionately greater rewards by participating in the system, the Berta and Silte have greater incentives than the OLF to position themselves to do so.

A second influential characteristic is each group's level of involvement in the political system as a whole. The conflict resolution system is, after all, not the only way that ethnic groups claim their rights. Rather, they claim them first and foremost through participation in government. And the success of political and structural incentives for participation in the government seems to reinforce participation in conflict resolution processes as well. Because the House is composed of representatives of the Nationalities, disputing Nationalities like the Berta and the Gumuz are already invested in the House as an institution, and it has responsibilities to them as its constituencies. The Silte, although not yet involved in the House, were seeking to be a part of it. In contrast, the OLF has refused to take part in the current government on principle and so not only has no pre-existing relationship with the House but is formally opposed to it.<sup>140</sup> This sense of constituency is a central theme in the structure of the Ethiopian system.

Finally, the expressive function of bringing a claim to the House favors the participation of groups like the Berta and Silte rather than the Oromo. Parties may be looking not just for process or for resolution, but for the imprimatur of an outside authority or for a means of expressing the seriousness of their dispute. For small groups like the Berta and Silte to submit their local conflicts to the House symbolizes the dispute's importance and seeks the acknowledgment of a higher authority. These are

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the Berta, Silte and Gumuz's ability to muster a cohesive group position for purposes of dispute resolution and the Oromo's inability to do so.

Representatives of Nationalities petitioning the House for enforcement of their rights to self-determination must now present evidence of agency and group consensus in the form of the signatures of 5% of the community, the official seal of the community administration if appropriate, and evidence of delegation. *See* HOF Proclamation, *supra* note 22, art. 21.

140. The Berta, Gumuz, Silte and Gurage have internal incentives to work with the system because they obtain rights from it and have greater authority within the ethnic federalism system than they would under most others. They are all small groups who could otherwise not protect their sphere of self-government from other rival groups or play a significant role on the national stage. The Oromo, in contrast, believe they would have substantially more power if political power were allocated strictly in proportion to population.

satisfactions that the Oromo, a large group with a national conflict, cannot expect. Since the federal government is the other party to their dispute, mere consideration of their claims by the House would serve as an expression of federal power rather than federal respect.

Taken as a whole, these factors suggest that there is a dynamic relationship between the ethnic groups, the political system as a whole, and the conflict resolution system. There are certain qualities inherent in these conflicts and groups that make them more amenable to participation in and resolution by the conflict resolution system: a cohesive group position on an issue, for example, or a claim that fits neatly into the political structure as it exists. But the ethnic groups also engage in an active process of reshaping their identities and claims, when they see it to their advantage to do so in order to participate in the system.

This also indicates that a conflict resolution system could be a tool for recasting ethnic interrelationships and roles in society, for the better or the worse. Whereas ethnic conflict may seem inchoate when it is undirected and takes place solely in social and political realms, the existence of a mechanism for resolving those conflicts to their advantage may encourage ethnic groups to narrow and hone their claims to specific concerns with specific remedies and to develop decision-making structures that will enable them to pursue those claims. That possibility raises important questions. Common wisdom has it that granting rights to ethnic groups may stir up more disputes or intensify old ones. Whether this is right or wrong, does granting access to process raise similar concerns?

On a more hopeful note, if we assume that ethnic groups will continue to play social roles in ethnic-identified societies and that access to process might encourage them to play a productive rather than a destructive role, what kinds of roles would the state encourage them to take on? What sort of incentives will encourage them to accept those roles? And in the context of dispute resolution, what kinds of processes and institutions will promote these goals?

### *B. Exploring Legal Process Models*

The Ethiopian system provides one set of answers to these questions. It has three distinctive qualities: 1) it establishes a permanent conflict resolution institution that is composed of ethnic representatives and grants a measure of standing to all ethnic groups; 2) it uses complementary consensual and adjudicative processes; and 3) it treats ethnic relationships as a primary subject of constitutional interpretation.

Other states make use of some of these mechanisms and permit ethnic groups to participate in their court systems or other legal processes in limited ways. Some states have established permanent ombudsmen or

commissions to address minority and indigenous concerns.<sup>141</sup> Some permit members of minority and indigenous groups to seek interpretation and enforcement of constitutional rights.<sup>142</sup> The Ethiopian system, however, appears to be singular in combining all three qualities.

However, the Ethiopian approach is distinctive in a more consequential sense than merely as a happenstance aggregation of these particular constituent parts. Other states may permit ethnic groups to make use of their legal processes when those groups can accommodate their identities and claims to those processes, by meeting the ordinary judicial system's requirements for standing and jurisdiction.<sup>143</sup> But ordinary judicial procedures are designed primarily for individuals and for the state, not for groups, particularly in civil law systems.<sup>144</sup> The Ethiopian system aims to design processes that accommodate the identities and claims of its ethnic groups, by granting some standing to all groups and authorizing some jurisdiction over all disputes.<sup>145</sup>

In so doing, the Ethiopian system challenges the usual assumptions and questions about the relationship of ethnic groups and legal process. Rather than asking whether ethnic groups can be rights holders or have

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141. Australia, for example, has a commissioner for aboriginal and Torres Strait Islander social justice on its human rights commission. This commission investigates complaints against the government and makes recommendations concerning those complaints, but does not have jurisdiction over conflicts that do not relate to the government and does not have authority to carry out other conflict resolution processes. See Australian Human Rights and Equal Opportunity Commission Website, at [http://www.humanrights.gov.au/social\\_justice/index.html](http://www.humanrights.gov.au/social_justice/index.html) (last visited Feb. 23, 2004).

142. Canada, for example, allows individual citizens who are members of English or French minority linguistic populations in their province to sue to enforce their right under the Canadian Charter of Rights and Freedoms to have their children educated in that minority language. See *Doucet-Boudreau v. Nova Scotia*, [2003] S.C.R. 62 (Can.). There are a number of relevant characteristics to this cause of action: at least in the *Doucet-Boudreau* case it is an individual, not a group, that has brought the claims; the cause of action appears to relate only to minority linguistic groups and not to all linguistic groups; and the right seems to be one solely vis-à-vis the government for provision of public funds and educational facilities, and does not provide for general conflict resolution processes in which other community members might have a say or other solutions to a conflict over the language of education might be sought. See *id.*

143. Although some states, such as the United States and India, are relatively open to public interest litigation on behalf of groups, most states' judicial systems are not designed for such claims. Even where such litigation is possible, standing and jurisdiction often arise as difficult issues. In the U.S., for example, even when considering claims of discrimination on the basis of group characteristics such as race, the U.S. Supreme Court has made a point of emphasizing that the protected rights are held by individuals, not groups. See *Gutierrez v. Bollinger*, 539 U.S. 306, 330 (2003).

144. See CAPPELLETTI, *supra* note 84, at 300 ("Traditionally, the role of the civil judge has been determined by the individualistic character and private content of civil litigation. . . . In the context of the new *actions collectives* or public interest actions, however, the traditional 'privatistic' schemes are clearly inadequate.")

145. As discussed above, the ethnic groups and their disputes do not all fit neatly into the system, however. See discussion *supra* Part II.A.5.

the capacity to participate in legal process, it asks how legal process can be accommodated to the needs and conflicts of ethnic groups. Which qualities of legal process lend themselves to ethnic conflict resolution, and how can legal process be put to service of the goal of maintaining an ethnic-identified multi-ethnic society?

### 1. Three Institutional Qualities: A Permanent, Ethnic-Composed Institution with Standing for Ethnic Groups

The House of the Federation is a permanent institution that is composed of ethnic representatives and grants standing to ethnic groups. These characteristics reflect and respond to the realities of ethnic conflict discussed in Part II, above. Accepting the inevitability of conflicts between ethnic groups, the Ethiopian government created a permanent conflict resolution system rather than relying on ad hoc interventions. Recognizing that the formally ethnic-blind ordinary courts in Ethiopia lack both the institutional capacity to handle any kind of group claims and the credibility to handle ethnic claims in particular, the House is focused specifically on resolving ethnic disputes and made up of ethnic representatives. By granting standing to all ethnic groups, the Ethiopian system makes legal processes available for all inter-ethnic disputes. In so doing, the Ethiopian system both acknowledges the complexity of Ethiopian inter-ethnic relationships and the need for processes that can address all ethnic groups' claims, whether they are a local majority or minority.

#### a. Permanence Offers Practical Advantages

A permanent, specialized system presents certain typical advantages, and the Ethiopian system makes use of these advantages to address the realities of ethnic group conflicts. The House has the opportunity to develop expertise and good practices over time, which is a benefit in the context of complex, interwoven ethnic relationships and disputes.<sup>146</sup> A permanent institution is positioned to address recurrent, pervasive social concerns over the long-term, by mandating and supervising the imple-

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146. In addition, because ethnic issues are the House's primary concern and it is composed of ethnic representatives, it has an actual and perceived interest primarily in the well-being of ethnic groups rather than other potentially adverse constituencies such as individuals, government entities, or private organizations. Practically speaking, exclusivity means that ethnic conflicts will not have to compete for institutional resources with other conflicts and concerns. As discussed below, exclusivity also means that procedures can be designed for ease of use by ethnic groups, unlike those of the ordinary court which are designed for individuals or for artificial entities such as businesses and do not easily accommodate claims by social groups.

mentation of new processes or institutional reforms, for example.<sup>147</sup> If controversies should arise in the future about the study and referendum process that the Council of Constitutional Inquiry established in the Silte case, the Council will be available to respond to those new issues.<sup>148</sup>

In addition, the House is already constituted and organized, so that it should be readily available as disputes arise. Initiating a dispute resolution process requires some measure of political will and is sometimes seen as a loss of face or a signal of a weak relative bargaining position. Indeed, one aspect of training for mediators is the art of bringing reluctant parties to the negotiating table. Triggering a pre-existing mechanism with an established institution is less controversial, requires less imagination and effort, and is therefore more likely to occur than calling for new ad hoc processes. The availability of a dispute resolution process can also provide an additional incentive to negotiate reasonably and peaceably outside that system, by posing the threat that the third party institution may bring the matter to a less advantageous solution than can be reached directly.<sup>149</sup>

Furthermore, the existence of a permanent institution promotes not just participation, but early participation. Even after the parties do begin an ad hoc process, delays in beginning the process can be socially and politically costly and tend to make resolving the dispute more difficult.<sup>150</sup> Easy cases now may well be hard cases later, after they have become contentious.<sup>151</sup> And while lingering conflicts between private parties might not concern the state much, multi-ethnic states know that unaddressed inter-ethnic discord all too often festers into unrest.

In this regard, early entry into the process also serves a diversionary purpose: by removing the dispute from its social and political context, its social and political costs may be contained. Once a process for addressing their concerns had been initiated, both the Silte and the Berta permitted the involved local political institutions to carry on with their

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147. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

148. If ethnic groups interacted only rarely so that a dispute between two groups truly was a one-time event without broader social ramifications, ad hoc processes might nonetheless suffice. But in the Ethiopian setting as in many others, groups are dealing with each other over the long-term and will inevitably face recurrent conflicts.

149. See CARPENTER & KENNEDY, *supra* note 10, at 224–26; SUSSKIND & CRUIKSHANK, *supra* note 139, at 81–83.

150. See CARPENTER & KENNEDY, *supra* note 10, at 13 (noting the same phenomenon and describing the spiraling development of an unmanaged public conflict: “The . . . methods used by officials to involve the public may be out of phase with what is happening in the developing conflict. Public hearings can be too late and too adversarial to make a difference.”); SUSSKIND & CRUIKSHANK, *supra* note 139, at 91–94.

151. See CARPENTER & KENNEDY, *supra* note 10, at 16 (“Many [public] conflicts begin with a resolvable problem and grow beyond hope of resolution because they are not dealt with early.”)



ordinary business instead of holding those institutions hostage to their dispute. The Oromo conflict, in contrast, is being played out in the socio-political arena, with disruptive and sometimes violent results.

### b. Ethnic Composition Builds Ethnic Constituency

It is common wisdom in Ethiopia, right or wrong, that the credibility of government institutions depends on having proportionate ethnic representation within them. A demand for proportionate representation in every institution presents a heavy and at times unbearable burden that can undercut other institutional mandates. However, in institutions that address ethnic interests, proportionate representation may foster a vital sense of constituency among ethnic groups. The nurture of and reliance on a sense of ethnic constituency is one of the central themes of the Ethiopian system.

In particular, ethnic representation in the House seems to promote both a general sense of constituency and also a practice of participating in the House as an institution. Because the Nationalities have representatives in the House and take part in its activities over the long-term outside the context of any particular dispute, they have continuous access to, investment in and oversight of it. As discussed above, there is a dynamic relationship between the Nationalities and the political system: when given access to the system, Nationalities tend to shape their identities, internal organization, and claims to make use of that access to their advantage. Although it is impossible to pinpoint the motivation of the involved groups, in the Berta, Silte, and Oromo cases, political participation, or an interest in it, correlated with participation in conflict resolution, and vice versa.<sup>152</sup>

If successful, the development of a sense of constituency in the House could have profound ramifications for the dispute resolution process. In any given dispute, it should encourage the involved Nationalities to bring their claims there. Over time, repeated individual acts of participation may establish a practice of resort to the House to resolve conflicts, and therefore a practice of using legal processes to resolve ethnic disputes. As discussed below, such practices may take on a life of their own, creating not just possibilities, but expectations of participation.<sup>153</sup>

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152. See discussion *supra* Part II.A.5.

153. Indeed, the House's ethnic focus may even draw in reluctant ethnic leaders who might prefer to prolong conflicts. Disputes between ethnic groups often provide an occasion for political leaders to use ethnic rhetoric for political purposes, but it would be difficult for ethnic actors to ignore an institution like the House when conflicts arise, even if exacerbating those conflicts might be in their own interests. That being said, this quality is obviously not always effective, as the OLF has not taken this approach.

In this sense, the creation of a permanent institution specifically intended for ethnic conflicts could gradually reshape the social perception of ethnic conflict. If ethnic disputes are treated and resolved as ordinary disputes subject to rational procedures, they will eventually be regarded as such. The very existence of a permanent institution like the House of the Federation thus could undermine the social expectation that inter-ethnic disputes will constitute pure exercises of power

But while the permanence and ethnic composition of the House present a transformative possibility, these qualities also run the risk of entrenching existing oppositions and hostilities. Particularly because constituency rather than independence is the basis of the institution's credibility, it risks accreting institutional biases or becoming a pawn to powerful players and coalitions. The problems of reliance on constituency rather than independence are at their peak in the context of constitutional interpretation.

The use of the House of the Federation, an ethnically representative body, to carry out the typically judicial role of constitutional interpretation underlines the high Ethiopian valuation of ethnic concerns in constitutional interpretation. It also relies again on a sense of constituency rather than an independent adjudicator to establish the process's legitimacy among ethnic groups. However, in so doing, this choice blends legal and political roles in ways that threaten to undermine other fundamental goals of constitutional interpretation, such as maintaining separation of powers.

As an initial matter, it is important to understand the place of the Ethiopian system in the range of methods of constitutional interpretation. Although Americans understand the essence of judicial review to be the power of the ordinary courts to interpret the constitution and to nullify laws as unconstitutional, this is not the shape of judicial review in many states.<sup>154</sup> Ethiopia is unusual but by no means unique in giving the power of constitutional interpretation to the upper house of its Parliament.<sup>155</sup>

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154. Indeed, some have argued that the American focus exclusively on review by the judiciary prevents other government actors and the public at large from taking part in the construction and understanding of the American constitutional rights and framework. *See, e.g.,* MARK TUSHNET, *CONSTITUTIONALISM WITHOUT COURTS?: TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (adding a liberal voice to the conservative chorus arguing against the practice of exclusive judicial review).

155. As a historical matter, Ethiopia seems to have been drawing primarily from the constitutions of communist states such as the Soviet Union, China and North Korea, among others. *See* G. HARUTYUNYAN & A. Mavčič, *CONSTITUTIONAL REVIEW AND ITS DEVELOPMENT IN THE MODERN WORLD (A COMPARATIVE CONSTITUTIONAL ANALYSIS)* 34 (1999); *USSR CONST. of 1977*. This makes sense ideologically, since the revolutionary groups that overthrew the Derg were themselves socialist by ideology and were fighting for semi-autonomous regional self-government rather than out of a love for capitalism. *See* MARCUS,

Indeed, many states have a considerably more limited vision of the role of judicial review than does the United States. These states permit review only of certain kinds of constitutional claims under limited circumstances, relying to a large degree on political mechanisms to hold government power in check and enforce civil liberties.<sup>156</sup> In general, states have authorized a wide range of institutions to interpret their constitutions, and the scope of that authority varies significantly in terms of jurisdiction, power to nullify a law, binding effect of the judgment, and enforcement.<sup>157</sup> For example, most states do provide for some form of

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*supra* note 21, at 194–95, 216–17. They were forced to abandon this ideology due to the untimely coincidence of their victory in 1991 with the fall of the Communist bloc.

But while the formal structure of the Ethiopian system may be similar to that of communist governments of the past, its practice is not. The communist parliaments exercised this power only rarely or not at all, whereas the Ethiopian parliament is exercising it, and on controversial and important issues. As of 2000, the Chinese legislative body with the authority to interpret the constitution had never done so. The Soviet system gave the right to interpret all laws (including the constitution) to the Supreme Soviet but also allowed the Supreme Court to interpret the laws in cases before it. However, the Constitution did not place any limits on the legislature's power in any event. Furthermore, the judicial branch was not independent but rather answered to the legislative branch based on the philosophy of legislative supremacy as an expression of the people's will. See Albert H.Y. Chen, *The Interpretation of the Basic Law—Common Law and Mainland Chinese Perspectives*, 30 H.K. L.J. 380, 409–13 (2000); see also discussion *infra* note 161.

156. See discussion *infra* notes 157 and 161. For a remarkably comprehensive summary and categorization of constitutional interpretation systems throughout the world, see HARUTYUNYAN & Mavčič, *supra* note 155.

157. The variation in the structures and powers, formally and in practice, of bodies interpreting the constitution is incredible. HARUTYUNYAN & Mavčič, *supra* note 155, at 264–89. Among these alternatives are the following. Structurally, the body can be an ordinary court, a special court, legislative body, or council, or a special chamber or task force thereof. *Id.* at 264. There may be a single body with authority to interpret the constitution, usually a single constitutional court, or there can be multiple bodies, such as the ordinary courts in the United States or multiple constitutional courts on different levels of government, as in Germany and Russia. *Id.* at 156–59. The members can be appointed or elected, for terms varying in practice from 6–15 years (with or without the possibility of reappointment or re-election) or for life. *Id.* at 264–65. Qualifications for membership vary: for example, while many states require members to be lawyers, others do not, including the United States, where the Constitution does not require Supreme Court Justices to be attorneys. *Id.* at 276–77.

The jurisdiction of constitutional interpretation bodies also varies substantially, including (and excluding) all manner of laws, regulations, rules, treaties, official and unofficial acts, acts of private and public actors, elections, referenda, and so on. *Id.* at 286. In light of the linguistic/ethnically defined federalist system in Switzerland, it is interesting to note that “[t]he Federal Court exercises its constitutional jurisdiction chiefly with respect to legislative acts and decisions issued by the Cantons,” while “[t]he only federal legislative decisions subject to constitutional review are issued by the Federal Executive (Federal Council).” *Id.* at 155. All other federal laws and acts are subject only to political review. In some states, such as France, the review body exercises solely preventative review of an act or law for constitutionality before it is enacted, while in others, the body can exercise repressive review after an act has been taken or a law has been passed. *Id.* at 265. If the body finds the law or act unconstitutional after it is already in force, the decision could be either declaratory/advisory or effective and binding. If binding, the decision can take effect *ex tunc*, annulling the law or act retro-

judicial review, putting the power to interpret the constitution and nullify some contradictory government actions in the hands of some independent judicial or quasi-judicial body.<sup>158</sup> But only about one-third of those states follow the United States in decentralizing this authority to the ordinary courts as a whole. The others vest the interpretative power in a special constitutional court or council, vest it solely in the highest ordinary court of the land, or use some mixture of these systems.<sup>159</sup> Only a few states do not provide for authoritative constitutional interpretation at all.<sup>160</sup>

But even when considered within the context of this variety of roles and institutional mechanisms for constitutional interpretation, the Ethiopian choice of the House as its constitutional interpreter raises a red flag about political control of the process. At times, assigning this authority to a non-judicial branch has been a signal of a repressive government disinterested in active review. While there are a number of democratic, stable, and rights-respectful nations that operate under a system of parliamentary interpretation of the constitution, those nations tend to have other internal incentives for voluntary adherence to the constitution that Ethiopia lacks.<sup>161</sup>

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spectively from the time of its initial adoption, or ex nunc, annulling the law or act prospectively from the time of the ruling. *Id.* at 274.

Finally, there is substantial variation in the procedure by which a constitutional interpretation issue can be brought before the review body. Standing can be limited to certain government bodies, such as the courts and legislature or an ombudsman, or a petition can be brought by private individuals or entities. *Id.* at 287. The body's deliberations may be public or private, and internal procedures also vary. *Id.* at 264–65.

158. Harutyunyan and Mavčič account for approximately 170 states, of which approximately 145 vest authority in a judicial or quasi-judicial body. HARUTYUNYAN & Mavčič, *supra* note 155, at 29–34.

159. Roughly 50 states follow the U.S. model, including nine states in Africa, whereas approximately 80 vest authority in a constitutional court or council or in the highest national court, and roughly 15 apply some sort of mixed system. *See* HARUTYUNYAN & Mavčič, *supra* note 155, at 29–34. I use the phrase “follow the U.S.” advisedly as an expression of the historical development of this system from its origin in the United States in *Marbury v. Madison*, 5 U.S. 137 (1803) to its subsequent consideration and adoption by other states.

160. For example, the Netherlands does not authorize any body to perform constitutional review, except for Supreme Court review of certain European Community issues. However, the Netherlands stands out in this group as being relatively stable and concerned with human rights. Liberia, Libya, Afghanistan, Pakistan, and Congo are more representative of the group as a whole. *See* HARUTYUNYAN & Mavčič, *supra* note 155, at 34.

161. Finland and the United Kingdom are examples. *See* Aulis Aarnio, *Statutory Interpretation in Finland*, in *INTERPRETING STATUTES: A COMPARATIVE STUDY* 123, 150 (D. Neil MacCormick & Robert S. Summers eds., 1991); Ariel L. Bendor & Zeev Segal, *Constitutionalism and Trust in Britain: An Ancient Constitutional Culture, A New Judicial Review Model*, 17 AM. UNIV. INT'L L. REV. 683 (2002). The judiciary is beginning to play a greater role in enforcing human rights norms in the United Kingdom as a result of its involvement in the European Union. But until that development, the U.K. had used Parliament itself to review and check its own and other government actions by exercising self-restraint and by defining and

In the Ethiopian case, this decision prioritizes the credibility created by a sense of ethnic constituency over the legitimacy and check on the political branches made possible by having an independent, nonpolitical body interpret the constitution. For reasons of sheer numbers if nothing else, it would not be possible to have representatives of all ethnic groups among the members of a constitutional court, whereas the House is composed of representatives of all the Nationalities.<sup>162</sup> If it is true that Ethiopia's ethnic groups would not accept constitutional determinations that came from a non-representative body, then the credibility of those determinations among ethnic groups is better guaranteed by ensuring constituency than independence. The costs of this trade-off are more acute, of course, in cases that do not affect ethnic interests, and so this trade-off also represents a judgment that ethnic issues will be a primary concern of constitutional interpretation.<sup>163</sup>

There is no doubt, however, that the decision to vest the power of constitutional interpretation in a political body does not sit easily with respect for the values promoted by separation of powers and systems of strong judicial review. Ethnic issues are only a few of those that must be addressed by constitutional interpretation, and active, independent constitutional courts have played a vital role in building respect for constitutional values in new democracies as well as old.<sup>164</sup> In light of these concerns, ethnic constituency building ought not take precedence over independent adjudication where constitutional interpretation is concerned. Furthermore, as discussed below, processes for ethnic conflict

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enforcing an unwritten constitution, the fundamental traditions and norms that have been established over generations. However, this self-restraint and quasi-constitutional judging and enforcement depends upon a set of social expectations and mechanisms that Ethiopia does not share, such as common, long-standing social norms, an active press, and a forceful court of public opinion. See Bendor & Segal, *supra*; see also discussion *supra* note 155.

162. See discussion *supra* Part III.A.1.

163. Two other factors mitigate the risk of politicization. While the House of the Federation is part of the Parliament, it does not legislate, so that there is a division of the legislative and interpretive functions. And while the House has the final authority over any constitutional decision, the Council of Constitutional Interpretation, a legal body, does the work of interpretation.

Unfortunately, the Council also lacks basic structural guarantees of independence. See HARUTYUNYAN & Mavčič, *supra* note 155, at 217–35. The Council does not have any funding guarantees or independent sources of funding. See CCI Proclamation, *supra* note 22, arts. 33–34. While the Council's powers are in principle quite broad, see *id.* arts. 6, 17, 21–22, its decisions are advisory and it has no powers of enforcement. See *id.* arts. 6, 27, 35. Council members have no immunities and can be removed “for good cause,” except for the Chairperson and Deputy Chairperson who are protected only by virtue of their positions on the Federal Supreme Court. *Id.* art. 8. And while the Council's implementing legislation calls for it to act transparently, in my experience it does not hold public hearings, nor does it release its decisions to the public. See CCI Proclamation, *supra* note 22, art. 29.

164. See TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES (2003).

resolution may be more effective generally if they are based in multiple institutions, rather than in a single, ethnic-focused system.<sup>165</sup>

### c. Risks and Rewards of Standing for Ethnic Groups

While the House grants standing to its Nationalities to bring quite a number of claims, its recognition of ethnic groups is not unqualified. Although Nationalities can be parties to virtually any claim, it is far easier for government entities to initiate a claim quickly than for a Nationality to do so. Under the new law organizing the House's procedures, regional state councils are automatically accepted as proper representatives of the state's interests, but Nationalities must prove agency and also must demonstrate that they have exhausted state remedies for their claims. While this is likely a wise safeguard against some forms of chicanery, it does place an additional burden on Nationalities and complicate the process of bringing claims for them. In addition, Nationalities can bring only those constitutional claims that relate to their constitutional rights, while states can petition for hearing of any constitutional claim. Since regional state councils tend to be dominated by the majority ethnic group in the region, these rules in fact give systematic advantages to regional majorities (acting as regional states), over regional minorities (who participate as Nationalities). Finally, while the House has heard claims affecting communities that have not been recognized as Nationalities, as it did in the Silte case, its new procedural law does not provide a specific mechanism for such communities to bring claims.<sup>166</sup>

Thus, while the kind of institution embodied by the House in theory could serve as a venue of first resort for ethnic groups in conflict, in fact the House's rules of admissibility, standing, and exhaustion mean that it serves as a venue of last resort, after other mechanisms have been tried and have failed. These limits on ethnic standing undercut the benefits promoted by the House's permanence and ethnic composition to some extent. The House presents a venue for most ethnic claims eventually, after exhaustion requirements are satisfied and so long as a regional state will bring those claims that a Nationality or smaller community is not specifically authorized to bring. However, it does not offer automatic, immediate access to legal process for all claims. Accordingly, it is less likely that ethnic groups will develop a practice or expectation of making use of the House's processes to resolve their conflicts, and less likely that the House will be able to intervene early in a conflict and prevent it from escalating.

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165. See discussion *supra* Part II.B.2.

166. See HOF Proclamation, *supra* note 22; CCI Proclamation, *supra* note 22.

These questions of the appropriate standards for ethnic group standing and admissibility of ethnic claims, however, beg a more fundamental question: whether it is ever wise to give official recognition to ethnic groups or to design legal processes specifically for resolving ethnic disputes. This question is particularly acute in the constitutional setting, as discussed in the next Section, but it presents concerns even in consensual and ordinary adjudicative proceedings.

It is worth noting again at this juncture that many multi-ethnic states will not find it in their interests to make use of legal processes for resolving ethnic disputes. Rather, there is a subset of multi-ethnic states that have an obvious need for some form of ethnic conflict resolution: that is, multi-ethnic states where ethnic identity is primary, ethnic division is deep, and recurrent debilitating ethnic disputes pose the primary threat to the existence of the state.

In considering whether it is appropriate to grant some form of standing to ethnic groups, it is also important to consider that state recognition of ethnicity poses a risk for ethnic groups as well as for the state. In the past, such recognition has been limited and often negative. To be sure, some constitutions contain protections for ethnic minority or indigenous groups, either in the form of group rights, protections against discrimination on the basis of ethnicity, or political structures such as autonomous regions or set aside parliamentary seats.<sup>167</sup> But other constitutions have

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167. See, e.g., HUNG. CONST. arts. 68, 70A; INDIA CONST. arts. 29–30, 330–35; UGANDA CONST. art. 36. As the disfavored position of minority and indigenous groups came to international attention after World War I, states began to ratify treaties protecting those groups, and then eventually to guarantee minority or indigenous rights in their constitutions as well. See Elizabeth F. Defeis, *Minority Protections and Bilateral Agreements: An Effective Mechanism*, 22 HAMLINE J. PUB. L. & POL'Y 291 (1999); Wilson, *supra* note 62, at 465–72; Istvan Pogany, *Accommodating an Emergent National Identity: The Roma of Central and Eastern Europe*, in ACCOMMODATING NATIONAL IDENTITY, *supra* note 15, at 175, 185–86.

These protections are exceptional in nature: they guarantee rights for certain ethnic groups in contrast to a civic whole, and not for all ethnic groups. See generally KYMLICKA, *supra* note 58, at 26–33. These rights are also of limited scope and purpose: they protect certain cultural rights, guarantee equal treatment under the law, provide for political representation, and some offer circumscribed rights of self-government or self-determination. For example, the Pakistani constitution specifically protects minorities' religious, cultural, and equality rights. See PAK. CONST. pmbl.; Shaheen-Saradar Ali, *The Rights of Ethnic Minorities in Pakistan: A Legal Analysis (with particular reference to the Federally Administered Tribal Areas)*, in ACCOMMODATING NATIONAL IDENTITY, *supra* note 15, at 189, 193. The new Slovak constitution guarantees members of minority groups the right to be educated in their own languages. See Eric Stein, *Out of the Ashes of a Federation, Two New Constitutions*, 45 AM. J. COMP. L. 45, 53 (1997). Finally, these rights are often dedicated to and enforceable by individuals rather than by the group collectively. See Wilson, *supra* note 62, at 466–67; Aukerman, *supra* note 1, at 1031; Stein, *supra*, at 53. Such constitutions therefore express a limited vision of the proper constitutional role of ethnicity: ethnic identity belongs only to the minority and only to the oppressed, and ethnic identity is recognized by the constitution only for the purpose of alleviating that oppression.

enshrined limits on citizenship that have been either obliquely or overtly based on ethnicity, and many have not addressed ethnicity at all.<sup>168</sup> Political policies targeted at ethnic groups are far more common, sometimes protecting minority and indigenous peoples, but sometimes targeting particular groups for sanction or oppression.<sup>169</sup> There is no doubt that state recognition of ethnicity has often been to the detriment of ethnic groups in the past, and that, whatever its ostensible purpose, such recognition creates risk of misuse.

Acknowledging the legitimacy of these concerns, two observations suggest that some multi-ethnic states should nonetheless run the risks associated with legitimizing ethnic identifications in order to gain the benefit of legal process for ethnic conflict resolution. First, if an ethnic conflict exists, whether sham or genuine, the multi-ethnic state's fears have already been realized: ethnicity has become a source of conflict. While there is a risk that recognition of ethnic groups may catalyze an escalation in ethno-political rhetoric, it is certain that the state must find some way of dealing with ethnic conflict in order to survive. In this context, recognizing ethnic groups as parties for the purpose of adopting

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168. For example, the constitutions of the two constituent entities of Bosnia and Herzegovina had provisions that limited citizenship according to ethnicity until those provisions were struck down by the Constitutional Court in 2000. See Case U 5/98, Request for Evaluation of Constitutionality of Certain Provisions of the Constitution of Republika Srpska and the Constitution of the Federation of BiH, Partial Decision (Constitutional Ct. Bosn. & Herze. July 1, 2000), available at <http://ccbh.ba/decisions> (last visited Feb. 4, 2004). By contrast, early constitutions dealt with ethnic groups only obliquely, even when key aspects of political life such as citizenship were determined in part by ethnicity. The U.S. Constitution does not refer to ethnic groups directly in spite of the variety of ethnic groups that made up the American polity at that time. Its only express references to ethnic groups are its provisions concerning the Indian Tribes, which it treats more as a set of particularly relevant foreign nations than as ethnicities, see U.S. CONST. art. 1, § 8, cl. 3.

169. Multi-ethnic states have long been riddled with ethnic categories and compromises below the constitutional surface. In the United States, treaties and other political agreements promised certain rights to indigenous groups at the time that they were incorporated into the United States. Of course, these promises were not always fulfilled. See KYMLICKA, *supra* note 58, at 12. Of course, often political or legal recognition of ethnicity has been for the purpose of facilitating stigmatization and discrimination rather than benefits. In the early twentieth century, public outrage in San Francisco over the "Yellow Peril" posed by increasing numbers of Japanese immigrants led to riots and school segregation orders and were eventually resolved with a federal Immigration Act and a "Gentlemen's Agreement" with Japan limiting immigration to the U.S. by Japanese citizens. See EDMUND MORRIS, THEODORE REX 482–84, 492–93, 510 (2001) (Morris views this as more of a labor conflict than an ethnic or racial conflict but acknowledges the ethnic nature of the targeting).

Political and legal recognition of ethnicity has often been catalyzed by ethnic conflict, either resolving it, or causing it, or both. Eastern Europe has had a complex history of ethnic conquest and accommodation, assimilation and repression for hundreds of years before its current travails. Multi-ethnic states were created through political compromises and military victories, and then divided into single ethnicity states again when fortunes shifted. Ethnic minorities within these changing states often have been subject to discriminatory laws and policies. See Pogany, *supra* note 167, at 176–77.



conflict resolution processes may present a measured risk that is worth taking.<sup>170</sup>

Furthermore, it appears that it is not so much ethnic identification itself as unresolved and festering ethnic disputes that pose an imminent threat to the multi-ethnic state. One reason that ethnic identification is persistent is that ethnicity often serves a positive purpose by constructing vibrant, valued communities. Beyond their cultural and social value, these communities may play a positive political role, governing themselves successfully and authentically representing the interests of their members. Indeed, they may be more popular, credible, and effective than non-ethnic political institutions. Nor is it even the development of disputes between ethnic groups that makes ethnic conflict destructive. After all, disagreements readily and ordinarily arise and are resolved just as readily and ordinarily between and within all communities, however defined.<sup>171</sup>

Rather, the primary threats that ethnic conflict poses to the state seems to be twofold: the use of ethnicity by political or community leaders to stir up conflict as a means to power, and the failure to resolve inter-ethnic conflicts, whether genuine or political shams, in an orderly and peaceful way. The first threat is one that legal process can address only indirectly, by undermining political rhetoric asserting that there is no effective remedy for ethnic conflict, and by actually resolving claims.

The second threat presented by ethnic conflict, that of unrest spurred by lingering unresolved conflict, is one that can and ought to be addressed directly by law and legal process. Where ethnic conflict is already occurring, early diversion of the disagreement into a conflict resolution process before it becomes intractable offers some hope of preventing the dispute from escalating. Granting standing to ethnic actors and recognizing their claims is necessary to this process.<sup>172</sup>

Mere acknowledgment of ethnic identifications in the conflict resolution context, without more (such as creation of new political rights or mandatory identification of all citizens with a particular ethnic group, for example), ought to pose a relatively small risk of catalyzing ethnic conflict, as compared to acknowledgment of ethnic identifications in other contexts. However, there is a specific risk to legitimizing legal institutions as an appropriate venue, and legal processes as an appropriate mechanism, for ethnic dispute resolution. Just as democratic processes have been co-opted by political and community ethnic leaders and used

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170. Indeed, the very existence of legal processes may have an ameliorating effect by undermining rhetoric alleging that ethnic discord is intractable.

171. See discussion of the complexity of ethnic identifications and conflicts *supra* section II.A.

172. See SUSSKIND & CRUIKSHANK, *supra* note 139, at 94.

as tools of nationalism and ethnic warfare, so too could legal processes.<sup>173</sup>

This raises several questions: Does ethnicity pose a risk that is greater or different in kind than other political interests that have been known to hijack legal processes? What safeguards might be established against misuse of the legal system for this purpose, as structural guarantees of judicial independence protect against misuse of the courts by the political branches of government?

#### d. Institutional Possibilities

The Ethiopian system calls on us to turn from the abstract to the actual in considering these questions. If we take seriously the possibility that legal processes might be effective in addressing some ethnic disputes, what form of standing should ethnic groups be given, and what kind of institution might best resolve ethnic claims, while mitigating the risks posed by legitimizing ethnic actors? The answer provided to this problem by the Ethiopian system is a permanent, ethnic-focused institution with standing for all ethnic groups.

While this approach has its advantages, as discussed above, it also presents certain concerns. Permanent institutions can build up permanent biases. In the ordinary courts, strict formalities of procedure and provisions for review, as well as the limits of the substantive law, are intended to mitigate this problem. As discussed below, the Ethiopian system lacks such formalities and works primarily from constitutional provisions, without much additional substantive law on ethnic issues. Without adequate provisions for independence, conflict resolution institutions may become mere puppets of the government's ethnic policy. In the Ethiopian context, the House has no safeguards for independent action such as those that commonly are used to protect the independence of the ordinary judiciary.

Furthermore, shunting ethnic claims off to special courts or other institutions may merely relegate them to a second class system rather than providing them a more effective one. In a resource-poor country, there is no guarantee that ethnic conflict resolution institutions will be more capable than judicial ones. In the Ethiopian case, the House has been plagued by insufficient resources and concomitant delays that have undercut its initial successes in persuading ethnic groups to participate in the system and threaten ultimately to undermine its credibility. There is also the risk of institutional bad faith: in the past, ethnic and tribal courts have been the mark of colonial governments intent on subjugation and

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173. See discussion *supra* section II.B.

differentiation.<sup>174</sup> Whether because of political bad faith, internal bias or simple lack of funds, a separate system, well designed in principle, may prove inadequate in practice.

Finally, creating an entirely new system especially for ethnic conflict may be well beyond what an ethnic-identified state has the resources, political will, or inclination to undertake. States that are already in a period of transition may have an interest in considering new state structures, and those facing severe ethnic conflicts may be willing to go to great lengths in order to address those conflicts. Many ethnic-identified states, however, might be willing to tinker with, but not to re-organize, their current legal processes.

The Ethiopian institutional structure presents an interesting experiment that should prod us to consider how legal processes could be shaped to address ethnic claims, rather than offering a blueprint for resolving ethnic conflict. Taking seriously the Ethiopian approach of offering processes designed for ethnic groups rather than the other way around, there are a variety of ways that a state might try to do so without adopting the Ethiopian institutional structure.

One possibility would be to have a permanent conflict resolution system but not permanent standing for ethnic groups. Rather, ethnic groups, like classes in class actions, might be required to demonstrate agency and representation on a case-by-case basis. This might help prevent the entrenchment of ethnic identities and of dominant viewpoints within ethnic groups and might spur intra-group debate on public issues.

Another possibility would be to create a venue that is designated exclusively for group claims, but not specifically for ethnic ones. This approach would permit the use of procedures that are aimed at groups rather than individuals and of mediators and judges who are accustomed to addressing public disputes rather than private ones, while mitigating the risk of creating a second class ethnic system or entrenching ethnic identities. This would also be more productive than a specifically ethnic system in states where group conflicts are not defined primarily along ethnic lines but as often occur between religious, linguistic, or other groups.

Yet another possibility would be to adopt processes that open the ordinary courts to ethnic groups' claims. In spite of the disadvantages of using the ordinary court system for group claims concerning matters of public interest, particularly in civil law systems, this solution would avoid the problem of shunting ethnic groups to a separate court system,

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174. Separate courts for indigenous groups were a mark of the apartheid regime in South Africa, for example. See Hallie Ludsin, *Cultural Denial: What South Africa's Treatment of Witchcraft Says For the Future of its Customary Law*, 21 BERKELEY J. INT'L L. 62, 67 (2003).

would treat ethnic group claims like other legal claims, and would provide the safeguards of established formal procedures and institutions.<sup>175</sup>

At the other extreme, a state might decide to rely on purely political processes created on a case-by-case basis as the only way to properly tailor processes, avoid the development of biases, and prevent the use of the system as a tool of the government. While this would mean the loss of the advantages of expertise and prompt availability that are created by a permanent system, these losses could be mitigated by a political commitment to identify and address ethnic disputes in early stages.

Finally, as discussed below, legal process and conflict resolution theories suggest procedural mechanisms for mitigating the problems raised by a permanent ethnic-focused system.<sup>176</sup>

Depending on the state's legal system, resources and ethnic relationships, one of these options might prove more productive than permanent, ethnic-oriented institutions. What is vital is that the state provide some venue, and one that is carefully chosen, for addressing ethnic conflicts.

## 2. Complementary Consensual and Adjudicative Methods

Because ethnic groups and their disputes are so varied, it would be too much to expect that a single legal process would be effective for all ethnic disputes. Disputes that are based in legally defined rights may be susceptible of adjudication in ordinary courts, but many ethnic disputes are not based in legal rights. Some issues may be readily negotiated while others affect vital group interests, and some groups are amenable to compromise while others have a contentious relationship that will not permit voluntary resolution of their disagreements. Furthermore, while some cases may concern only the immediate parties to the dispute, others have broader implications for the nation as a whole.

While legal processes do not come in as many varieties as ethnic conflicts, there are many different modes of legal process for ethnic-identified states to consider. Although we tend to think of legal process primarily in terms of litigation before a court, alternative dispute resolution ("ADR") methods have become an integral part of the everyday workings of legal systems. A single claim may make its way through all kinds of legal process, from mediation to litigation to a negotiated settlement, for example, or from arbitration to judicial review of the arbitrator's decision. This shift in practice has also shifted the ordinary understanding of legal process to encompass arbitration, mediation, and other forms of consensual dispute resolution as well as adversarial and adjudicative mechanisms. In addition, in ethnic-identified countries like

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175. See discussion *supra* Section II.B.2.

176. See discussion *infra* Section III.B.2.

Ethiopia, there are often rich legal traditions within ethnic groups that might be employed fruitfully.<sup>177</sup>

The Ethiopian example suggests that using complementary processes may be more effective for the immediate purpose of resolving disputes than a single system. It also indicates that, at least in some instances, legal processes may play a transformative social role. This transformative potential, however, also heightens the risks associated with misuse of the system by parties acting in bad faith, and so we also must consider how to mitigate those risks.

#### a. Effectiveness in Dispute Resolution

By using both consensual and adjudicative processes ranging from informal negotiations to authoritative constitutional interpretation, the Ethiopian system aspires to combine several legal processes into a comprehensive whole that can effectively address many ethnic concerns. However, it does not achieve this goal in practice. According to its constitutional mandate, the mediation process ought to permit consideration of claims such as the Berta's that are not based in legally enforceable rights and obligations,<sup>178</sup> or even of other, more diffuse concerns such as repeated verbal or physical quarrels between members of the groups. The non-constitutional adjudicative component should provide an effective backstop to the risk of an impasse in mediation. Through constitutional interpretation, the House can define a legal framework of constitutional rights to provide a baseline for future negotiations and create a process for implementing rights, like the Silte's referendum procedure.

In theory, those processes could complement and balance each other, but in reality, the Ethiopian system fails to take advantage of each process's potential strengths. The informal, consensus-building aspects of a mediation process tend to be most effective if there are low barriers to entry into the system, so that parties will tend to initiate the process early, before positions have hardened and the dispute has become intractable. While a permanent institution presents the opportunity for early intervention in disputes, as discussed above, the Ethiopian system's

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177. Indeed, traditional Ethiopian modes of private and public litigation are a fascinating subject in themselves. See JEMBERE, *supra* note 90, at 187–216. The House of the Federation's mandate requires it to incorporate traditional dispute resolution systems as appropriate. See HOF Proclamation, *supra* note 22, art. 33. To my knowledge, no formal steps have been taken to study traditional dispute resolution mechanisms, but the House has made use of local practices, such as reliance on councils of elders, in mediating particular disputes. See Alemayehu June 6, 2002 Interview, *supra* note 26.

178. Although the election process is defined by law, no cause of action exists for the Berta to bring their challenge to court.

requirement that local processes be exhausted means that a dispute will not come to the House until it is at a deadlock.<sup>179</sup>

The weakness of the House's adjudication system presents a serious gap in the system's comprehensiveness and effectiveness. While mediation and other consensual procedures may benefit from flexible procedures due to their reliance on the agreement of the parties for decision, adjudication processes that impose decisions depend on the use of established procedures and rules to ensure fair, non-arbitrary decision-making. However, the law establishing the House's authority does not define the processes of adjudication except in the most general terms. In the Berta case, without an established process to move the matter ahead, resort to adjudication seems to have meant merely a continuation of the impasse.<sup>180</sup>

Furthermore, creating adjudicative procedures in the context of ongoing disputes is not only inefficient, but is also likely to impair the effectiveness of the institution and presents a serious risk of undermining its legitimacy. As discussed below, any system of ethnic dispute resolution must carefully take account of and try to countermand the likelihood of bad faith on the part of at least some participants in the system. The lack of procedures leaves the adjudicative process open to misuse.

On a positive note, the House's constitutional decision in the Silte case represented a step toward the end of creating additional processes to address recurrent concerns. Here, the House created a multi-stage process for determining a community's identity that blends legal and political, consensual and adjudicative mechanisms and multiple levels of government. As the process progresses, it moves from the most local, political and consensual processes, votes by the community's council and by the community itself, to the second stage, a hybrid political-legal study and adjudication at the regional level. If that adjudication is not accepted by the parties, the final step is the most national, legal, and

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179. With more resources, the process could be made more accessible in practice. Limited staff and funds mean that the States' Committee cannot immediately and effectively respond to every concern that is brought to them and therefore has no incentive to promote greater accessibility. See Megiso Interview, *supra* note 24.

180. Some of the issues uncovered in the mediation process in the Berta case, such as questions of what constitutes proportionate representation and the rights of non-indigenous peoples to representation, may be susceptible of constitutional interpretation. But to the extent that the obstacle is a simple refusal to accept the results of the States' Committee's study, or the need to resolve other non-constitutional issues such as allocation of agreed upon rights, constitutional interpretation will offer no redress. An effective, defined non-constitutional adjudicative process, such as a form of arbitration or litigation, would provide a venue for deciding such non-constitutional legal and political issues. In addition, adjudicative and consensual processes can be blended in various ways to fit the circumstances. Examples include structured negotiations and nonbinding arbitrations. See LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 3-4 (2d ed. 1997).

adjudicative process, a possible appeal to the House for constitutional interpretation.

The results in the Berta and Silte cases suggest that different processes do have different strengths and weaknesses, of which a successful conflict resolution system should take account. However, while establishing a single system making use of complementary processes may present a theoretical ideal, to do so will require a significant influx of resources and exercise of political will. For states lacking both, second-best options may present a more successful alternative.

### b. Generating Legal Norms and Practices

If the ability to bring disputes to some sort of conclusion provides the measure of success, using multiple and complementary processes seems to provide an advantage. In light of the serious social and political ramifications of unresolved ethnic disputes, this is no small matter. But there are other considerations: equality, efficiency, fairness, enforceability and credibility among them.<sup>181</sup>

Precisely because ethnic groups do play such a significant role in ethnic-identified societies, the social effects of these processes are a vital concern for the state. As discussed below, the Ethiopian system on its face promotes a particular social goal: self-determination for its ethnic groups. Certainly the results of the constitutional interpretation in the Silte case seem to advance this purpose. However, as discussed below, other multi-ethnic states will likely have other predominant concerns, such as security and equality among their ethnic groups, and so their practices will need to be guided by and judged against different norms.

There is a lively debate about the essential social purpose and functioning of legal processes, spurred not only by the infiltration of ADR into legal systems, but also by the social effects of public interest litigation and by the critical legal studies movement. Division on these questions is particularly acute when it comes to questions like the one before us: the appropriate processes and institutions for deciding group disputes of public significance. The discussion began with opposing principles. Owen Fiss and other advocates of litigation before a judge promoted authoritative adjudication based on external, neutral legal principles as a potent agent of institutional and social change, and emphasized the importance of formal procedures as a protection for

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181. Consideration of these and other values would be a worthwhile endeavor, but one well beyond the scope of this Article. See *Paths to Justice: Major Public Policy Issues of Dispute Resolution*, Report of the Ad Hoc Panel on Dispute Resolution and Public Policy, National Institute for Dispute Resolution (1983), in RISKIN & WESTBROOK, *supra* note 180 (developing these criteria).

weaker parties.<sup>182</sup> Advocates of consensual systems, in contrast, contended that the parties themselves can better create durable solutions that promote their primary, often underlying goals, and that their direct, active participation in self-defined processes is crucial to this end.<sup>183</sup> Critical legal scholars, meanwhile, saw in both systems flawed assumptions of neutrality and equality that merely mask the use of law as a vehicle for power.<sup>184</sup>

As this debate has progressed, new approaches and theories have emerged. A middle ground has developed, based on the proposition that different processes will have roles to play in serving different sorts of disputes, and that relevant factors can be identified to provide models for choosing between processes in the context of any given dispute.<sup>185</sup> In the private sector, some businesses and industries have developed complex hybrid, multi-stage models, beginning with defined and directed negotiation, and progressing into increasingly adjudicative and coercive mechanisms in later stages if consensual processes fail.<sup>186</sup> The goals envisioned for legal processes in public disputes have also evolved: Nathalie des Rosiers, for example, argues for a therapeutic approach, calling upon courts to play an expressive role rather than an adjudicative one.<sup>187</sup>

It is worth noting that each of these positions, new and old, presupposes the existence of effective, competent courts that are ready and able to consider claims if called upon to do so. For ethnic conflicts, this is often untrue. Indeed, in the ethnic conflict context, there may well be no legal processes of any kind to address the dispute at hand.<sup>188</sup> Therefore, the challenge that we face in considering processes for ethnic conflict is not to determine an ideal among the available legal processes, but rather to develop any effective legal process at all.

In this light, while this debate raises many interesting legal process issues, I would like to touch on only two: the capacity of legal processes

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182. See Fiss, *supra* note 147.

183. See Andrew McThenia & Thomas Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985); Owen M. Fiss, *Out of Eden*, 94 YALE L.J. 1669 (1985) (responding to McThenia & Shaffer); SUSSKIND & CRUIKSHANK *supra* note 139, at 26–32, 77.

184. See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 82–88 (1996).

185. See RISKIN & WESTBROOK, *supra* note 180, at 711 (quoting Harry Edwards), *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668 (1986); Carrie Menkel-Meadow, *Whose Dispute is it Anyway?*, 83 GEO. L.J. 2663 (1995).

186. See RISKIN & WESTBROOK, *supra* note 180, at 747, 753 (quoting Thomas F. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65 (1996)).

187. See generally des Rosiers, *supra* note 81.

188. Not only this, depending on the issues that are the subject of recurrent ethnic disputes, there may be virtually no substantive law governing ethnic disputes in general.



to create law, and the risk that legal processes will be used in bad faith or to destructive ends.

If there are both substantive law and formal legal processes to enforce that law, then adjudicative and consensual models' processes may offer distinctly different advantages: binding versus nonbinding judgments, and an obligation to uphold legally prescribed norms versus an ability to expressly compromise those norms, for example. But when there is little or no substantive law, and particularly in contexts in which enforcement mechanisms are meager, these distinctions begin to collapse.<sup>189</sup>

In this context, consensual processes as well as adjudicative ones may generate law by establishing practices of participating in those processes and adhering to the substantive norms that result. In the Ethiopian context, the Berta's established practice of participating in the House of the Federation facilitated their consent to the House's jurisdiction over their dispute. If this new practice endures and is repeated, the jurisdiction of the House over such disputes may eventually become obligatory, in that the expectation of participation in the House's mediation process may become as absolute as if that jurisdiction were formally mandatory, and the social and political costs of refusing to participate may play an enforcement role as effectively as formal sanctions. If the Berta case were to reach a substantive result reallocating representatives among locally non-indigenous as well as indigenous groups, this result itself could also become an institutional norm within the House's mediation process. Thus, because it is a permanent institution with institutional memory, the mediation system may in time develop its own customary or common law.

This capacity of various kinds of processes to generate law suggests that the most important goal of ethnic-identified states should be to draw ethnic groups into ongoing participation in legal processes.<sup>190</sup> Legal processes will not only become a habit of dispute resolution but also

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189. This description of the issue presumes the hegemony of substantive law when enforcement is effective. That hegemony and its legitimacy are of course far from unchallenged. See Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

190. Harold Koh's theory of transnational legal process offers an interesting insight into such processes in the international context. See Koh, *supra* note 12. While there are of course numerous differences between international law and the situation of ethnic groups, there are certain key similarities. International actors, like ethnic groups, have shifting identities and often face group agency problems. There are enormous gaps in the law governing the relationships and disputes of states in the international arena, just as there are in the relationships and disputes of ethnic groups. There are few venues for adjudication of disputes between states, and enforcement mechanisms are weak and often come in the form of political sanctions rather than legal ones. Finally, the stakes are similarly high; just as unresolved conflicts between ethnic groups pose a fundamental threat to the multi-ethnic state, so do unresolved conflicts between states pose a fundamental threat to world security.

may over time themselves generate the law necessary to resolve those disputes. Much as states participate in international law, gradually developing and complying with common norms through iterative processes of interpretation, implementation and repudiation that extend far beyond traditional legal contexts, so might ethnic groups be drawn into participation in and creation of domestic legal norms for their behavior by participation in legal processes of all sorts.<sup>191</sup>

If this is so, then the potential effect of legal processes in controlling ethnic conflict transcends the resolution or containment of any particular disputes. But if so, then its potential to cause destructive results through generation of destructive norms also transcends the risks associated with bad faith participation in any given dispute.

In each model of legal process, the safeguards against destructive use of the process can be readily subverted by a bad faith actor. In the adjudicative model, formal processes and a neutral judge are intended to winnow out false claims and evidence, if not false motives, and to mitigate power differentials between the parties. But if the judge herself is biased, this safeguard fails. Consensual models protect against destructive results by their reliance on the agreement of the parties, and on the active participation of a third party neutral to address differences in power. But if all of the parties are acting in bad faith, they can nonetheless hijack the process.<sup>192</sup> Finally, if there is not just individual but institutional bias, the risk of generating destructive law is acute. If the mediation institution develops its own common law by means of the practices of the parties, that common law could perpetuate and enforce the biases inherent in those collective practices.

In this respect, having multiple, complementary legal processes is not just a matter of maximizing the chance of successful resolution of an immediate dispute or providing multiple contexts for participation in legal processes and generation of legal norms and compliance. Rather, the use of multiple processes centered in multiple institutions helps to mitigate this risk of bad faith, and enforcement of constitutional principles in particular must serve as a vital safeguard against destructive norms. Bad faith on one level may be counterbalanced by good faith on another; biased norms or practices in one institution ought to be corrected by the norms and practices of another. This possibility creates complexities, of course — what if the norms and practices between levels and institutions are truly different? What if, for example, ethnic

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191. See *id.*

192. See CARPENTER & KENNEDY, *supra* note 10, at 209–210, 216–23 (“If, for example, there is serious doubt that some individuals can ever be persuaded to deal fairly with others, the [consensual negotiation] program should not go forward, because it may expose participants to harm if they act in good faith.”).

communities consistently vote for recognition as independent Nationalities, and regional states consistently determine that they are ineligible according to the constitutional standard? If there are such divergences, the development of productive constitutional principles and useful constitutional interpretation will be vital to controlling and limiting them.

### 3. Constitutional Interpretation

The Ethiopian constitution is extreme in its emphasis on ethnic group rights. Not only does the constitution provide for virtually unqualified rights of self-determination, but it is the "Nations, Nationalities and Peoples" of Ethiopia who are invoked in the preamble as constituting the Ethiopian polity, and it is those same Nations, Nationalities and Peoples in whom sovereignty is said to reside.<sup>193</sup>

Other multi-ethnic states do not generally place such constitutional weight on their ethnic groups. But ethnic concerns do arise in other constitutional contexts and claims nonetheless. The issue of ethnic identity that is raised in the Silte case, for example, is often a preliminary question in constitutional controversies concerning minority and indigenous groups.<sup>194</sup>

Beyond questions that can be addressed by reference to existing constitutional rights, however, multi-ethnic states must maintain positive inter-ethnic relationships to survive. Constitutional interpretation could be a powerful tool for addressing recurrent questions that affect numerous ethnic groups and therefore require authoritative nationwide determination, even if those claims are not based in particular rights. For example, in the Canadian Supreme Court's decision regarding Quebec's right to secede unilaterally (the "Quebec Secession case"), discussed below, the primary argument made in favor of Quebec's right to secede was not a rights-based claim, as there is no right of secession stated in the Canadian constitution. Rather, the court's decision was founded in principles of democracy. And notably, this case was not brought by Quebec in an effort to secede, but by the Canadian government in an effort to bring the question of Quebec's status into the legal and constitutional arena.<sup>195</sup>

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193. See ETH. CONST. pmbl., art. 8.

194. Such controversies may concern antidiscrimination clauses, rights to language or education, or questions of political representation, self-government or secession. See, e.g., *Doucet-Boudreau v. Nova Scotia*, [2003] S.C.R. 62 (Can.); *Case of Gorzelik & Others v. Pol.*, App. No. 44158/98, 2004-IV Eur. Ct. H.R. forthcoming (Feb. 17, 2004), available at <http://hudoc.echr.coe.int> (last viewed Aug. 2, 2003). In ethnic-identified states, ethnic groups that function as communities may wish to bring claims that are unrelated to their ethnicity but nonetheless require them to be recognized as functional groups, such as constitutional challenges to national policies or programs that adversely affect their communities.

195. See Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 218 (Can.).

The Ethiopian system promotes its Nationalities' participation in constitutional interpretation by placing the power of constitutional interpretation in an ethnic-composed body, providing extensive constitutional rights for Nationalities, and granting Nationalities standing to raise claims concerning those rights. As discussed above, providing for an ethnically representative constitutional body and granting sweeping rights to ethnic groups raise numerous constitutional and political concerns. However, ethnic-identified states might well find it productive to permit ethnic groups to raise constitutional issues, without otherwise altering the state's current structure for constitutional interpretation.

What role, then, might constitutional interpretation play in resolving ethnic concerns in ethnic-identified states? I see two possibilities: states could grant standing to ethnic groups to raise general constitutional claims, and courts could actively seek out constitutional values that will promote the state's interest in positive inter-ethnic relationships. Each of these approaches would promote ethnic participation in, and therefore investment in, the constitutional structure. Each would also promote a mode of ethnic involvement that transcends an opposition of ethnic rights and state interests and incorporates shared inter-ethnic and state interests.

#### a. Constitutional Standing

Although Ethiopian Nationalities do have standing to request constitutional interpretation on issues relating to their rights, they do not seem to have standing to request constitutional interpretation on other issues.<sup>196</sup> In addition, ethnic communities that have not been recognized as Nationalities for other purposes are also not recognized as having standing to bring constitutional claims.<sup>197</sup> In the Silte case, therefore, it was the Southern Nations' state council, and not the Silte community, that referred the constitutional question to the House.

More broadly, although any litigant in the United States can raise a constitutional claim on the same basis as other legal claims, many countries sharply limit constitutional standing on the basis of the petitioner's identity. In some systems, only designated government entities, such as the executive or the legislature, can request constitutional interpretation. In others, the ordinary courts can also refer claims that arise in the course of cases to the constitutional court; and in

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196. See CCI Proclamation, *supra* note 22, arts. 21–23 (providing standing only for: any person alleging a violation of fundamental rights and freedoms (including Nationality rights); courts, to submit constitutional issues that are necessary to decide the case; the parties to a court case; and the federal or state executives or one-third of the members of the federal or state councils, in cases that are not within the courts' jurisdiction).

197. See CCI Proclamation, *supra* note 22.

more expansive systems, citizens can also petition for enforcement of their constitutional rights.<sup>198</sup>

Some states currently grant constitutional standing to individual members of minority or indigenous ethnic groups to bring claims based on minority and indigenous rights. But even when the claims are ones that must practically be claimed by more than one person, such as the right to schools that will educate students in a minority language, ethnic groups can rarely make claims as groups.<sup>199</sup> Rather, if ethnic groups can make constitutional claims at all, it is generally when they represent the rights of their member citizens or can be re-characterized as political entities.<sup>200</sup>

Ethnic-identified states could take a more inclusive approach to ethnic standing and thereby permit ethnic groups to participate in the process of defining the constitutional structure as it currently exists, without granting them new political or social rights. The state could, for example, permit ethnic groups to collectively claim general constitutional rights that may not be defined in terms of ethnicity, such as the right to use one's own language or the right to education. It could also permit ethnic groups to file requests for constitutional interpretation on questions of general interest, irrespective of efforts to enforce rights.<sup>201</sup> Particularly in ethnic-identified states in which ethnic groups represent communities, they may have concerns about all aspects of government administration and authority, just as individual citizens and other citizen groups do.

As discussed above, the problems of agency and representation that are common to group claims could be addressed through one of a variety of mechanisms. A state could adopt a set of requirements like those for class certification, or could require ethnic groups themselves to gather evidence of representation and group consensus in order to bring claims. Granting ethnic standing only on a case by case basis might help to prevent ethnic polarization and to ensure authentic representation of a community perspective. For these purposes, and for the purpose of encouraging consideration of diverse intra-group interests, it might also be a positive step to grant standing in appropriate cases to multiple repre-

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198. In Hungary, however, standing is virtually unlimited. Any individual, even a non-citizen, can raise a constitutional claim. See GINSBURG, *supra* note 164; ARENDT LJPHART, PATTERNS OF DEMOCRACY (1999).

199. See, e.g., Doucet-Boudreau v. Nova Scotia, [2003] S.C.R. 62 (Can.).

200. See Aukerman, *supra* note 1, at 1031; Stein, *supra* note 167, at 53; Wilson, *supra* note 62, at 466–67.

201. For a discussion of the issue of participation by and satisfaction of the French minority in the Quebec secession case, see generally Nathalie Des Rosiers, *From Quebec Veto to Quebec Secession: The Evolution of the Supreme Court of Canada on Quebec-Canada Disputes*, 13 CANADIAN J.L. & JURISPRUDENCE 171 (2000).

sentatives with multiple viewpoints from within ethnic groups, rather than requiring groups to muster and sustain a single viewpoint in order to be heard.<sup>202</sup>

Just as providing expressly ethnic mediation institutions may encourage ethnic groups to participate in them, so giving ethnic groups an interest in the results of constitutional interpretation might encourage ethnic groups to use constitutional interpretation to establish their rights and obligations vis-à-vis other ethnic groups and the state rather than operating outside the constitutional framework.<sup>203</sup> This possibility raises several questions that deserve further consideration. In theory, it seems that granting standing to ethnic groups as groups ought to promote these participatory goals better than granting standing only to individual members of the group, but is this so in practice? Are there risks associated with granting ethnic groups constitutional standing that are different from those raised by granting standing to participate in other dispute resolution processes? And if so, can those risks be mitigated?

#### b. Constitutional Principles

The possibility of broad ethnic participation in petitions for constitutional interpretation raises another concern: how should ethnic interests be weighed in interpreting the constitution? I suggest that courts should look beyond dichotomies of ethnic rights and state interests, to constitutional principles that express the genuine interest of the multi-ethnic state in maintaining its ethnic diversity, fostering inter-ethnic stability and equality, and the like.

In the *Silte* case, the Council of Constitutional Inquiry faced a common interpretative problem: how to fill gaps and resolve ambiguities in the constitutional text. Although the Ethiopian constitution provides for extensive and specific group rights, the Council of Constitutional Inquiry nonetheless found itself without express constitutional direction on the questions raised in the *Silte* case. In justification of its decision to give primary authority over the question of ethnic identity to the petitioning *Silte* community itself, the Council culled out and applied an underlying

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202. As discussed above, ethnic groups may well re-characterize claims in order to gain access to useful systems. Granting standing to intra-group constituencies without requiring consensus where consensus does not exist would permit the use of constitutional interpretation as a forum for debating and deciding vital issues without pressuring groups to shape their claims and interests in ways that do not reflect their true interests.

203. More generally, giving ethnic groups a legitimate place in political discussion may dissolve their role as opposition groups and thereby encourage internal fracturing and diversification of political and social views.

constitutional principle of general ethnic self-determination above and beyond the specified rights of Nationalities.<sup>204</sup>

Other constitutional courts in multi-ethnic states have also struggled to articulate effective constitutional principles for determining ethnic questions. When asked to decide whether Quebec had the right to secede unilaterally from Canada, the Canadian Supreme Court found that the constitution did not speak directly to the question and looked to unwritten principles for its decision.<sup>205</sup> Similarly, the Constitutional Court of Bosnia and Herzegovina relied on unwritten principles to determine whether its entity states could constitutionally define only certain ethnic groups as the "constituent peoples" who comprise the polity.<sup>206</sup>

Of course, theories of constitutional interpretation differ sharply on the appropriateness of looking beyond the constitutional text at all when faced with gaps and ambiguities, and if one should look, where one might look, for what kinds of principles, and what use one might make of them. An adequate discussion of these questions in the ethnic context, while both interesting and relevant, is well beyond the scope of this Article.<sup>207</sup>

For present purposes, therefore, let us look to constitutional practice. The Ethiopian, Canadian, and Bosnian cases suggest that courts in multi-ethnic states will face ethnic claims that implicate fundamental state concerns, up to and including the continued existence of the multi-ethnic

204. See *Proposed Decision, Silte case*, *supra* note 129; see also discussion *supra* Section III.A.3.

205. See *Quebec Secession case*, *supra* note 195. While Canada is a multi-ethnic state, it is not one that I would describe as ethnic-identified as defined in the introduction to this Article. In addition, Quebec is an excellent example of overlapping group identities: the French community in Quebec could be described either as a linguistic group or as an ethnic one. The Quebec Secession case thus presents an interesting example of how these issues and identities intersect, and demonstrates that even civic-identified states are at times confronted with fundamental ethnic questions that can be addressed through constitutional interpretation.

206. The court relied in part on the Canadian Supreme Court's decision in the Quebec Secession case to justify turning to inherent constitutional principles as a basis for its judgment. It derived from the constitutional preamble the principle of equality among ethnic groups and determined that this principle forbade the entity states from defining only their own respective majority ethnic groups as their constituent peoples. See *Constituent Peoples Decision*, *supra* note 168.

207. To say that there is an extensive, rich literature grappling with these problems of interpretation is, alas, to devote but a brief wave of the hand to libraries of legal scholarship. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (2d ed. 1986); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980). For a history of modern American theories and debate, see KALMAN, *supra* note 184. For a discussion of these questions in the context of the Canadian and Bosnian cases, see Sujit Choudhry & Robert Howse, *Constitutional Theory and the Quebec Secession Reference*, 13 CANADIAN J. L. & JURISPRUDENCE 143 (2000); Jean LeClair, *Canada's Unfathomable Unwritten Constitutional Principles*, 27 QUEENS L.J. 389 (2002); Anna Moreweic Mansfield, *Ethnic but Equal: The Quest for a New Democratic Order in Bosnia and Herzegovina*, 103 COLUM. L. REV. 1352 (2003).

state. In each of these cases, the court looked for a principled way of taking into account the effect its judgment would have on the state's interests in its inter-ethnic relationships. But in each of these cases, the constitutional texts did not provide the courts with an explicit basis for articulating those interests. Faced with these gaps and ambiguities, these courts turned to underlying constitutional principles.

In the Silte case, the Council relied solely on rights-based principles. This approach, however, can be effective only in those cases in which there are rights at stake, but in which there are not conflicting sets of rights. Here, the Council considered only the rights of the petitioning community, the Silte, and not the rights of the larger community to which they then belonged, the Gurage. If the court had taken account of Gurage rights of identification and self-determination in addition to the Silte's rights, it would have needed to resort to other principles to determine the proper balance between those rights in the identification process it established.<sup>208</sup>

In the Canadian and Bosnian cases, in contrast, the courts turned to constitutional principles that express the interest of the state in its ethnic groups, rather than considering only rights-based arguments, or setting ethnic and state interests in opposition. As such, they illustrate ways that courts could take account of inter-ethnic state interests as a complement to rights-based approaches.

In the Quebec Secession case, the Canadian court turned to underlying constitutional principles of federalism, democracy, constitutionalism, and minority rights to find that Quebec could not secede unilaterally, but that the rest of Canada would be obligated to negotiate with Quebec concerning its status if Quebec demonstrated a popular consensus in favor of secession. In reaching this conclusion, the court relied on the national interest in maintaining not just the integrity of the Canadian federation, but also its multi-ethnic character. It balanced this national, inter-ethnic interest primarily against the democratic legitimacy that would be established by a referendum vote in favor of secession. Minority rights played only a secondary role in the analysis.<sup>209</sup>

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208. See *Proposed Decision, Silte case*, *supra* note 129. The Council could, of course, have found other, inter-ethnic principles from which to draw. While the Ethiopian constitution does not state outright that ethnic stability is a constitutional value, various provisions call for promotion of ethnic unity and equality. See ETH. CONST. art. 62, § 4 (the House of the Federation shall promote equality and unity among Nationalities); *id.* art. 88 (one of the national government's political objectives is to "strengthen ties of equality, unity and fraternity" between the Nationalities).

209. See *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.). Notably, the Canadian court also created a process for determining secession in the future rather than merely issuing a substantive decision, much as the Ethiopian Council did in the Silte case. *Id.* at 221.



In the Bosnian case, although the court did not state its decision in terms of state interests, it derived and applied a constitutional principle of inter-ethnic equality and citizenship from the preamble of the constitution. Relying in part on the decision in the Quebec Secession case, it found that these inter-ethnic principles governed the rights established for each ethnic group in the state's ethnic power-sharing arrangement. The Republik Srpska and the other sub-entities could not define their constituent peoples by ethnicity and thereby exclude other ethnic groups, for such exclusions violated the principles of inter-ethnic citizenship and equality.<sup>210</sup>

Where a state's constitution makes express acknowledgment of its multi-ethnic nature, as the Bosnian constitution does, such provisions can serve as a basis for the promotion of inter-ethnic values, such as inter-ethnic stability and equality. But even where it does not, some general constitutional values may well be transferable to ethnic controversies. In particular, constitutional courts might apply principles of national security and stability, equality and nondiscrimination, and citizenship, to the interest of the multi-ethnic state in maintaining its existence and its multi-ethnic character, thereby deriving principles such as inter-ethnic stability, inter-ethnic equality and fairness, and multi-ethnic citizenship.<sup>211</sup>

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210. See Case U 5/98, Request for Evaluation of Constitutionality of Certain Provisions of the Constitution of Republika Srpska and the Constitution of the Federation of BiH, Partial Decision (Constitutional Ct. Bosn. & Herze. July 1, 2000), available at <http://ccbh.ba/decisions> (last visited Feb. 4, 2004).

211. Each of these principles has a sturdy constitutional basis outside the context of ethnicity. Values of stability, equality, fairness, and citizenship are generally regarded as implicit in the constitutional framework and powers of the state, even when they are not explicitly set forth in it. And for the multi-ethnic state, values such as inter-ethnic stability and equality are as fundamental as national security and other state interests in orderly governance, for ethnic conflict poses an undeniably fundamental threat to the multi-ethnic state. The court could balance an interest in, for example, inter-ethnic equality with other state and citizen interests in weighing the constitutionality of government policies and proposals. For example, when faced with a challenge to a language policy promoting official use of a particular ethnic group's language, the court could weigh the state's need to foster ethnic stability and equality in addition to any relevant language and education rights in determining whether the policy is constitutional. Ethnic stability and equality could also be used as goals for crafting remedies. Considering the language example again, let us assume that the court found that the state's language policy was unconstitutional, and chose to craft a new policy rather than simply voiding the old one. In doing so, it could take into account what sort of solution would promote ethnic stability, such as phasing out the policy gradually, instituting bilingualism, or providing alternative support for the ethnic group that is losing the benefit of the policy. Finally, the state's interest in its inter-ethnic relationships could be weighed in the context of claims that are not primarily ethnic at all. When challenges are brought to environmental measures such as building dams, government contracts with foreign companies for development or investment, civil service reforms, or any other state policy, the court could consider the effect of the proposals on inter-ethnic relations as well as considering the constitutional authority of the government and any relevant environmental or property rights.

These principles would provide a language for expressing the multi-ethnic state's interest in inter-ethnic relationships, in the context of any group rights regime (or none at all). Rights-based approaches, while valuable in establishing constitutional baselines, do set ethnic groups at odds and give them incentives to argue for and promote their independent interests. Consideration of inter-ethnic state values in addition to rights requires the constitutional court to promote the overall welfare of the state as a whole.<sup>212</sup>

Of course, the use of underlying constitutional principles puts incredible discretion in the hands of the interpreter.<sup>213</sup> There is, therefore, a risk that statements of inter-ethnic state concerns could be used to implement ethnic biases. The use of ethnic equality might justify a decision to upset the current ethnic arrangements made for any purpose, whereas a statement in favor of ethnic stability will tend to favor status quo relationships even if fundamentally unfair. In addition, while the Canadian and Bosnian courts took a purposive approach to constitutional interpretation, a textualist or originalist approach might preclude the extension of unwritten constitutional principles into the arena of ethnic conflict.<sup>214</sup> The fact that underlying constitutional principles could serve to address ethnic concerns does not mean that they should. But states with fundamental inter-ethnic interests and equally fundamental inter-ethnic disputes should carefully weigh this approach.

#### IV. CONCLUSION: A ROLE FOR LEGAL PROCESS

A conflict resolution system could comprise not only legal processes, but also religious edicts, games of chance, contests, or any other accepted method for resolving disputes. Conflict resolution systems can be reserved for certain sorts of conflicts, as are bankruptcy courts. They can also be limited to certain communities, as are local courts that serve only their districts and religious tribunals that serve only believers. However, conflict resolution systems need not be specialized in either of these ways. Many courts are generalists that hear all kinds of cases. The process of conflict resolution itself can be as complex as a years-long trial with thousands of documents and hundreds of witnesses, or as simple as flipping a coin.<sup>215</sup>

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212. In order to persuade the court to rule in its favor, an ethnic group would have an incentive to demonstrate that its view not only was in accordance with its rights, but also benefited inter-ethnic relations generally.

213. See discussion *supra* note 207.

214. *Id.*

215. The Goldberg table outlines the primary forms of dispute resolution processes, including adjudication, arbitration, mediation, and negotiation, as well as hybrid forms such as

In the world of ethnic conflict, conflict resolution has all too long meant use of force. Seeking power and driven by contention, the leaders of some multi-ethnic states have used the law as well as politics to divide ethnic groups to their advantage. Afraid to endorse divisive ethnic affiliations, many multi-ethnic states have shrunk from giving ethnic groups access to legal processes. But for ethnic-identified states, a refusal to acknowledge potent ethnic affiliations may be more likely to undermine the legitimacy of the state structures than the legitimacy of the ethnic groups. If so, this strategy robs the state of the positive effects of legal process demonstrated in other arenas.

The sort of legal process that will be effective in resolving any given ethnic dispute is highly dependent on the nature of the dispute, the parties, and the surrounding circumstances. It is not likely that any one process could be identified that would be successful in resolving all ethnic disputes, and it is not my aim to prescribe such an approach. Rather, what is important is that ethnic-identified states facing recurrent ethnic disputes recognize the need for some kind of process, and tailor that process to their own ethnic environment.

However, that does not mean that multi-ethnic states must start from scratch every time. The Ethiopian case study offers one approach to this problem, and in so doing, raises five fundamental issues that deserve further consideration.

(1) Ethnic-identified states facing recurrent ethnic conflicts ought to consider opening their legal processes to ethnic groups in some way, either by providing special venues or by making the pre-existing judicial system accessible to them. Legal processes could provide mechanisms for dispute resolution, transform social perceptions of the adjudicability of ethnic conflicts, and provide ethnic groups with incentives to shape their behavior and claims to be formally cognizable and therefore formally remediable.

(2) Next, the Ethiopian system relies heavily on the influence of constituency on group practices. Constituency is built through participation in processes and can promote toleration and cooperation through self-enforcing incentives for good behavior. For legal processes to succeed, ethnic groups must have a sense of constituency in the institutions that foster them, and legal processes themselves may help to build a sense of constituency in the state. Standing could be one method of developing constituency, and group representation could be another.

(3) It is also important to develop principles for constitutional interpretation that enable constitutional courts to weigh ethnic interests

openly. Ethnic groups and their relationships are a vital part of multi-ethnic states and especially of ethnic-identified states, and many constitutions recognize this, either explicitly or implicitly. Constitutional courts could identify and apply relevant constitutional principles, that promote the multi-ethnic state's interest in maintaining its inter-ethnic relationships, as well as its desperate need for inter-ethnic peace.

(4) If ethnic-identified states are to consider adopting legal processes for ethnic groups, they must also implement safeguards against bad faith and misuse. Otherwise, the legal system could be co-opted to ethnic rhetoric and ethnic warfare through the very mechanisms that are intended to bring stability. The state will need to establish protections on an institutional level to prevent expressly ethnic institutions from becoming biased or second class courts. It will also be important to create protections within legal processes, so that ethnic affiliations and interrelationships can remain dynamic rather than becoming artificially entrenched.

(5) Finally, there is the question of institutional design. The Ethiopian system, the world's history of complex and recurring ethnic conflict, and legal process and dispute resolution theory all suggest that groups in long-term relationships should anticipate and plan for the certainty of conflicts by establishing multi-stage dispute resolution processes within an overarching legal framework. Depending on a multi-ethnic state's circumstances, resources, and political will, however, a state may find that it is better off incorporating ethnic groups into its pre-existing legal system to some extent, rather than creating an entirely new system for them. Special group or ethnic courts would offer greater expertise and ease of access, but would require creation of new institutions and would run the risk of creating a second class court system with institutional biases.<sup>216</sup>

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216. Based on the lessons from the Ethiopian attempt, one possibility for a comprehensive system would be a two-stage process of mediation and adjudication, governed finally by constitutional interpretation in a constitutional court or similar institution. The first stage could be a consensual mediation process with an institutional mandate to identify ethnic disputes in their early stages and intervene quickly before they escalate. This institution should be made up of ethnic representatives and should also make use of any relevant ethnic conflict resolution systems and leadership, in order to build a sense of institutional constituency among ethnic groups. If mediation should fail, the next stage would be a binding adjudication process. This second stage could take place either in special courts for group conflicts, or in the ordinary courts with procedural modifications to permit ease of access for ethnic groups and consideration of claims that are not necessarily governed by statutes or codes. Overarching constitutional questions should be addressed in a constitutional court without ethnic affiliations, as the concerns of constitutional interpretation are too vital and broad to make ethnic constituency a priority in spite of the potential costs to credibility among ethnic groups. The constitutional court should, however, develop some mechanism for considering and expressing

No process can offer a panacea for ethnic conflict. Some disputes are too diffuse, others too entrenched for law. But amidst the volatile dynamics of ethnic conflicts within ethnic-identified states, there are moments at which a legal process could divert at least some conflicts from the realm of force into the realm of law. This is a prospect that is well worth considering.

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ethnic concerns, such as using principles of inter-ethnic stability and equality, and ethnic groups should have standing to bring claims in the constitutional court.