

*Exploring Consociational Features of the Ethiopian
Federation: A constitutional-legal analysis*

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Abstract

Consociationalism is a political arrangement and ideology, gaining popularity, characterized by acute cultural, religious or linguistic diversity. Increasingly, federalism is also being conceived not only as an essential tool, but also an ideal means of managing diversity. Though federalism and Consociationalism are distinct as ideologies and also in practical application, they are usually assumed to overlap a great deal. The overlap gets more pronounced in the context where the federation in question is culture-based (multi-national or ethnic), and some authors go even to the extent of making the simultaneous adoption of these two systems a condition of success. The most salient feature of the current Ethiopian Federal System design is the adoption of national ethnic-based groups as building blocks of the federation, and this represents, without doubt, the recognition of the high diversity level in the nation. Even though federalism allows all for shared ruling and self regulation, Consociational mechanisms are said to be a supplement to the scheme that federalism offers in the context of multinational federations.

Introduction

The main objective of this research was to investigate the legal structure of the Ethiopian federal arrangement in a bid to locate consociational arrangements, if any. Moreover, the paper aimed at identifying the salient features of consociational systems and compares them with federalism at both the conceptual and the empirical levels. It also intended to assess the consociational features which exist in the current Ethiopian federal set-up. More specifically, the study explored the Ethiopian Constitutions and other laws of the Federal Government of Ethiopia and those regional states.

Research Methodology

As to the research methodology in the study, a legal analysis was predominantly employed and triangulated by documentary analysis of the available literature from different sources. The study also used a comparative method to compare and contrast the existing different systems of federations.

Scope and Delimitations of the Study

This study focused on the consociational arrangements and procedures, unlike federal practices, which are said to be based on political agreements more than legal or constitutional stipulations. It also covered the consideration of the Federal Government's and Regions States' Constitutions. As said, the researcher delimited the study to a legal analysis those Constitutions located at different levels in order to find out

any consociational features in the Constitutions of the Ethiopian Federal Government and Regional States. In addition, the study examined some the Ethiopian Federal Government's laws.

Federalism, Consociationalism and Consociations in Federations

Federalism

To begin with, it is worth defining the term 'federalism' in order to distinguish it from other related terms. However, this venture is difficult because of the availability of various definitions of the term in the literature that have been produced over the years. Scholars in the area have generally based their definition of the term on the features of federations they deem essential, but now it is neither necessary nor fruitful to go deep into the theories of federalism. Rather, we contented ourselves with a definition of the term given by Daniel Elazar. This is done in order not to discredit the other alternatives but to simplify our task.

Here, we need to make a distinction between *federalism* and *federation*. Federalism is a normative term, referring to an ideology that advocates a multi-level government and political structure.¹ It is also a reference system for the accommodation of unity and diversity, or an ideology prescribing a system that has a measure of self rule at the local level and participative in the national scene (shared rule).² Hence, federalism is an ideology that encourages a multi-tiered governmental structure, promotes

¹ Ronald L. Watts, 2008, *Comparing Federal Systems*, (3rd ed.), p. 8.

² *ibid*: Federalism has been examined as a political ideology in the sense that it reflects values and benefits, which suggest specific forms of federation. The particular type of federation prescribed is determined by the interests that the designers and the actors want to achieve.

the perpetuation of unity and autonomy at the same time, and recommends the simultaneous existence of unity and no centralization.³ On the other hand, when we consider the concept of federation, it is the institutional and structural structure for achieving the aims that federalism as normative principle prescribes. Accordingly, it refers to the actual system of government established to accomplish the idea of multi-tiered government institutions.⁴

The fact that we have distinguished these two concepts doesn't mean they are not interrelated, as if we took federalism as a theory and federation as its practical application; it is obvious that theory and practice influence one another. Moreover, we can say that there is a kind of 'symbiotic relationship' between federalism – which is the concern, and federation – which is the institutional expression of such a concern. Given this relationship, there is something which is of a particular importance involved in this linkage in that its representation serves as a "conceptual ligament"⁵ that ties federalism and federation together.⁶

The other term which we need to distinguish from federalism is decentralization. Even though there is a great deal of decentralization in federalism, the difference between the two is a world apart. Decentralization can be defined as "a process of decision making closer to the people or citizens". Moreover, Daniel Elazar argues, "In the language of contemporary social science, centralization and decentralization are

³See, Preston King, *Federalism and Federation*, p.20.

⁴ See Watts, *supra* note 1.

⁵ See, Michael Burgess, *Comparative Federalism: theory and practice*, 1.

⁶ *ibid*

two extremes of the same continuum, while non-centralization represents another continuum altogether.”⁷

However, the importance we need to attach to their difference cannot be overemphasized. Federalism refers to the co-equal tiers of government having its “natural” sphere of competence, whereas in the case of decentralization, the power of the local administration comes as a result of the magnanimity of the center. This difference is clearly summarized by Elazar as follows:

*Decentralization implies the existence of a central authority, a central government. The government that can decentralize can also re-centralize if so desires. Hence, in decentralized systems, the diffusion of power is actually a matter of grace, not right, and, as history reveals, in the long run, it is usually treated as such.*⁸

Therefore, the act of equating decentralization with federalism or using these two terms can at best be qualified as half truth⁹, because the more appropriate word for the diffusion of power in federalism is “non-centralization”¹⁰.

Essential Features

There is a strong disagreement among authors about the features that make a given system federal. But, it seems that they have reached at

⁷ Daniel J. Elazar, Federalism vs. Decentralization: The drift from authenticity, *Publius*, Vol. 6, No. 4, Dialogues on Decentralization (Autumn, 1976), p. 13.

⁸ *ibid*

⁹ See Eghosa E. Osaghae, *A Reassessment of Federalism as a Degree of Decentralization*, *Publius*, Vol. 20, No. 1 (Winter, 1990) at p. 98.

¹⁰ *ibid* at p. 84.

consensus on the basic features of a constitutional system to be regarded as a federal political or constitutional system. These features include: division of power, entrenchment of the regions at the center, a written, supreme and rigid constitution, and an impartial empire of the constitution.¹¹ As it may be helpful, we will deal each of these features in the following consecutive paragraphs.

Division of Power

The idea of division of power refers to the establishment of two or, in some rare instances, three levels/orders of governments, which may exist along with formal constitutional allocation of authority. “Federalism is characterized by an irrevocable division of power between the central government and the component units (e.g., states, regions, provinces, and cantons)”¹². This must be done in a way that insures genuine autonomy for each level, and in a form that each one will not be subordinated to the other.¹³ It should follow the “shared rule and self rule” spirit according to which all the issues about a group has a sort of ‘exclusive interest’ should be left for it and be handled by itself.

Federalism is said to combine the advantages of small and large states, because of the possibility of self rule and shared rule power management

¹¹ Nicholas Aroney, 2006, Formation, Representation and Amendment in Federal Constitutions, *The American Journal of Comparative Law*, 54(2): 277.

¹² Eghosa E. Osaghae, *A Reassessment of Federalism as a Degree of Decentralization*, Publius, Vol. 20, No. 1. Oxford University Press (Winter, 1990), P. 85.

¹³ If one of them, i.e. the union government or constituent units, is subordinate to the other we will either have a confederation or some sort of unitary system depending on who is subordinated. If the constituent units are subordinated, it will be a unitary system and where the union government is subordinated that form of government is a confederation. See R. Watts, *Comparing Federal Systems*, 1999.

system. Accordingly, if a certain area of administration or regulation is expected to be predominantly a concern of each group, then this will be left to be administered by the government of the relevant constituent unit with little or no influence from the national government.¹⁴ In this regard, Montesquieu states:

*This form of government is a convention by which several small states agree to become members of a larger one, which they intend to establish. It is a kind of **society of societies** that constitutes a new one capable of increasing by means of further associations till they arrive at such a degree of power as to be able to provide for the security of the whole body.*¹⁵

Here, we must also recall that the power division must be settled in a way that cannot be taken away from one of them by the other. Regarding the mode of power division, we can find exclusive powers, concurrent powers and residual powers as the case may be.

Entrenchment of Regions

The other essential feature of federalism is the constitutional “entrenchment of the regions at the center”.¹⁶ What we mean by constitutional entrenchment of the regions, or federating units, at the center is that they hold an adequate way to influence policy making at the federal or national level, as from the shared rule of federal principle. Usually, this is realized through the form of bicameral legislatures, where one usually refers to as ‘the upper house’, is crafted to represent the voice of all the constituent units. This is achieved by making the second

¹⁴ Daniel Elazar, *Exploring Federalism*, supra note 8.

¹⁵ Montesquieu, 2005, *Combining the Advantages of Small and Large States*. In Dimitrios Karmis and Wayne Norman (Eds.). *Theories of Federalism: A Reader*, p. 55.

¹⁶ Preston King, *Federalism and Federation*, 1982, Chap. 7, 94–95.

chamber composed of representatives of the federating units. The counter-majoritarian device of federalism is shown by requiring the double majority (majority in both houses), for the making of any law.

The Constitution

The third most important feature of federations is the nature of the constitution they need to have. In this case, we can mention three distinct characteristics of a federal constitution. First of all, it has to be supreme. This is important because, if the federal government and the states are to remain autonomous within their particular spheres of competence, the power of one should not depend on the other, but must be derived from something which is supreme to both of them. The federal constitution polices their relations and, so far as, it regulates their relations with each other, it must remain supreme at least in all that of the division of authority between the two. In short, the federal arrangement presupposes the existence of a supreme federal constitution from which the federal government and the states derive their authority.¹⁷

Not only has it to be supreme but also it should be written.¹⁸ The division of power between the federal government and the states is based on a written and supreme federal constitution to which both orders of governments must submit. Federations come into existence from particular bargains struck at a particular time designed to serve for generations. Written constitutions are, therefore, necessary records of the

¹⁷ K C. Wheare, 1967, *Federal Government*.

¹⁸ Nicholas Aroney, 2006, Formation, Representation and Amendment in Federal Constitutions, *The American Journal of Comparative Law*, 54(2): 278.

terms of the bargain.¹⁹ Consequently, federal constitutions, as expressions of the covenant must be written as opposed to a collection of conventions and precedents.

In addition to supremacy and written form, federal constitutions are expected to exhibit more rigidity than their unitary counterparts. When we say rigidity we are referring to the amendment procedure. The amendment procedures of a federal constitution vary from one federation to the other; nevertheless, as a federal constitution is a rule of game fixed by bargain among various interest groups, the change to that rule of game somewhat requires a higher procedure than that adopted in ordinary legislative process that ensures the participation of these groups. As a compromise resulting from bargains, federal constitutions typically rely on special majority requirements: super majorities (such as two-thirds, three-fourths, or any procedure that well goes beyond simple and absolute majorities), multiple majorities (such as approval by the two legislative bodies and the states) or a combination of the two.²⁰

In some specific cases, even unanimity is required to amend the parts of the constitution that is assumed to be most relevant to the federal system, as is the case in Canada for amendments on parliamentary representation and language policy, but most federations (presidential and parliamentary alike) require supermajorities (along with double or triple majorities): two-thirds super majority in the two chambers of India, in Germany and in

¹⁹ William Riker, 1987, 'The Origin of Federal Government', In William Riker, *The Development of American Federalism*, p.17.

²⁰ Thomas O. Hueglin and Alan Fenna, 2006, *Comparative Federalism: a Systematic Inquiry*, p. 248.

the United States, while three-fifths in Spain and Brazil, and three-fourths in South Africa.²¹

Independent Arbitrator

Equally important in a federation is the presence of a body that adjudicates disagreements concerning the constitutionality of laws in general and the division of powers in particular. The principle of constitutionally guaranteed division of power and the supremacy of the constitution means that, the last word in settling disputes about the meaning of the division of powers must not rest either with the national government at the centre or with the federating units.²²

We have already seen that the constitutionally entrenched division of power is one of the most important characteristic of federations. However, the division of powers between the federal government and the states cannot be clearly and adequately stipulated in the constitutional document in such a way as to avoid all conflicts. “Division of power is artificial, imperfect and a generalized skeletal thing. Political life cannot be perfectly or permanently compartmentalized. The words can rarely be more than approximate, crude and temporary guides to the ongoing or permissible political activity in any federal system”²³. Accordingly,

²¹ *ibid* at p. 250, Rigidity has its own risk. Even if for the reasons mentioned above there is a need to make constitutions rigid, there is a risk of being non-responsive to social change. This can be remedied by making the rigidity limited to the “federalism clauses”.

²² K. C. Wheare, *Supra* note, 17, p. 60.

²³ See, Rufus Davis, 1978, *The Federal Principle: A Journey Through time in Quest of a Meaning*, p. 143, quoted in Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia*, 2006.

somewhere during the life of a federal system, there is found to be some kind of dispute between the two tiers of government.

There are about three formats followed to have such an independent referee to the constitution.²⁴ These are: courts, constitutional courts or the regular courts, referendum, and upper houses with a specialized power. In the United States, this task is undertaken by the Supreme Court.²⁵ The other alternative is to have a special court for the purpose of constitutional dispute. In Germany, the Constitutional Court takes care of the duty of enforcing the supremacy of the Basic Law. Unlike the US Supreme Court, the Court does not deal with the ordinary resolution of disputes. It only entertains cases that engage interpretation of the Basic Law (the German Constitution). The same holds true in South Africa.²⁶

The second format is the one uniquely followed by the Swiss Federation, i.e. referendum. In Switzerland, the last word does to rest with the federal court. The constitutionality of federal laws is examined through a referendum. Any law voted for by the federal legislature must be submitted to the people for approval if and when contested for its constitutionality. Only the people have the last word as to whether or not such a law shall become effective.²⁷

Finally, specialized upper houses can be made to handle this task. Ethiopia under the Constitution of the Federal Democratic Republic of

²⁴ Ronal L. Watts, 2008.

²⁵ Even though the federal constitution doesn't have a clear stipulation to this effect, it was the legendary Justice Marshal in his famous opinion in *Murbury Vs Madison*, who brought it into the US System. See *Murbury Vs. Madison*.

²⁶ Ronald Watts, *Supra* note 1.

²⁷ *ibid*, See also, K. C. Wheare, *Supra* note, 17, page 60.

Ethiopia (FDRE) has adopted this rather unique model, at least among federations.²⁸

Consociationalism

Consociationalism is a form of democracy that promotes a sort of non-majority decision making, where decisions are, as much as possible, made by ‘consensus’. The kind of democracy that was represented by the famous saying of John Stuart Mill, as he stated: ‘the minority will have its say but the majority must have its way’ is not always an option.²⁹ Accordingly, for us to have a stable political environment where the majority rules, is dependent on two mutually reinforcing conditions. The first one, according to Lijphart, is the reasonable chance of the minority becoming a majority.³⁰ In other words, for the minority to accept the system of majority rule is where they think they will have a time to be in the majority.

The second condition is related with the societal composition and the political parties in the country. This is to say that for us to have a working and stable democracy where the majority rules, the society must be fairly homogenous in terms of ethnicity or religion, and the major political parties must not have a sharp difference so that the interest of one of them can fairly be represented by the other. Accordingly, majority democracies will be appropriate and functional only in places or counties where we have “...relatively homogeneous societies and that their major parties have usually not been very far apart in their policy outlooks because they

²⁸ *ibid*, see also *FDRE Constitution, Article 62 sub art. 1*. See also pp. 82-84.

²⁹ Arend Lijphart, 1999, *Patterns of Democracy*, p. 32.

³⁰ *ibid*

have tended to stay close to the political center”.³¹ What Arend calls the Westminster Model of Democracy is assumed to have, first of all, a first pass in the post electoral system, winner take all cabinets.³² Because of the societal structure, political competition in Westminster style democratic systems does not threaten political stability.³³

Hence, in societies that are characterized by sharp political, ideological, religious, or ethnic divisions; there is no reasonable chance for current minorities to change into future majorities as a result of political realignment or shifting alliance of ‘governing coalitions’. Therefore, it is argued that consensus democracy creates better and more stable democratic order, and hence consociationalism.³⁴

The utmost proponent of this system of government or “ideology” and the most prolific writer on the subject is Arend Lijphart. For him, any political system to qualify as a consociational system must contain four basic ‘principles’³⁵. These are: executive power sharing in the form of grand coalitions, mutual veto, proportionality and segmental autonomy. Let us deal with each of them separately.

³¹ *ibid* at p. 31.

³² Sujit Choudhry, 2009, Bridging comparative politics and comparative constitutional law: Constitutional design in divided societies, In Sujit Choudhry (Ed.). *Constitutional Design for Divided Societies: Integration or Accommodation?* P.17.

³³ *ibid*

³⁴ Ben Reilly and Andrew Reynolds, 1999, *Electoral Systems and Conflict in Divided Societies*, p. 16.

³⁵ Arend Lijphart, 1979, Consociation and Federation: Conceptual and Empirical Links, *Canadian Journal of Political Science*, 12 (3): 500.

Executive Powers Sharing

Executive power sharing or power sharing in short denotes the political or constitutional system where “...the participation of representatives of all significant communal groups in political decision-making, especially at the executive level”³⁶, is guaranteed. Hence, power sharing means all major groups or political parties representing the most important groups in a given country should have a ‘right’ to participate in government even if they have not secured the majority number of votes. This is useful to bring about political stability because it will give a sort of guarantee to ‘permanent’ minorities. Practically speaking, there is no one-size-fits-all model to sharing power. The goal of representing every group in government can be achieved through a myriad of options.

One is a constitutional requirement to the effect of making the cabinet composed of equal number of representatives from all or major ethno-linguistic groups.³⁷ Another option is to require the representation of all political parties who managed to secure more than a minimum number of seats in the legislature or parliament in the executive group. This can be done by assuring them a place in the cabinet.³⁸ A further alternative is equal representation in the cabinet for major parties and alternating of the

³⁶ Arend Lijphart, 2008, *Thinking about democracy: power sharing and majority rule in theory and practice*, P. 75.

³⁷ *ibid*, at p. 77, this is the case in Belgium.

³⁸ *ibid*, for example, as in South Africa by granting all parties with a minimum of 5 percent of the legislative seats the right to be represented in the cabinet (South Africa, 1994–99).

presidency between the groups as in Colombia from 1958 to 1964, and Nigeria (Lijphart calls this sequential grand coalition)³⁹.

Proportionality

Proportionality refers to the situation where all societal groups have a role in government proportionate to their population size. The most noticeable and important aspect of the consociational principle of proportionality is the proportional representation as in elections to the legislature (PR). But one can think of no less important facets that include proportionality in legislative and the cabinet, representation that can occur without formal PR, proportional appointment to the civil service, the armed forces and proportional allocation of public funds.⁴⁰

Thus, proportionality in the legislature and the cabinet is achieved by the adoption of a proportional representation system of elections. Proportional representation voting (PR) is mainly contrasted with plurality-majority voting. Among many advanced Western democracies, it has become the principal voting system. In Western Europe, for instance, twenty-one out of the twenty-eight countries use proportional representation, including countries like Austria, Belgium, Cyprus, Denmark, Finland, Germany, Greece, Ireland, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, and Switzerland.⁴¹

To show how it is different from the plurality voting system, the following illustrative paragraph might be considered:

³⁹ *ibid*

⁴⁰ Lijphart, *Supra* note 39 at p. 8.

⁴¹ Available at <http://www.mtholyoke.edu/acad/polit/damy/prlib.htm>, accessed on Thursday, November 25, 2010, 5:20:44 PM.

The basic approach of proportional representation is simple: legislators are elected in multimember districts instead of single-member districts, and the number of seats that a party wins in an election is proportional to the amount of its support among voters. So if you have a 10-member district and the Republicans win 50% of the vote, they receive five of the ten seats. If the Democrats win 30% of the vote, they get three seats; and if a third party gets 20% of the vote, they win two seats.⁴²

Technically speaking, the basic benefit and advantage of this electoral system, in addition to helping achieve proportionality, it ensures that no one's votes are wasted as it happens in a plurality voting system.⁴³ This is an essential tool in making minority groups in a 'divided society' comfortable enough since it is a 'fair' guarantee that they will be represented to at least the number of votes they have secured.

Mutual Veto (Minority Veto)

In societies that are characterized by segmental cleavages as opposed to cross cutting cleavages, some of those segments are necessarily going to be minorities. And no matter how carefully one is able to craft group autonomy for some 'exclusive' concerns of minority groups, there is always going to be a risk of being overridden by the majority. To safeguard against this possibility, every group must have some sort of power to reject decisions that are passed on a majority basis. Accordingly, mutual veto (minority veto) will allow each faction to protect its' interest by vetoing

⁴² *ibid.*

⁴³ Ben Reilly and Andrew Reynolds, *supra* note 37, p. 29. Moreover, they go on to argue that "For many new democracies, particularly those which face deep societal divisions, the inclusion of all significant groups in the parliament can be a near essential condition for democratic consolidation. Failing to ensure that both minorities and majorities have a stake in these nascent political systems can have catastrophic consequences".

any decision they may find prejudicial for their interest. This is how “the positive requirement of unanimity or the negative right of minority veto”⁴⁴ is guaranteed.

Practically speaking, the application of this principle may take different formats and vary from country to country. It can be “...either an absolute or a suspending veto, and it may be applied either to all decisions or to only certain specified kinds of decisions, such as matters of culture and education.”⁴⁵ Accordingly, the minority concerned may be given a full power of nullifying the majority’s decision when it feels such policy tramps on its interest or in alternative to postpone it of.

Another way it can be conceived is in relation to the given formality, as in some systems, the mutual veto of the minority groups is rather formal and constitutionally entrenched. A good example of both ‘suspending’ veto and formal constitutional recognition of it is the one which is found in the Belgian Consociational Federal System.⁴⁶

Segmental Autonomy

⁴⁴ Ivo D. Duchacek, 1985, Consociational Cradle of Federalism, *Publius*, Vol. 15, No. 2, *Federalism and Consociationalism: A Symposium*, p. 41.

⁴⁵ Lijphart, *Thinking about Democracy*, supra note 39, p. 67.

⁴⁶ See Article 54 of the Belgian Constitution, which in part provides for “*Except for budgets and laws requiring a special majority, a reasoned motion signed by at least three-quarters of the members of one of the linguistic groups and tabled following the depositing of the report and prior to the final vote in a public sitting can declare that the provisions that it designates of a Government bill or private member’s bill can gravely damage relations between the Communities*”.

Segmental or communal autonomy refers to situation where “the decision-making is delegated to the separate segments as much as possible.”⁴⁷ Accordingly, areas of policy where a group is expected to be eager for distinctness, it shall be granted with its wishes. In other words, where a specific area of regulation or administration and where there is a need for policy making, the group will be allowed to autonomously design its course of action and implement it.

This is usually achieved by an introduction of a system of formal legal pluralism, situation in which the state recognizes the existence and operation of a different system of law other than the law that is promulgated and by the state legislature.⁴⁸ The kind of recognition can take different levels and forms. First, the state may just decide to acknowledge the validity of decisions and acts made pursuant to this “other law”, and leave it at that. The second alternative is to provide infrastructure for the operations and maintenance of the parallel system of law. As a third option, the state may apply the parallel system of law in its regular courts and law enforcement agencies. This is where different individuals with similar cases are adjudicated by different laws in the states’ own legal structure, i.e. courts and law enforcement agencies.

Another way of exercising communal autonomy is by tolerating the running of communal and religious schools and cultural institutions

⁴⁷ See, Daniel J. Elazar, 1985, Federalism and Consociational Regimes, *Publius*, Vol. 15, No. 2, *Federalism and Consociationalism: A Symposium*, p. 31.

⁴⁸ See, R. Mohr, *Territory, Landscape and Law in Three Images of the Basque Country*, Faculty of Law – Papers, PDF available at <<http://ro.uow.edu.au/cgi/viewcontent.cgi?article=1043&context=lawpapers>>

funded by state. The Belgian Constitution, for example, requires that “Schools run by the public authorities offer, until the end of compulsory education, the choice between the teaching of one of the recognized religions and non-denominational ethics teaching.”⁴⁹

A noteworthy point about the development of Lijphart’s four principles of consociationalism is that he has now reduced them into two primary and two secondary characteristics.⁵⁰ The primary ones are power sharing and segmental autonomy, while the secondary ones are proportionality and mutual-veto (minority-veto). The primary and secondary relationship is drawn in a way that the secondary aspects became implementing tools for the principal attributes. This is aptly summarized in his own words:

*Consociational democracy can be defined in terms of two primary attributes, grand coalitions and segmental autonomy-and two secondary characteristics, proportionality and minority veto. Grand coalition, also called powers haring, means that the political leaders of all the significant segments of a plural, deeply divided society, jointly govern the country. Segmental autonomy means that the decision-making is delegated to the separate segments as much as possible. Proportionality is the basic consociational standard of political representation, civil service appointments, and the allocation of public funds, etc. The veto is a guarantee for minorities that they will not be outvoted by majorities when their vital interest is at stake.*⁵¹

⁴⁹ See, the Belgian Constitution Article 24 section 1, see also Section three which states, “All pupils of school age have the right to moral or religious education at the community’s expense”.

⁵⁰ Lijphart, The Politics of Accommodation, quoted in Daniel J. Elazar, Federalism and Consociational Regimes, *Publius*, Vol. 15, No. 2, *Federalism and Consociationalism: A Symposium* (Spring, 1985), p. 30.

⁵¹ *ibid* at pp. 30-31.

Conceptual links

One of the most obvious and most noticeable linkage between federalism and consociationalism is their common objective of providing political arrangements, in which the tension between the segments of a plural or divided society should be accommodated within a single sovereign state.⁵² In analyzing the conceptual and empirical connection between federalism and consociationalism, Lijphart has developed a very useful approach, pertinently summarized in the following two questions: (1) When is a consociation a federation? (2) When does a federation qualify as a consociation? Let us describe each of them in turn.

At this juncture, it worth posing the following question: When does a consociation qualify as a federation? One of the determining marks of federations is division of power on a territorial basis.⁵³ What this means is that, when the segmental or communal autonomy takes a territorial and by extension a federal form, i.e. the communities comprising the polity are given self rule on a territorial criteria, the consociation is assumed to have fulfilled two essential features of federation. These two are: the division of power and the guarantee of regional power, since we presuppose the division to give a guaranteed power to the communities and then by extension to the constituent units.⁵⁴

The other requirement is that a consociation must exhibit to qualify as federation is for it to have a 'federal society'. This is where the segments

⁵² Arend Lijphart, 1979, Consociation and Federation: Conceptual and Empirical Links, *Canadian Journal of Political Science*, 12(3).

⁵⁴ See Arend Lijphart, *Supra* note 57, p. 505.

of the larger polity are geographically concentrated. Moreover, the “boundaries between the component units of the federation must follow segmental boundaries”.⁵⁵ That is not implying the territorial boundaries of the federation must squarely fit with that of the communities, or we should have the same number of federal units as the number of the constituent communities, but rather it will be sufficient to have more or less internally homogenous federating units.

In the same framework, let us raise another question. That is, when do we say a federation is a consociation? What should occur for a given federation to be considered as consociation or more appropriately a consociational ‘federation’? This is important question for us given our main and fundamental research objective of exploring the consociational features of the Ethiopian Federation. Again, we resort to Lijphart to find answers to the question raised. Accordingly, the same author forwards four main qualities to test the “consociationality” of a given federal system. These are democracy, plurality of the society, the application of those two primary and two secondary consociational principles, and decentralization.⁵⁶

As consociationalism is conceived and understood as a form of democracy, any federation to qualify as a federation it must be a democratic one, “first and for most⁵⁷”. Secondly, consociationalism cannot be imagined as a homogenous society. The federation in question

⁵⁵ *ibid.*

⁵⁶ See above section 2.2.4.

⁵⁷ Democracy is made a relevant point for Lijphart because he recognizes non-democratic federation as one category of federation and the implementation of federalism.

must have a segmented or ‘divided society’.⁵⁸ Hence, the plurality of the society or its being diversified and segmented is important. A more obvious criterion is the requirement of applying or the existence of the four major principles of consociational political systems in one form or another. Finally, since Lijphart recognizes centralized federations as one category of federation, he insists on arguing about the existence of meaningful decentralization so that we can consider a given federation as a consociation.⁵⁹

Consociations in Federations: A comparative perspective

This section intends to shade some light on comparative approaches to the practical application of consociational principles in a federal set up. Accordingly, let us consider practical federations that, for one or more reasons, can be categorized as a consociational federation. Here, our purpose is to have an illustration of the two systems applied. To this end, we briefly look at the two ‘consociational federations’, namely, the Swiss Federation, the Canadian Federation and the Nigerian Federation. Switzerland is chosen for its ability to show all the basic principles of consociationalism as identified by Arend Lijphart. Canada is also selected for its exemplary contemporariness. Finally, Nigeria is included in such a federation for its similarity with the Ethiopian Federation in terms of its

⁵⁸ See Lijphart, *Supra* note 57. p. 508 which states that” *a divided society is not merely a society which is ethnically, linguistically, religiously, or culturally diverse. Indeed, whether through conquest, colonization, slavery or immigration, it is hard to imagine a state today that is not diverse in one or more of these dimensions. The age of the ethno-culturally homogeneous state, if there ever was one, is long over. Rather, what marks a divided society is that these differences are politically salient - that is, they are persistent markers of political identity and bases for political mobilization. Ethno-cultural diversity translates into political fragmentation.*

⁵⁹ *ibid* at p. 509.

ethnic aspect and, more importantly, because it is located closer to “home”.

Now, let us consider the characteristics of the Switzerland’s federalism. The federal structure in this country is composed by: the Federal Assembly, including the National Council (lower house) and the Council of States (second chamber); the Federal Council (the executive) based upon the *collegial* principle; and the Federal Court *elected* by the Federal Assembly. National elections occur every four years to the National Council based upon the party list version of proportional representation (PR) and equally elected representation of the 26 cantons (that set their own electoral rules) in the Council of States.

In Switzerland, there is a practice of direct democracy. This type of democracy is exhibited in the forms of the cantonal and local communal democracy, the use of obligatory and optional referenda and popular initiatives, referenda for constitutional and legislative reform.

The principle of proportionality refers to power-sharing in small community; the principle of double majorities; citizens participating in the electoral politics of decision-making in their dual capacity as holders of the cantonal and federal interests and identities. Cantonal autonomy and strong local powers and competences are considered prevalent. There is also a system of “administrative interlocking”, practices whereby the 26 constituent units implement most of the federal legislation. This is, in more technical words, a case of cooperative federalism.⁶⁰

⁶⁰ Michael Burgess, *Supra* note 5, p.119.

The Consociational Features

The fact that Switzerland is a consociational federation is confirmed by many of the day-to-day political practices of the country. For instance, Burgess clearly said: “Its peculiar form of federal unity can be ascribed to a combination of the federal political system allied to a consensus-seeking political culture that is historically rooted in minority representation, all appropriately encapsulated in the ‘politics of accommodation’”⁶¹. Moreover, the Territorial Principle, which guarantees the right of cultural integrity to historical ethnic populations, despite the fact that they are in the cantonal majority, could be taken as a consociational element in Swiss Federation System, as well as the long-standing practice of proportionality, which seeks to represent effectively all major groups in the highest echelons of government.⁶²

In an attempt to correlate each feature of the Swiss federal arrangement with the consociational principles and practices, Lijphart stated:

*The seven-member Swiss National Executive is now composed according to the so-called "magic formula" which normally gives five seats to German-speakers, one to a French-speaker, and one to either a French-speaker or an Italian-speaker. The ideas of **proportionality** as a minimum and minority overrepresentation as the usual rule can also be clearly seen in the composition of the federal chamber, in which the smaller and weaker units tend to enjoy a disproportionately large share of legislative power. The idea that the amendment of the federal constitution requires the consent of the component units reflects the **veto** principle to some extent. And the consociational principle of **segmental autonomy***

⁶¹ *ibid* at p.120.

⁶² David Earle Bohn, 1981. Consociationalism and Accommodation in Switzerland, *The Journal of Politics*, 43(4): 1239.

is a very obvious parallel to the federal principle of a firmly guaranteed autonomous status of the component units.⁶³

Nigeria's Federation System Characteristics

Federal structure: The Nigerian Federation is meant to be a structural design for the accommodation of ethnic-territorial cleavages. Going beyond its Ethiopian and Indian counterparts, it also recognizes territorial organization which is established on the basis of religion and has paved the way for the “establishment of a multiplicity of sub-units that are not strictly coterminous with ethnic group boundaries.”⁶⁴

The Nigerian Multi-State Federation has a bicameral parliament, composed of the Senate (second chamber) and the House of Representatives (first chamber).⁶⁵ Just like the Swiss Council of States, but unlike the Ethiopian House of the Federation and the Indian Council of States, the Nigerian Senate is composed of equal number of representatives from each of the thirty-six states directly elected by citizens.⁶⁶

Consociational Features: The most significant consociational feature of the Nigerian Federation is the alternating presidency. Although it is not officially mentioned in the Constitution, there is an agreement among the political elites in the ruling the People's Democratic Party ([PDP](#)), that is, the presidency should be alternated between North and South after every

⁶³ Lijphart, *Supra* note 57, p. 506.

⁶⁴Rotimi Suberu, Nigeria: Dilemmas of Federalism, In Ugo M. Amoretti and Nancy Bermeo (Eds.). *Federalism and Territorial Cleavages*, pp. 329, and 332-338.

⁶⁵ *ibid* at p. 343.

⁶⁶ *ibid*.

two four-year terms.⁶⁷ This alternating presidency can be taken as a consociational feature because we can conceive it as a “sequential grand coalition”.⁶⁸ Another consociational quality we may find in the Nigerian Constitution is the requirement of representing every state in the cabinet. The Nigerian Constitution, in fact, provides that “...the President shall appoint at least one Minister from each State, who shall be an indigene of such a State.”⁶⁹

As for segmental autonomy, the Nigerian system has ample space for customary and religious courts. Finally, the upper house of the federal legislature can be fairly taken as a form of weak mutual/minority veto.⁷⁰

The Ethiopian Federal System: A description

Since 1995, Ethiopia has formally instituted a Federal System of Government and state structure. In this section of the paper, we will try to descriptively present the Ethiopian Federal System as is enshrined in the Constitution of the Federal Democratic Republic of Ethiopia (hereinafter

⁶⁷ Available at: <http://www.foxbusiness.com/markets/2010/09/18/qa-nigerias-presidency-north-south-question/> Accessed on April 9, 2011.

⁶⁸ See, Lijphart, Supra note 39. p. 8.

⁶⁹ Constitution of the Federal Republic of Nigeria of 1999, Section 147 (3). Moreover, Section 14 (3) of the constitution states that: “*The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few State or from a few ethnic or other sectional groups in that Government or in any of its agencies*”.

⁷⁰ L. Adele Jinadu, 1985, Federalism, the Consociational State, and Ethnic Conflict in Nigeria, *Publius*, Vol. 15, No. 2, *Federalism and Consociationalism: A symposium* (Spring, 1985), p. 75.

called the FDRE). We first start with a brief description of the historical antecedents of the practice of federalism in Ethiopia that were somehow precursors to the current system. Afterwards, the paper presents the guiding and normative principles upon which the federation is established and the institutions that are tasked with the practice and implementation of federalism in the country.

Precursors to the FDRE

The UN General Assembly passed a resolution on December 2, 1950 and this Resolution stated that Eritrea, a former Italian colony, should form ‘an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian crown.’ An Eritrean Assembly adopted a draft constitution prepared and submitted by the UN experts on the 10th of July 1952. By the subsequent legislation, the Eritrean Constitution was put into force and published on the *Negarit Gazetta*. At this juncture, the Federation of Eritrea with Ethiopia came into effect. The Federal Act as well as the Eritrean Constitution provided for a ‘federal arrangement’ between the two governments and, according to the Constitution, ‘Eritrea is an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown’.⁷¹ This arrangement is best conceived in what Daniel Elazar dubbed as “Federacy”.⁷² The Government of Eritrea was authorized, as a manifestation of its autonomy, to exercise legislative, executive and judicial powers.⁷³

⁷¹Tsegaye Regassa, Comparative relevance of the Ethiopian federal system to other African polities of the Horn: First thoughts on the possibility of “exporting” multi-ethnic federalism, *Bahir Dar University Journal of Law*, 1(1): 7.

⁷² See Daniel Elazar, 1987, *Exploring Federalism*.

⁷³ See Article 4 of the Federal Act of the United Nations of the December 2, 1952.

But this was a short lived experiment, as it was abolished in less than 10 years time. On hind sight, we can mention different factors for its failure, but "... the imposed nature of the federalism, the absence of federal culture, and the absence of civil societies, and excessive emphasis on unity as uniformity, have played a role in leading to its failure."⁷⁴

After the Federation of the Eritrean Government with Ethiopia had failed, there was no significant incident related to a federal experience in the Ethiopian history worth of mentioning. This holds true until the advent of the Transitional Charter of Ethiopia adopted by the victorious forces on the ex-military regime in 1991. The Ethiopian Charter document was adopted as a response to the conflict that has raged for decades as an apparent opposition to oppression, lack of equality, dignity and ethno-cultural justice.⁷⁵ Some of the rebelling forces even went to the extent of demanding full independence of their territory from Ethiopia and an establishment of their own state, since they perceived and interpreted their situation to be that of a colonial subjugation or domination.⁷⁶ In an attempt to address this concerns and deep grievances, the Transitional Charter in Ethiopia was adopted in the form of an interim constitution pending the draft and promulgation of the constitution.

The Charter created a form of government largely similar to federation or 'quasi-federation'.⁷⁷ The Charter of the Transitional Government of Ethiopia established the structure for the Transitional Government and guaranteed nationalities to preserve their identity, administer their own

⁷⁴ See Tsegaye Regassa, *Supra* note, p. 13.

⁷⁵ See Tsegaye Regassa, 2010, Learning to live with conflicts: Federalism as a tool of conflict management in Ethiopia - an overview, *MIZAN LAW REVIEW*, 4(1): 96.

⁷⁶ *ibid.*

⁷⁷ *ibid.*

affairs within their own defined territory, their rights to participate in the central government based on fair and proper representation, and the right to self-determination.⁷⁸ Accordingly, a subsequent proclamation in Ethiopia established only 14 regions, most of which consisted of more than one ethnic groups, even if the proclamation identified sixty-four “ethnic groups”.⁷⁹

The Transitional Government of Ethiopia then established a Constitutional Commission tasked with a preparation of a draft constitution for submission to a specifically elected Constitutional Assembly. The draft constitution was ratified by the Constitutional Assembly on December 8, 1994, and came into effect on August 21, 1995. Thus, Ethiopia formally and constitutionally has become a federation from this day onwards which is composed of nine regional states.

Norms

Now, let us attempt to present a brief description of the normative principles underlying the current federal system under the FDRE Constitution upon which it is based. To this end, we primarily focus on the fundamental federal characteristics and some of the unique norms that may distinguish the Ethiopian federal design from those of other countries. Accordingly, one of the most striking normative features of the present federal system is the ethnicity criteria. The Ethiopian Federation is

⁷⁸ See *The Transitional Period Charter of Ethiopia*, Part One, Article 2 (b) and (c), p.2.

⁷⁹ Proclamation No. 7/1992, which is a Proclamation to provide for the establishment of National or Regional Self-Governments, *Negarit Gazeta*, 51st year, No. 2 Addis Ababa, 14th January 1992. Article 3, p.91.

based on a ‘milt-foundational’ covenant, read from the incipit: “We, Nations Nationalities and Peoples of Ethiopia”,⁸⁰ giving the impression that the covenant is made between the different ethnic groups and not every individual citizen, as usually stated in the “we the people” expression in many modern constitutions.

Hence, the Nations Nationalities and Peoples of Ethiopia are the building blocks of the federation. Though the Constitution uses these three words to refer to the ethnic groups, it fails to distinguish between them and defines them as one. Under Article 39 (5) of the Constitution, they are only defined as “a group of people who have or share a large measure of common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory”⁸¹. Even though many of the standards themselves may need their own definitions, we can categorize them into four basic standards, i.e. custom/culture, language, psychological makeup and territory.

In spite of the fact that the Ethiopian Constitution has recognized the right to establish a state for every nation nationality and people, it only establishes nine states. In addition, the number of ethnic identities which were established at the time of the adoption of the Constitution was more than sixty.⁸² And the criteria of state formation/delimitation are based on four criteria. These are *settlement pattern, language, identity and*

⁸⁰ See, the preamble of the *FDRE Constitution of 1995*, p. 2.

⁸¹ *The FDRE Constitution*, Article 39 sub-article 5, p. 14.

⁸² Proclamation No. 7/1992, which is a Proclamation to provide for the establishment of National/Regional Self-Governments.

consent.⁸³ Here, one might wonder if the Ethiopian Federation is a purely ethnic one, since some of the criteria, for example, the settlement pattern and consent cannot be said to be ethnic markers.⁸⁴

It is almost a universally accepted fact that federations need to have a supreme and rigid constitution and under the FDRE the principle of supremacy of the Constitution is enshrined under Article 9 stating that, “the Constitution is the supreme law of the land, any law or customary practice or a decision of an organ of a state, or a public official that contravenes this Constitution shall be of no effect”.⁸⁵ This obviously guarantees the federal structure from tampering either by the federal or by the state governments, unless they manage to meet the rigid requirements of Constitutional Amendment. However, what is missing for the supremacy clause is the federal supremacy principle given that the Ethiopian Federation is a dual one.⁸⁶

As to rigidity, the Constitution provides two sets of procedures, one in Chapter Three and one for the rest.⁸⁷ We can say that federalism has protection from both of these procedures in Ethiopia. First of all, the right to full measure of self government, including the right to “establish institutions of government” in its territory, for every nation nationality and people, is protected under the Chapter on the Fundamental Rights in the Constitution. This Chapter requires a unanimous decision of all the nine

⁸³ The FDRE Constitution, Article 46, Sub-article 2.

⁸⁴ See, Tsegaye Regassa, 2010. Pp. 52-101.

⁸⁵ *The FDRE Constitution*, Article 9, p. 4.

⁸⁶ See Tsegaye Regassa, 2009, *Issues of Federalism in Ethiopia: Towards an inventory of legal issues*, In Tsegaye Regassa (Ed.), *Issues of federalism in Ethiopia*, Ethiopian Constitutional Law Series, Vol. 2, pp. 1-68.

⁸⁷ *The FDRE Constitution*, Article 105, Chapter Three of the FDRE Constitution provides for fundamental rights and freedoms, p. 38.

state councils, by a majority vote in each regional state plus a two-thirds majority in the two federal houses.⁸⁸ Secondly, the rest of the Constitution, where the federal structure is explicitly provided for, an amendment needs two-thirds majority of a joint session of the two federal houses and the approval, by a majority vote, of two-thirds of the councils of the member states of the federation.⁸⁹

The Ethiopian Federation, despite the fact that ethnic federations are an asymmetric federal system, is clear in its adoption of a symmetric option.⁹⁰ Here, one could even probably take the issue of special assistance to the nations and nationalities that are deemed least advantaged in economic and social development as a trace of asymmetry, but this rather looks like a provisional measure of affirmative action.⁹¹

Institutions

In the next few pages, we will discuss the most significant institutions in the Ethiopian federal design. Even though many of the institutions the Constitution created have some kind of relevance for federalism and its practice in Ethiopia (like the House of Peoples Representatives) here we delimit ourselves to a description of three institutions that are the most important and unique from other comparable institutions in other federations. These are the House of the Federation and the Council of Constitutional Inquiry.

⁸⁸ *The FDRE Constitution*, Article 105 (1), p. 38.

⁸⁹ *The FDRE Constitution*, Article 105 (2), p.38.

⁹⁰ See Tsegaye Regassa Supra note 91 page 40, see also Article 47(4) of the *FDRE Constitution*, p. 17.

⁹¹ *The FDRE Constitution*, Article 89 (4), p. 33.

The House of Federation

House of Federation (hereinafter HoF), conceived in the sense of bicameralism, refers to the legislative power that is expected to have as a typical second chamber is very much contested. The only provisions where one may imagine a trace of legislative functions are its decision on joint revenues under Article 62(7), determination of undesignated tax bases jointly with the House of Representatives, and its role on amendment of the federal constitution.⁹²

Under Article 99, the HoF has concurrent power with the House of Peoples Representatives (HPR) in the determination of residual powers over taxation. In essence, this provision refers to reserve powers regarding undetermined future tax bases. Article 62(7) refers to the ‘division of revenues derived from joint Federal and State tax sources and the subsidies that the Federal Government may provide to the states.’ In both cases, it seems that there is a role to be played by the HoF, but one cannot tell precisely whether this role is legislative or otherwise. In the latter, at least the practice so far indicates that the function of the HoF is to set the criteria that the HPR may use in allocating shared taxes as well as subsidies concerning fiscal transfers to the states. The HoF outlines the criteria to be taken into account and the HPR considers the factors in approving the annual budget. As regards the powers of the HoF, the assignment of undesignated tax bases, it is far from clear whether or not ‘determining jointly’ is meant to include decisions incorporated by laws to be approved by both houses, and whether it falls short of that. It could be stated that both Houses will decide in a joint meeting and that decision

⁹² *FDRE Constitution*, Article 105, p. 38.

will be the basis for the HPR in making laws, in which case it still remains a non-legislative function.⁹³

Aside from lack of power in the normal legislative process, the most notable attribute of the HoF is the manner of representation. Here we can think of two points. The first one is that the members do not represent the federating units, as is usual in upper houses with bicameral federations elsewhere. It is rather “...composed of representatives of the Nations Nationalities and Peoples”⁹⁴. Secondly there is no equal representation, rather a sort of weighted representation, because some ethnic groups are necessarily represented even though their number is extremely small.⁹⁵

The Council of Constitutional Inquiry

The Council of Constitutional Inquiry (hereinafter the CCI), is composed of eleven members that comprises, among others, the Chief Justice and his deputy of the federal Supreme Court, who also serve respectively as Chairman and Vice Chairman of the CCI, six other legal experts appointed by the President of the Republic with the recommendation of the lower house, and three persons elected by the House of the Federation from among its members. The CCI has the power to investigate constitutional disputes.⁹⁶ The examination of the petition may result in a *prima facie* case calling for interpreting the Constitution. In this case the

⁹³ See Tsegaye Regassa, 2009. Issues of Federalism in Ethiopia: Towards an inventory of legal issues, In Tsegaye Regassa (Ed.), *Issues of federalism in Ethiopia: Towards an Inventory, Ethiopian constitutional Law Series*, Vol. 2, P. 54.

⁹⁴ *FDRE Constitution*, Article 62 (1), p. 24.

⁹⁵ Hueglin and Fenna, *supra* note 23 at page 181.

⁹⁶ *FDRE Constitution*, Article 82; of Proclamation No. 250/2001, Article 4 Council of Constitutional Inquiry Proclamation, *Federal Negarit Gazeta*, 7th Year, No. 40, Addis Ababa, See also Article 84 of the Constitution, p. 31.

CCI is required to ‘submit its recommendations’ to the House of the Federation or remand the case and render a ‘decision’ if it is not convinced of the need for constitutional interpretation.⁹⁷

Where the council decides that there is no need for a constitutional interpretation the party dissatisfied with the decision of the CCI may appeal to the HoF.⁹⁸ Thus, it is clear that the CCI is merely an advisory body to the HoF, lacking the competence to give a binding decision. The HoF as well has been at liberty to disregard the CCI’s opinions in some cases. So far the practice indicates that the HoF has for the most part endorsed the decisions of the CCI but in the case of the Benishangul-Gumuz case, it disregarded the opinion of both the majority and the minority and came up with an entirely new decision.⁹⁹

It is also interesting to see the position of the constitutional provisions dealing with the council of constitutional inquiry. Even though it is structurally situated within the House of the Federation (in the constitutional text), it is found within Chapter Nine of the Constitution, where it provides for the power and structure of courts. Perhaps, this is an indicator to what the drafters might have had in mind regarding the form of institutional set up for the interpretation of the constitution.

⁹⁷ *FDRE Constitution*, Article 84 (3) (a), p. 31.

⁹⁸ *FDRE Constitution*, Article 84; See also, Article 6 of Proc. 250/200, p. 1600.

The Ministry of Federal Affairs

The precursor to this Ministry was the *Kilil Gudday Zerf office*, meaning Regional Affairs Sector Office under the Prime Minister’s Office, which was later formally by Proclamation No. 256/2002.¹⁰⁰ The main task of this office and later the ministry was to facilitate the assistance that was supposed to be given to the economically and socially disadvantaged regional states as per the constitutional stipulation. In the latest legislation to provide for the definition of powers and duties of the executive organs of the federal government, the ministry is given many, previous and additional powers inter alia related to public peace and order, facilitation of disputes that may arise between regional states, coordinating the implementation of federal interventions, if any may come, follow up coordinate and integrate the support that goes to the states needing it and most importantly for us “serve as a focal point in creating good federal-regional relationship and cooperation based on mutual understanding and partnership and thereby strengthen the federal system”.¹⁰¹

This institution is the closest thing to an intergovernmental institution in the Ethiopian federation. But the fact that it is a federal agency may come in its way to success, since there will at least be a perception of bias in favor the federal government in which it is a part. “*Transparency and*

¹⁰⁰ A Proclamation to provide for the Reorganization of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation,’ Proclamation No. 256/2001.

¹⁰¹ Proclamation No. 691/2010, Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation, interestingly, it has been given many functions that at least at first glance look out of place, like regulation of charities and arms.

participatory systems may get the regions to trust the ministry as and build confidence”¹⁰²

Processes

In this section we will be dealing with the issue of intergovernmental relations. Here we discuss about “*a set of formal and informal processes as well as institutional arrangements and structures for bilateral and multilateral cooperation within and among the tiers of government*”¹⁰³ Judging from the division of powers between the national government and the regional states in the FDRE Constitution, the Ethiopian Federation is a dual federation where legislative powers are co-extensive with executive powers. This obviously calls for a strong need for institutionalized intergovernmental relation to secure the implementation of federal policies at the state level. Hence, the current situation is explained by extra constitutional mechanisms for the most part.

According to Assefa Fiseha,¹⁰⁴ there are three ways in which the current regime tackling this issue. These are delegation, making use of federal executive institutions (like the Ministry of Federal Affairs and the party channel). In addition, none of them are institutionally mandated and constitutionally guaranteed mechanisms of cooperation. The only trace of institutional cooperation between the federal government and the states in Ethiopia is the availability of delegation. The Constitution under Article

¹⁰² Tsegabirhan Tadesse, 2010, The Ministry of Federal Affairs as an Implementing Agency of Intergovernmental Relations in Federal Ethiopia, In Alem Habtu (Ed.), *Ethiopian Federalism: Principle, Process and Practice*, The 5th International Conference on Federalism, Addis Ababa, 2010, p. 79.

¹⁰³ Lianne P. Malan, 2005, *Intergovernmental relations and cooperative government in South Africa*, p. 228.

¹⁰⁴ Assefa Fiseha, 2005.

51 provides for the possibility of delegation by the federal government in regard to some of its powers to the states. But his stipulation is not clear enough for implementation. First of all, it doesn't even tell which powers are delegable and which are not. Second, it doesn't say whether it is possible to delegate executive power or legislative or both.¹⁰⁵ As one can understand from the meaning of the term delegation, it is of a purely voluntary nature. The states are under no obligation to execute federal laws and policies. So far, we have not yet seen the federal government to exercise its revenue power to coerce the states to implement its program as it is customary in the United States.

Finally, even though there are concurrent powers between the federal government and the states, in addition to the exclusive powers, in Ethiopia; there is no institutional mechanism which is put in place by the Constitution to facilitate cooperation between them. But for the time being, the problem may not be felt because there is a very strong party system that guarantees cooperation. An observer will be amazed at how fast and enthusiastically the policies adopted by the national government are accepted and implemented from west to east and from south to north of the country.

Consociational Features of the Ethiopian Federation:

Towards an exploration

In this section, an attempt will be made to identify the consociational attributes in the constitutional and legal framework that establishes and runs the Ethiopian Federation. To this end, we consider Lijphart's Four

¹⁰⁵ Remarkably, it is clear as to the possibility and modality of delegating judicial power from the federal to the states. See Articles 78 (2), and 80 of the FDRE Constitution.

Principles of Consociationalism, and assess the federal and the state constitutions as well as relevant legislations to trace and to find those principles and to identify how they have been incorporated. Accordingly, let us first look for traces of power sharing, segmental autonomy proportionality and minority/mutual veto. For ease of analysis and clarity, we then consider power sharing along with proportionality and segmental autonomy with veto.¹⁰⁶

Identifying the Features

Power Sharing

As discussed in section one above, power sharing might be implemented at different levels of government, assuming different forms (i.e. from having a panel of chief executives in Switzerland to alternating presidency in Nigeria). However, the most important aspect of power sharing is at the executive level. On this issue, the Transitional Period Charter of 1991 had clear provisions on executive power sharing, as stated in its Article 9 (b), the Head of the State, the Prime Minister, the Vice Chairperson and Secretary of the Council of Representatives to come from different ethnic groups. Further, the Charter calls for the consideration of “broad national representation” in addition to technical expertise and loyalty to the Charter.¹⁰⁷

¹⁰⁶ The latest formulation of the four principles makes power sharing and segmental autonomy to be primary attributes and principles while proportionality and veto are taken as secondary principles that help maintain the first two primary attributes respectively.

¹⁰⁷ See Article 9 (C), of The Transitional Period Charter, *Negarit Gazeta*, 50th year, July 1991 Addis Ababa

When we examine the actual FDRE Constitution, specifically the Prime Minister's powers and functions, the PM is no under obligation to make sure that the ministerial and other executive portfolios he nominates for those positions ensure the Nation's Nationalities and Peoples are represented.¹⁰⁸ In reality, however, one can notice that the cabinets which have been elected are fairly representatives of the Nations Nationalities and Peoples so far¹⁰⁹, and may be especially interesting to note how some ministerial portfolios seem to be reserved to some ethnic groups.

Article 39, sub-article 3 of the Constitution, on the contrary, suggests that the Nations' Nationalities and Peoples of the Ethiopian Federation are entitles to some sort of power sharing at the federal level, as being stated the right to: "... *equitable representation in State and Federal Governments.*"¹¹⁰ Even if the Constitution does not provide for detailed system and procedures (i.e. failing in laying down the manner of representation of the Nations Nationalities and Peoples) one can argue that this stipulation requires the representation of the ethnic communities in Ethiopia in both the Federal and the State Governments.¹¹¹

¹⁰⁸ See FDRE Constitution Article 74 sub Articles 2, 7, 9, the current prime minister was clear in stressing the absence of any legal obligation requiring him to come up with a diverse cabinet when he presented ministerial nominees to the parliament for approval after the 2005 election, even though he claimed the composition too have been legitimate not only in terms of ethnic composition, but also gender and religion.

¹⁰⁹ Christophe Van der Bekken, *Ethiopian Constitutions and the accommodation of Ethnic diversity: The Limits of the Territorial Approach*, in Ethiopian Constitutional Law Series, Vol. 2, Tsegaye Regassa (Ed.), Issues of Federalism in Ethiopia: Towards an Inventory, May 2009, page 280

¹¹⁰ FDRE Constitution Article 39 (3)

¹¹¹ The requirement of representation at the state level is meaningful since many of the regional states are multi-ethnic.

The greatest and best form of power sharing in consociations is recognized as that of grand coalitions, where all parties are allowed to be represented in the executive government proportionally to the votes they managed to secure in general elections.¹¹²

Proportionality: first of all, for the issue of proportional representation we will look at the electoral system. Accordingly to ensure and ascertain power sharing a Proportional Representation electoral system must be present. The basic principles underlying proportional representation elections are that all voters are worthy of representation and that all political groups in society deserve to be represented in the legislature, in proportion to their strength in the electorate. In other words, everyone should have the right to fair representation.¹¹³

In order to achieve this fair representation, all PR systems have certain basic characteristics -- characteristics that set them apart from the 'winner takes all' electoral system. First, "they all use multi-member districts. Instead of electing one person in each district ... several people are elected. These multi-member districts may be relatively small, with only three or four members, or they may be larger, with ten or more members."¹¹⁴ Second, they distribute the seats in these multi-member districts according to the proportion of votes received by the various parties or groups running candidate.¹¹⁵ But when we observe the Ethiopian electoral system in general elections, we have a single member

¹¹² Horowitz.

¹¹³ Available: <http://www.mtholyoke.edu/acad/polit/damy/BeginningReading/howprwor.htm> accessed on Thursday, November 25, 2010, 5:19:30 PM,

¹¹⁴ *ibid.*

¹¹⁵ *Ibid.*

constituencies, Article 28 of the latest Electoral Proclamation, in fact, provides that “...*only a single representative shall be elected to the Federal House of Peoples Representatives, from a constituency*”.¹¹⁶ Moreover, it declares that a candidate who secured more votes than other candidates within a constituency shall be the winner.¹¹⁷ The notable exception in the representation to the House of Peoples Representatives is that “at least twenty seats” reserve made for minorities.¹¹⁸ Presumably, this is for those Nations Nationalities and Peoples that are not big enough to make up a constituency, and hence may not be represented through the normal process. Here one might imagine the possibility of greater proportional representation by a new legislation given the appropriate political will, since the number of seats for minorities can be enlarged.¹¹⁹

The most constitutionally proportional institution probably is the House of the Federation (HoF). This is because every ethnic group in Ethiopia is entitled to “*be represented by at least one member*”¹²⁰ and “*one additional representative for each one million of its population*”.¹²¹

Proportionality consociations is not limited to elected offices, rather it requires the equitable representation of every segment of the polity in the civil service, the judiciary and the armed forces. As for the civil service, except for the constitutional requirement in stated Article 39 (3) for

¹¹⁶ See Electoral Law of Ethiopia, *Amendment Proclamation No.532/2007, Article 28*

¹¹⁷ Ibid.

¹¹⁸ See *FDRE Constitution*, 1995, Article 54 (2) and (3).

¹¹⁹ One of the unresolved constitutional and legal issues in relation to the representation of minorities is the question of who these minorities are. For a superb analysis and inventory of the legal issues in the Ethiopian federal practice, See Tsegaye Regassa, 2009, *supra* note 98, pp. 1-68.

¹²⁰ *FDRE Constitution*, Article 61 (2), p.

¹²¹ Ibid.

equitable representation, neither the relative commission establishment Proclamation of 1995¹²² nor the current proclamation that establishes this commission as a ministry¹²³ suggests ethnic composition and representation as an objective. Again, the same is true for the judiciary power.¹²⁴

Differently and interestingly enough, the Constitution is clear in its requirement of ethnic composition in the military. In the section that provides for the principles of national defense, the first principle laid down by the Constitution reads: “*the composition of the national armed forces shall reflect the equitable representation of the Nations Nationalities and Peoples of Ethiopia*”. This is a clear requirement of proportional representation.

Segmental Autonomy: Aside from the legislative powers given to the regional states, segmental autonomy in Ethiopia can be traced in its system of legal pluralism. At least since the 1960’s, when Ethiopia took on the project of modernizing its laws in earnest, the overall tendency was towards legal centralism, as only state formulated one are valid, formally made by the parliament and published on the *Negarit Gazette*. Hence, we could say that there had been no formal legal pluralism in Ethiopia’s recent history until the adoption of the current Constitution. But, it has to be recalled that the indigenous legal orders were and are still really

¹²² Proclamation No. 8/1995, *Federal Civil Service Commission Establishment Proclamation*.

¹²³ Proclamation No. 691/2010, *Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia*.

¹²⁴ Proclamation No. 684/2010, *Amended Federal Judicial Administration Council Establishment Proclamation, Article 11*.

operative in the urban centers, let alone the rural areas to which the state machinery had little access.¹²⁵

Thus, after the Ethiopian Government has adopted the current Constitution, Ethiopia takes a great stride towards formal legal pluralism by a constitutional recognition of religious and customary laws on some level.¹²⁶ This is first justified by the right to develop and promote one's culture. Law which is being an inextricable element of one's culture definitely calls for the possibility of using one's own recognized law and legal system.¹²⁷

When we come to the constitutional provision that provide for the applicability of non-state law, the first provision of interest is Article 34, sub-articles 4 and 5,¹²⁸ in the Human Right Section of the Constitution under Chapter Three. Sub article 4 in the Constitution stipulates the possibility of enacting laws that recognize marriages made under religious and customary laws, while after sub-article 5 the same Constitution provides for adjudication as follows: *“This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws...”*¹²⁹

Building on these two rules in the Human Rights Section, the section on the judiciary provides room for institutionalization of such sources by

¹²⁵ See Tsegaye Regassa, Urgessa Genemo, and Tena Yigezu, 2008, Restorative justice in Oromia: Baseline Study, p. 64.

¹²⁶ Limited to “On some level” because the recognition is only accorder to family and personal matters.

¹²⁷ See Supra note 131, at page 66.

¹²⁸ *FDRE Constitution.*

¹²⁹ *FDRE Constitution Article 3, Sub-article 5.*

providing chances to establish religious and customary courts at both the federal and state government levels. In addition to new establishment of courts, both the federal and state governments are empowered to grant official recognition to any customary and religious courts functioning before the coming into effect of the Constitution.¹³⁰

It is worth noting that, the explicit constitutional provision specifies, personal and family matters when they talk about the possibility of formal legal pluralism. This is to make a distinction as to the application of let us say criminal, tax, labor, etc. matters. This is justified by the assumption that family and personal laws have a relatively low opportunity of affecting the overall welfare of the society.¹³¹ Personal and family matters are fairly considered to be of exclusive interest in agreement with the principle of segmental autonomy.

Minority Veto: As stated-above, the minority veto is an instrument that guarantees the minority; they will not lose their fundamental interest by a majority decision. While looking for constitutional or legal right of a minority veto in the Ethiopian federal system, one may find the closest thing in relation to constitutional amendment. As indicated in Section 2.1, all the regional states need to agree for the amendment of Chapter Three of the Constitution in which most of the serious rights and interests are contained. Here the problem is, however, the regional states are not

¹³⁰ FDRE *Constitution Article 78, Sub-article 5*, the recognition has been necessary because the Sharia court has been handling family and personal matters according to the Islamic Law since the Italian occupation in the 1930's.

¹³¹ For a discussion of the Ethiopian Constitution, See, *Ugo Mattei, 1995, The New Ethiopian Constitution: First thoughts on ethnical federalism and the reception of Western Institutions.*

synonymous with the Nations Nationalities and Peoples. So, the right of ‘veto’ is not given to the ethnic groups, rather it is given to the States.

When we examine the parliamentary procedures of decision making, it is a majority one. Article 59(1) provides “unless otherwise provided in the Constitution, all decisions of the House shall be by a majority vote....”¹³² Moreover, the parliamentary in house rule doesn’t provide for any chance of total veto or delaying legislation, to the minority.¹³³ Even if the HoF doesn’t have any significant policy making power, all of its decisions are again simple majority is enough for decisions.¹³⁴

¹³² *FDRE Constitution*, 1995.

¹³³ The House of Peoples’ Representatives of The Federal Democratic Republic of Ethiopia Rules of Procedures and Member’s Code of Conduct Regulation, *Regulation No 3/2006*.

¹³⁴ *FDRE Constitution Article 64(1)*.

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