

# The Nonfederal Features of the Ethiopian Ethnic-Based Federal Experiment<sup>©</sup>

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## **Abstract**

*Many have tried to deal with the essentials of the Ethiopian federation with regard to its content, context and process. However, in most cases, the operational practice of the federation is ignored which makes difficult for practitioners to appraise the success or failure of this young federal experiment. Introduced with the motives of granting sufficient autonomy for the various nationalities of the country under the ideological foundation of nationality question, the federal politico–legal framework is now near to celebrate its second decade of existence. Some of the unique features that are inherent to the federal set up, such as the constitutional recognition of secession, umpiring of federalism through a second chamber of parliament, a unicameral parliamentary structure and etc are the areas by which weight has been given in the academic as well as political circle. This article is designed with the aim of looking at some if not all features natural in the Ethiopian federal design which are in one way or another are unsuited with the very idea of federalism, at least for those of us who agree on the general attributes of the system (such as an impartial umpire, constitutionally recognized and protected autonomy of constituent units, diversity of opinions and its accommodation et cetera.). A related matter is whether such nonfederal features are deliberately introduced during the constitutional making or resulted from the political practice or a combination of these. It is also the aim of this article to take the debate on federalism and federal practice in Ethiopia one step ahead. In order to accomplish this mission, the paper begins with a short background of the federal setup followed by a brief look at the federal process, content and context then proceed to examine the features which makes the system unfederal. At the end, the concluding remarks will boil down all the issues and concerns.*

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## I. Background

Following the demise of the long-lived historical *de facto*<sup>1</sup> federal setup, prominent political elites of the 20<sup>th</sup> century by and large labeled Haileselassie I as the chief architect of modern state of Ethiopia through the Western ideal of nation-state. His majesty, who reigned for forty-four years up until his forceful removal from the crown in 1974 by the radical military group led by Mengistu Hailemariam, otherwise branded as *Dergue*, was principally celebrated as the one who revealed the *better days of Ethiopia* and honored to be a modernizer and avant-garde sovereign who fiercely guarded the sovereignty and independence of this northeast African polity.

Weakened by a protracted revolutionary war in Eritrea and by withdrawals of Soviet support, Mengistu's regime was overthrown by the Tigrayan People's Liberation Front (TPLF) and its allies in May 1991. The new Transitional Government of Ethiopia (TGE) is dominated by the Ethiopian People's Revolutionary Democratic Front (EPRDF)<sup>2</sup>, a party created by ethnic oriented alliances. The winners at the battle field, some liberation front's, including trade unions has attended the July 1991 Conference that approved the Charter under which the TGE operated, and which forecast the contents of the new Constitution.

The Transitional Government that was established by the Charter and elaborated by the subsequent proclamations was not explicitly designated as federal. Neither the Charter nor the Proclamation that provided for the establishment of self governments referred to this government as federal or decentralized for that matter.<sup>3</sup> Subsequently however, on

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<sup>1</sup> The long lived historical decentralization in Ethiopia has been at the forefront of the academic as well as political debate concerning its correspondence or otherwise with the concept of *de facto* federalism. Some notable federalism writers for example enunciate such a pedigree in Ethiopia as a *de facto* federal experience while some others considers it as lack of centralization. Though, the argument still goes, for my purpose, it is not as such relevant to boil down all the concerns and issues here. What I need to explain here is there was no unified strong central governance in much of the country's political history. See for example Assefa Fiseha, *infra* (19) and Tsegaye Regassa, Comparative Relevance of the Ethiopian Federal System to other African Polities of the Horn, *Bahir Dar University Journal of Law*, Vol.1 No. 1 at 14 for such a debate.

<sup>2</sup> Without any significant change in its structural organizations, even after two decades of republican federal experiment, this is the party now in power with nearly all seats in the federal as well as state parliaments.

<sup>3</sup> Yonatan Tesfaye *Institutional Recognition and Accommodation of Ethnic Diversity: Federalism in South Africa and Ethiopia*, (Unpublished PhD Dissertation, University of Western Cape, Community Law Center, 2009) at 64.

the way to illuminate the Ethiopian choice and after this enough margin of transition, in December 1994, a constitutional assembly ratified the new constitution, which was lauded for its commitment to a fully fledged federalism beared with liberal democracy and respect of political freedoms and human rights.<sup>4</sup>

Within the new federal structure, the different multicultural elements are reflected in structuring the members of the federation.<sup>5</sup> This is the primary reason for labeling the Ethiopian federation as an ethnic oriented federation. The nine states which are organized based on settlement patterns, language, identity, and consent<sup>6</sup> accordingly are, Tigray, Afar, Amhara, Oromia, Somalia, Benshangul Gumuz, Gambella, Harari, and the SNNPR (Southern Nations, Nationalities, and Peoples Region).<sup>7</sup> Note also that, Ethiopian federalism does not limit the number of the states as every nation, nationality, and people has the right to establish, at any time, its own state.<sup>8</sup> Therefore, the number of the constituent units could be increased or decreased based on the willingness of ethnic groups to form a new state or merge with the existing one, making it a unique feature of Ethiopian federalism.

The Constitution, after opting for parliamentary federalism characterized by a coordinate<sup>9</sup> relationship between the center and the constituent units, tries to emphasize

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<sup>4</sup> The constitution was ratified on 8 December 1994 and entered into force on 21 August 1995 (The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, and Proclamation of the Constitution of Federal Democratic Republic of Ethiopia, *Federal Negarit Gazeta*, 1<sup>st</sup> Year No. 1, and Addis Ababa-21<sup>st</sup> August, 1995, adopted on 8<sup>th</sup> of December 1994 and came into force on 21<sup>st</sup> August 1995, (Here in after referred as The Constitution or the FDRE constitution)). So, as of this date Ethiopia is a federation *de jure*. However, many argued against the composition of the constituent assembly by labeling it as an affiliated group of individuals to the ideology of EPRDF. Such contest was exacerbated by the highly rigged election took place some time after the constitutional making and very recently.

<sup>5</sup> For the purpose of this short work, the author uses constituent units, Regions, regional states and states interchangeably to refer the members of the federation.

<sup>6</sup> Article 46 (2) of the FDRE constitution.

<sup>7</sup> Article 47 of the FDRE constitution.

<sup>8</sup> Article 47 (2) of the FDRE constitution.

<sup>9</sup> The argument on this notion of coordination or cooperation is drawn from the existence of some clues on the concurrent (even other than the tax provisions) as well as framework powers which all calls for some kind of coordination between the two orders of government to meet most of the socio-economic ends. More importantly, Article 50 (8) which introduces the *federal comity* principle can also serve as another ground for the cooperative scenario. For the purpose of clarification, framework powers are those powers by which the federal government enjoys to lay down the principles and guidelines to let the states experiment them according to their preferences and priorities (see for instance, Articles 51(2,3), 52(2,c) and 56(6) of FDRE constitution). On the other hand, concurrent powers are shared powers of both governments but usually exercised by the constituent units until the federal government step in as the issue becomes a matter of federal importance. See also Solomon Negussie, *Intergovernmental Relations*

on the equality, even in some cases the Nations, Nationalities and Peoples supreme position though the term calls for qualification in some respects.<sup>10</sup> The two tiers of government are constitutionally empowered to act exclusively on their affairs which fall under their respective jurisdiction<sup>11</sup> even though there are some areas of framework and concurrent powers that may necessitate the joint actions of the states as well as the federation. This is to signify the *de jure* equality of the parties to the federal bargain. Thus, constitutionally speaking, the FDRE Constitution opted for dual federalism as opposed to the German and Swiss model of executive federalism.<sup>12</sup> There is nothing provided about federal supremacy unlike its US counterpart or federal preemption principle as the case in some federations.<sup>13</sup>

## II. The Ethiopian Federal Structure: a Brief Look

According to the Federal Constitution, which is taken as a turning point of the previously centralized state structure (especially after the reign of Haileselassie I), while serving the role of being a *covenant* of the federal bargain, uniquely (or as some prefer to explain, confusingly) among the ethno-linguistic groups of the country; Ethiopia is a federation operating under the Republican principle.<sup>14</sup> Consequently, the nationalities, through their representatives preserve all the sovereign powers. Hence, they are the *loci* of sovereign

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*and Fiscal Issues in Federations: the situation in Ethiopia and Its implication to the Horn*, 3<sup>rd</sup> conference on constitutionalism and human security in the Horn of Africa, December, 2009, Addis Ababa at 62.

<sup>10</sup> Article 8 of the Federal constitution provides that *all sovereign power resides on the Nations, Nationalities and peoples of Ethiopia* (emphasis added) without sufficient clarification of who these groups are. But it is wise to note that, Article 39(5) has introduced some grounds of parameter to distinguish who these groups are.

<sup>11</sup> This is what the Americans and Pro-American federalism authors call Dual federal structure.

<sup>12</sup> In the case of Dual or legislative federalism, in their respective domains, each level of governments are responsible for policymaking in its entirety; from policy initiatives and formulation to legislation, implementation and administrative execution. On the other hand, in the typical German model of executive or administrative federalism the regional governments are in addition responsible for applying most of federally designed policies based on exclusively federal standards even though they have the chance to partake on the deliberations.

<sup>13</sup> The concept has got its origin from the American constitutional history. Accordingly, after an agreement has been reached on the federal option, a large measure of the States' sovereignty was ceded under the Constitution to the federal government by virtue of the Supremacy Clause in Article VI, which declared that all laws of the United States "*shall be the supreme Law of the Land*".

<sup>14</sup> See Article 1 of the FDRE Constitution. But note that, Federal non-centralization was formally adopted in 1995 with the adoption of the Constitution though hinted by the Transitional charter alongside the regime change.

authority in this country.<sup>15</sup> The constituent units are shaped in line with such understanding and vested with powers that can be viewed by many as overwhelming.<sup>16</sup>

In theory, the states power extends from those routine businesses of local authority to self determination, secession included.<sup>17</sup> Some also contend that, the Ethiopian states are in a much better position than any other federal experience.<sup>18</sup> In connection with this view, the constitution adopts an incomplete federal structure that leaves enough constitutional space to the members of the federation back from its inception. Thus, by adopting a dual federal setup, it establishes a two-fold lawmaking scenario which is described by the federal jargon; Legislative Federalism as opposed to the German replica of Executive (Administrative) Federalism. Therefore, states are in a position to legislate and thereby to follow up execution on matters that fall under their competencies. Moreover, member states can have their own constitution which can be treated as a symbol of their sovereignty.<sup>19</sup>

Under its unique *modus operandi* of '*Nations, Nationalities and Peoples*', the constitution also acknowledged other tangible privileges. Among others, members of the Federation may by law determine their respective working language and such a choice shall enjoy equal state recognition.<sup>20</sup> The establishment of the House of Federation, with all its critics (on its composition and power), is another concrete measure in the position of states under the pretext of defending ethno-national groups from *assimilationist* policy.<sup>21</sup> This House,

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<sup>15</sup> Article 8 of the FDRE constitution.

<sup>16</sup> The significant position that the Ethiopian states have can be traced from the readings of the preamble of the constitution and some of the constitutional provisions. For instance, the residual authorities (the policy making powers which are not given to the center expressly or concurrently to the states and the center) remains with the states. In addition, the contextual definition of the right to self determination up to and including secession also covers the states. See also Assefa Fiseha, *Federalism and Accommodation of Diversity in Ethiopia*, Nijmegen, Wolf Legal Publishers, the Netherlands (2006) at 210. But, for others, which I include myself, the substance and weight of the states power is relatively meager.

<sup>17</sup> Article 39 of the FDRE constitution.

<sup>18</sup> See for example, Assefa Fiseha, *Theory versus Practice in the Implementation of Ethiopia's Ethnic Federalism*, in David Turton (ed.), *Ethnic Federalism: The Ethiopian Experience in Comparative perspective* (Oxford: James Currey, 2006) pp. 131-164.

<sup>19</sup> However such a duality argument is not absolute as some tries to explain. Due to the absence of a comprehensive list of concurrent powers and the wide ranging framework jurisdiction given to the federal government, cooperation between the two is usually inevitable and considered as the hallmark of all federations by which Ethiopia cannot claim exceptionality. More importantly, it is impractical for the constitutional framers to list all areas of powers and authorities of the governments in a single compartment. So, cooperation is considered to be naturally ally to federations.

<sup>20</sup> Article 5 of the FDRE Constitution.

<sup>21</sup> It is important to understand the fact that the Ethiopian constitution is not interested in equating the states with the nationalities. It is these latter groups that are considered as the forming bricks of the

which is the second chamber in the Ethiopian parliamentary edifice, is equipped with important powers that make it the guardian of the constitutional rights and interests of the *contracting parties* to the union. It interpret the *covenant*, decides on the right to self determination of groups; it also determines the allocation of revenue derived from the joint federal and state tax basis and the subsidies that the federal government may grant the states.<sup>22</sup>

In connection with the division of competencies, as I have tried to point out, the federal government, following the American model, remains with enumerated exclusive legislative powers by which the states are entitled to exercise the possible competencies and those not yet mentioned under the federal or concurrent list.<sup>23</sup> However, uncommonly, the constitution has expressly mentioned some of the constitutional powers of the constituent units. By this, the states have the right to enact and execute their own constitution in fact in line with the basic tenets of the federal constitution,<sup>24</sup> administer land and natural resources as per federally designed framework legislations, the power to set up their own administration that best advances self government, a democratic order based on the rule of law, levy and collect taxes on their own revenue sources, establish and administer state police force.<sup>25</sup>

Unlike some other federal constitutions however, there is no concept of executive office sharing between the states and the center. However, in practice, at least through the party channel (and due to the coalition nature of the central party in power), states will have the chance to be part of the central policy implementation. Similarly, the states are not part of the central lawmaking process though the federal laws are going to be implemented throughout the nation. This is due to the fact that, the so called second chamber of the Ethiopian parliament has been constitutionally ousted from the legislative business.

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federation (rather than the states). Nonetheless, in practical terms, the states as the supreme administrative organs can possibly be taken as the real expression of such autonomy and indirectly recognized as political entities to put into practice such constitutionally certified autonomous existence.

<sup>22</sup> Article 62 of the FDRE constitution.

<sup>23</sup> Those powers which are normally of national significance such as interstate commerce, printing and administration of currency, foreign policy, etc are assigned to the federal government. However, one may wonder whether the powers of the central government are only those listed under Article 50 and 51. The common understanding now in Ethiopia is, the power of the national government transcends this provisions and one has to trace the whole text to figure out the competencies of the same.

<sup>24</sup> Article 9(1) of the FDRE constitution provides for the supremacy of the constitution.

<sup>25</sup> Article 52 (2 a-g) of FDRE constitution.

By any counts however, for those who has made a cursory look into the constitutional aspirations at the preamble as well the contents, it may create an impression that the Ethiopian constitution has more of a confederal character by which the nationalities (in directly the states) are the major actors in the politico-economic process. The human rights provisions, traditionally known as the bill of rights regime under chapter three of the constitution,<sup>26</sup> is also another evidence for such a dominant position of the states of the federation. The right to self determination is taken as the preeminent right that grants the states (the ethno-national groups) with the choice to stay or leave the federation.<sup>27</sup>

All this underscores the central position, at least in the language of the constitution, the Ethiopian states have. Legal pluralism, in the course of the constitutional recognition of customary and religious laws and courts respectively<sup>28</sup> has been effected and sensibly went into action in the areas of family and personal stuff on the way to reflect the self identity of various groups residing in the constituent units.<sup>29</sup> Some also argued that, the Ethiopian federal understanding is characterized by a *soft* center.<sup>30</sup>

Earlier, we have noted that, under the previous regimes, political and economic supremacy was concentrated at the center. This scenario has condemned most of the country and its residents to backwardness and underdevelopment. It is by taking full account of this that the constitution made an attempt to lay emphasis on the autonomy of member states of the federation through an ethnic-based federal arrangement. Political theorists see the decentralization policy as a way to foster democratization process inasmuch as it enables more people to influence the political process.<sup>31</sup>

However many doubt the commitment of the government to realize such constitutional aspirations. To many critics, Ethiopia's is a *de facto* one party state in which ethnic organizations are mere satellites of one vanguard political party; EPRDF (Ethiopian

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<sup>26</sup> This chapter includes Articles 13 to 44.

<sup>27</sup> Article 39(1) of the FDRE constitution.

<sup>28</sup> Articles 34(5) and 78(5) of the FDRE constitution.

<sup>29</sup> Articles 34 and 78 of the FDRE Constitution.

<sup>30</sup> See for example Assefa Fiseha, *Federalism and Accommodation of Diversity in Ethiopia*, A comparative study, Nijmegen, Wolf Legal Publishers, the Netherlands (2006) , Assefa Fiseha, *supra* note 19 .

<sup>31</sup> Among others M.A.M Salih and John Markakis can be mentioned, see Salih and Markakis: *Ethnicity and the State*, Cambridge: Cambridge University Press (1987) at .8.

People's Revolutionary Democratic Front) which is a multiethnic ruling coalition.<sup>32</sup> Particularly, there are a number of *signals* that Ethiopia's government has failed to devolve real power to the Regions and to bring about decentralization as opposed to the constitutional framework. These are the concerns that I have mentioned in the title as *the nonfederal features of the Ethiopian Federal experiment*. In the following, such centralizing trends of the Federal dispensation are dealt.

### **III. The Nonfederal features of the Ethiopian Federal setup**

The ruling coalition, immediately after toppling down the unitary pro socialist regime in 1991, declared its intention to implement a plan to devolve power from the center to states and local governments. Thus, many of the local elites believed that their respective regional states were responsible for regional political life, development policies, laws, regulations and taxes. However, when it fully materialized, Ethiopia's new state building attempt through the federalism ideal became a *near to unitary* federation than being a *devolutionary one*.

The following realities that the federal configuration reveals can be cited as illustrative markers of such (un)federal features of the political bargain in Ethiopia. This features, as illustrated in the following subsections, embraces both constitutionally inherent factors and those resulted from a distorted political practice.

#### **A. The Hegemonic control of all the spaces by the EPRDF**

One of the chief markers of continued centralization is the EPRDF's conception of ethnic based satellite Parties, which run the regional governments under the supervision of the *Central Committee* of the ruling coalition. For various reasons (such as protesting persecution and intimidation), independent opposition Parties boycotted all elections held in the history of the country, leaving EPRDF and its satellite Parties to monopolize political power.<sup>33</sup> This biased tendency strictly goes against the underlined tenets of political pluralism; let alone Democracy and Constitutionalism. Without any significant opposition, the EPRDF has/ is maintained control over the Regional Governments, and

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<sup>32</sup> See Alem Habtu, *Multiethnic Federalism in Ethiopia: A study of the secession clause in the Constitution*, Oxford University Press, *Publius/Spring* 2005 pp 313-335, Kidane Mengisteab, *Ethiopia's Ethnic Based Federalism: 10 years after*, *African Issues*, Vol. 29, No. 1-2, African Studies Association, (2001), at 20\_25.

<sup>33</sup> In the time when I have attempted to write the early version of this short article, the country was ready to conduct the 4<sup>th</sup> National Election in her history and makes the incumbent party (EPRDF) busy of accusing oppositions for each and every movement they wish to undertake.



the satellite Parties have become vehicles by which the EPRDF drills an indirect rule over the entire realm. It is *via* this party channel (in fact, surprisingly for many federal advocates after the collapse of the Soviet Union) that the Federation bases itself. Intergovernmental relation and state(s) allegiance to the center is measured not by their willingness to be part of the political process rather through the underpinning of *Party discipline* which eventually driven the country's political leaning to demonstrate the features of *Democratic Centralism*.<sup>34</sup>

In this connection, the TPLFs (Tigray's People Liberation Front, one of the constituent blocks of EPRDF) continued dominance in the ruling coalition is considered by many as an auxiliary reason for the prevailing political centralization in the hands of, not only the center but also in specific groups.<sup>35</sup> Without losing sight of the federal compact, at all times it calls for genuine decentralization and ethnic neutrality of state at the center, both in essence and in appearance.<sup>36</sup>

Although the regions (nationalities) are given self determination rights (secession from the federation included), it has existed only on paper and at policy levels. The regions and their citizens are held together by an ideology that permitted no divergence from the dictates of the rulers under the democratic centralism ideal and the existence of the omnipresent quasi- socialist party which controlled all levels of government and enforced conformity throughout the Ethiopian society.

Since the federation is *ipso facto* held together by a vanguard party ideology under the Revolutionary Democratic<sup>37</sup> dogma; it is probable that, as soon as the coalition collapses, the cementing force of partisanship that kept the various ethnic groups within the fold will collapse and Ethiopia will possibly witness a Soviet like scenario.

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<sup>34</sup> The concept of *Democratic Centralism* reveals the feature of a political trend that is characterized by centralized decision making without or little involvement of the electorate. All the deliberations and decisions of state affairs are concluded in *camera* or *behind the walls* without the active participation of the populace; usually at the top party level. Decisions always follow a top-down approach.

<sup>35</sup> See for example Merera Gudina, *Ethiopia: Competing Ethnic Nationalism and the Quest for Democracy, 1960-2000* (Shaker Publishing, 2003).

<sup>36</sup> I am not advocating the absolute state -ethnic neutrality from the political sphere since "*benign neutrality*", as Elazar pointed out is rhetoric than a reality. See also D.J. Elazar: *Exploring Federalism*, Tuscaloosa, AL: University of Alabama Press, (1987).

<sup>37</sup> Such political ideology is almost the replica of the Chinese Communist thinking of the incumbent party (CCP) with slight departures.

## **B. Revenue Concentration and Expenditure Decentralization**

The other indicator of this persistent centralization is attributed to the excessive financial dependency of the Regional Governments on the centre. This can be best depicted by one prominent critic as “*Revenue Concentration and Expenditure Decentralization*”<sup>38</sup> which the Ethiopian Federal setup is running.

A federation is a type of government in which the two tiers of government coexist in a coordinate manner, both exercising sovereign power in their respective jurisdiction. This is inclusive of government finance which is closely related to governmental structure and organization. In the same fashion as in other federal countries, the constitutional provisions in Ethiopia are designed to enable fiscal and administrative responsibilities for both levels of governments.

The federal constitution put schemes of dispensation featuring exclusive, concurrent and undesignated powers of taxation as principal sources of revenue for both government levels. Unlike expenditure responsibilities where we find residual power, there is no such thing in revenue source allocation. The residual principle does not hold true for assigning taxation prerogatives.

Constitutionally, both levels of governments share the right to levy taxes and collect duties on revenue sources. But, the central government has monopolized most of the lucrative revenue generation powers under the guise of *redistribution role*.<sup>39</sup> Thus, the Regional governments have to rely on grants and subsidies from the federal government to be able to carry out their duties. At this juncture, one can perhaps argue against such institutional mechanisms at least from the federalist point of view. Grant programs may often tend to impair the political powers of states and may bring some loss of self government which the Ethiopian constitution aspires to achieve. Functions nominally in state hands come to be federally conditioned and defined. The central government will have another leeway to dictate the states in a manner it pleases. The constitutionally entrenched states sovereignty at the end will turn out to be a myth than a reality.

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<sup>38</sup> Minassie Haile: *The New Ethiopian Constitution: Its Impact upon Unity, Human Rights and Developments*, *Suffolk Transnational Law Review*, No. 1, (1996) at 1-84.

<sup>39</sup> See Articles 95-97 of the constitution.

Ideally, any level of government should meet its expenditure responsibility or, at least its revenue on core services should come from its own resources. In the existing Ethiopian reality, the strongest state is able to cover only (just about) 20% of its spending from its own sources.<sup>40</sup> The rest comes from the center through different institutional modalities. As a result, the national government uses its financial leverage to force states to strictly follow its political and economic program.<sup>41</sup>

Many critics hold that, there are financial sources that serve no purpose of maintaining the federal balance of power.<sup>42</sup> The huge fiscal imbalance (especially the Vertical one) that the Ethiopian federal system reveals is not an admirable trend for the state-federal relation. Some have resentment to the basis of fiscal distribution and revenue sharing while others argue from the economic standpoint by which the central government has to take the leading role in determining the equitable share of the states in that way realize the equitable development of the regions.

### **C. Cassation over Cassation:<sup>43</sup> the power of the Federal Supreme Court to Review final decisions of state Supreme Courts on exclusive state matter**

Even if the federal constitution through its dual federalism approach established parallel jurisdictions of courts in both tiers of governments, a decision of any court can be reviewed by the Cassation Division of the Federal Supreme Court if it manifests a *prima facie* case for basic error of law.<sup>44</sup> In turn, the cassation division of the federal judiciary is located at the apex of the present court system in Ethiopia. It considers any final court decision over any matter regardless of the federal arrangement that empowers the states an autonomous governance structure including the judiciary.

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<sup>40</sup> A glance at some of the international reports on the Ethiopian federal political process reveals such a tendency. See for instance African Report by International Crisis Group: *Ethiopia: Ethnic Federalism and Its Discontents*, 4 September 2009.

<sup>41</sup> Extensive Discussions held with some anonymous regional political actors by the author for other research work reveals the dominant position played by the central government in designing and even specifically setting priorities for states by which financial dependency of the latter on the former remains to be the principal reason.

<sup>42</sup> See for example Solomon Negussie, *Fiscal Federalism in the Ethiopian Ethnic-based Federal system*, Nijmegen, Wolf Legal Publishers, the Netherlands (2006) at 119 -148.

<sup>43</sup> The term *cassation over cassation* signifies the possibilities of review of decision rendered in State Supreme Court through its Cassation bench (on a purely state matter) by the federal counterpart on the same basis.

<sup>44</sup> Article 83(1) of the FDRE Constitution.

In such a setting, the reach of state power in Ethiopia depends on what the organ of the federal government determines to be a proper exercise. This federal organ then can decide what the state government can do and cannot do through its power of interpreting the laws.<sup>45</sup>

In Ethiopia, since Article 50(2) of the constitution, *inter alia*, states that the federal government is composed of the executive, the legislative and judiciary, the latter organ specifically the Cassation Division of the Federal Supreme Court contravenes this constitutional provision by reviewing disputes of a purely regional nature. In other words, following a federal court structure in the country, the states do have their own separate tiers of courts with certain jurisdiction over some matters, which could be identified by way of inferences, over these matters, state courts must have a final say; the federal courts must not review, be it by way of appeal or cassation over matters squarely falling within the ambit of state courts.<sup>46</sup>

Summing up, the power of the Federal Supreme Court to review decisions of its counterpart in the state (on exclusive state matters) on the basis of its cassation prerogative<sup>47</sup> is condemned as a causative factor of the ever growing centralization and is tantamount to put the states autonomy into question.

#### **D. Ousting the States from the Policymaking Venture**

Even though the constitution opted for a bi-cameral legislature, the House of Federation, which is considered the guardian of the sovereignty of Nations, Nationalities and Peoples under the federal compact, has no law making power. It is a non lawmaking Upper House vested with other decisive but unusual tasks including constitutional justice and federal umpiring. It is the Federal House of Representatives (the Parliament) that exclusively (without the states' participation) enact federal laws which are going to be applicable throughout the federation.

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<sup>45</sup> Muradu Abdo, Review of decisions of state courts over state matters by the Federal Supreme Court, *Mizan Law Review*, Vol. 1, No. 1 (June 2007), Addis Ababa, Ethiopia. In this connection, Nwabueze stated: "if the federal principle were to be strictly applied one would expect a dual system to be established in a federation, one set of courts to apply and interpret the law of the central government, and other to apply and interpret the law of each state" see B.O. Nwabueze, *the Machinery of Justice in Nigeria*, Butterworth, (1963) at 83. But practices so far indicates the lose consideration of such dual structure of courts. Canada and Germany are classic examples.

<sup>46</sup> *Ibid.*

<sup>47</sup> Article 80(3) of the FDRE Constitution.

The worst scenario is the national governments' call for the states to execute policy details issued under the guise of *Five years development plan* with no proper consultation as to their implication and consequences. Accordingly it has currently issued several policy documents.<sup>48</sup> These documents sketch at times areas covering even basic education (primary education), health and sanitation services, regional security issues etc that are according to the Constitution within the competency of the constituent units.<sup>49</sup>

The policy documents might create some logic in the context of state governments that need expertise who may devise such policy guidelines but the architects occasionally not recall that in a federal structure, there is limit on the competence of the respective governments.<sup>50</sup> The documents essentially invented as party compromise but were then published as federal documents and offered by the Communication Affairs Agency (the former Ministry of Information). Party members at federal and state level discuss them and decide to implement them in their capacity as government officers. In general, the states accept the economic, social and development plans issued by the federal government. Theoretically, they can adapt the policies to fit their own circumstances but the federal government does play a key role in influencing through national policies mainly due to the party congruence and decision-making structure and secondly, because the states lack the required expertise to bring alternative policies.<sup>51</sup>

As Abbink pointed out, the new system of “regional states”<sup>52</sup>, roughly based on majority ethnicity, led to a formally more autonomous political structure.<sup>53</sup> A number of studies have, however, indicated that these regional administrations have a dual structure, remaining under the auspices of the central government and the ruling party. Behind the visible office holders who come from the states themselves (*i.e.* being of the “right ethnic background”) stand advisors and policy makers linked directly to the federal EPRDF

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<sup>48</sup> See for instance *The Implementation capacity of the Ethiopian Democratic Republic*(Ministry of Information, Addis Ababa February 2002); also *Democratic Governance in Ethiopia* (Ministry of Information, Addis Ababa, May, 2002.). See also Assefa Fiseha (*supra* note 31).

<sup>49</sup> However the Federal constitution specifically recognized the dual structure of federalism by which both tiers of government enacts laws and policies on their exclusive competencies.

<sup>50</sup> Assefa Fiseha (*supra* note 31).

<sup>51</sup> *Ibid.*

<sup>52</sup> The constitution used terms like Regions, Regional states and states interchangeably to denote the constituent units of the federation.

<sup>53</sup> Abbink, Jon, *the Ethiopian Second Republic and the Fragile “Social Contract”*, in: *Africa Spectrum*, 44, 2, 3-28. (2009)

central offices. In this way, policy coherence, organizational unity and executive control are thought to be best guaranteed. It means that informal political channels remain very important, if not decisive even in the area of policy making.

### **E. The Federal Intervention Act**

In 2003 the central law making organ issued a federal intervention act that has the possible force to curve the federal arrangement in to *Unitarism* without even the consent of the states.<sup>54</sup> Though there are provisions in the constitution that dictates the procedure for intervention, this particular law stands against such constitutional utterance. There is no procedural safeguard put to preserve the autonomy of sub national units and their constitutions.

### **F. The Centers' Visible Presence in the Regional State Machineries**

While the intervention of the central government can be justifiable from the angle of ensuring symmetry between constituent units,<sup>55</sup> excessive manipulation of the regional politics under the semblance of assistance cannot be tamed with the idea of federalism. In the Ethiopian context, some of the sub-national units are historically marginalized and not integrated in the long-lived unitary or *de facto* federal<sup>56</sup> as some prefer to describe of the political setup.<sup>57</sup> As a result, they are not yet in a position to manage their own affairs. Their backwardness can be explained in terms of little or no manpower to run the regional public offices, dearth of basic infrastructures etc which in turn makes self rule awkward.

Using such loophole, the centre, through the Ministry of Federal Affairs<sup>58</sup>, controls not only the public offices there in less developed regional states but also entirely define the political positions by federally imposed policies and priorities. The Ministry recruited

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<sup>54</sup> This Law is described as System for the intervention of the Federal government in the Region Proclamation No. 359/2003. *Federal Negarit Gazette*, 9<sup>th</sup> year, No. 80, Addis Ababa, 10 July 2003.

<sup>55</sup> Even if symmetry is taken as a norm in the constitution it is almost impossible and impractical for federation's especially multiethnic federations to realize such equality of constituent units. Therefore my assertion is to mean, the intervention is to realize in practice the constitutional aspiration of creating a people living nearly the same standard of life throughout the federation.

<sup>56</sup> In most cases this *de facto* argument is valid for those relatively civilized and infrastructured parts of the country.

<sup>57</sup> The Regional state of Afar, Somali, Benishangul Gumuz and Gambella are classic examples.

<sup>58</sup> The Ministry is an organ established with the primary task of maintaining the federal arrangement in terms of balance of power, conflict resolution at regional and local level and some other related powers

senior EPRDF *cadres* to serve as a watchdog of political harmony and party networks in these regions thereby installing the ideology of the Revolutionary Democrats over the region's preferences. Almost all major offices of the subunits are managed directly or indirectly by these central personnel's (who are at the same time influential in the national policy initiatives). Needless to say, this practice (even if a little bit moderated on paper towards realizing cooperation between the federal and state governments) is against the very purpose of the idea of federalism.<sup>59</sup>

In addition to these sets of factors, federalist advocates also fear the government's *bona fide* enthusiasm in realizing the constitutionally entrenched right to self-determination (secession included) arguing that the provisions of the constitution necessitates a complex set of procedure to be followed before a *nation, nationality or people* establishes its own state within the federation or secede from the same. The conditions for establishing a state or secede are somehow stringent and do not follow the "bare majoritarian procedure".<sup>60</sup> If national groups (who are considered to be the *loci* of sovereign powers and forming segments of the federation) want their own state within the federation, the state council has to accept it with a two-thirds majority vote and has to arrange a referendum where the majority of the voters agree on it. In the same fashion, the demand for secession has to be approved by a two-thirds majority of the respective state council and a majority in a referendum arranged by the national government.<sup>61</sup>

Besides, for certain federal theorists, the right to secession which is constitutionally recognized in the Ethiopian context is alleged to be in opposition to the underlying

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<sup>59</sup> If we are looking for an intergovernmental relations, or collaborations institution, this Ministry which is a federal executive office couldn't be the appropriate candidate. First, the states have no say in the office and secondly, it is an office originally designed with the purpose of controlling the activities of the states and to secure their willingness to be part of the political process at the center.

<sup>60</sup> For the detailed analysis of such bare majoritarian requirement, see Preston King *Federalism and Federations*. London Croom Helm, 1982. However, if we look at the requirements strictly, for a nationality (state) that keeps on insisting on secession or establishing a new state of the federation may become successful of realizing the claim as everything will going to be concluded with a two-third votes of the referenda. But, the initial stages of securing the consent of the lower level council may be challenging that the argument for the strict nature of the requirements becomes visible. See also articles 39(4) and 47 of the FDRE constitution.

<sup>61</sup> Articles 39 and 47 of the FDRE Constitution, See also Lovise Aalen, *Ethnic Federalism in a dominant Party State: The Ethiopian Experience 1991\_2000, 2000* (Bergen: Chr. Michelsen, Institut Development Studies and Human Rights, 2002).

principles of federalism.<sup>62</sup> This argument is based on the idea that citizens may probably impede loyalty to the central government. Whenever the constituent units are free to leave the union, the political arrangement between the two tiers of governments becomes confederal than federal.<sup>63</sup> The recognition of secession as a constitutional right to each and every constituent of the federal bargain let alone the nationalities is therefore challenged by such groups of scholars (Such as Duchacek and many others) as an additional non-federal feature of this young federal experience.

The administration of land and natural resources under federally enacted laws is also criticized by many as another avenue for centralized administration.

#### **IV. Conclusions**

In sum, the Ethiopian federal conceptualization formula tracks Lenin's famous dealing with the *nationality question* in a multiethnic state. It is based on ethno nationalism argument and defined in such a way that politics and cultural (ethnic) boundaries must coincide rather than crosscut each other. In consonance with this view, the federal constitution trendily recognizes the multicultural, multiethnic, multilingual and multinational realities of Ethiopia<sup>64</sup> but, especially in practical terms short of political expressions (in terms of political plurality).<sup>65</sup>

In my view, the Ethiopian structure (at least theoretically) can enhance the federal division of power; because the basis will be the states not the centre. However, in practical terms, the centralized party structure exacerbated by the accepted wisdom of democratic centralism undermines the federal division of power and subordinates the state governments to the national direction. It is this situation along with the way it affects policymaking process that explains the centralizing trend in the federal system. Though the constitutional framework is silent about federal supremacy or pre-emption, operational realities reveals such a leaning. The regional governments are forced to pursue nationally set standards in the conduct of day-to-day affairs within their

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<sup>62</sup> Among others Duchacek argued that, secession disqualifies a state as federal, Duchacek: *Comparative Federalism: the territorial dimension of politics*, Lanham, Md: University press of America, (1987).

<sup>63</sup> Ibid.

<sup>64</sup> Not to mention the preamble of the constitution, Article 5, 8, 39, 34, and 78 validates this assertion.

<sup>65</sup> Political plurality, like the pluralistic character of culture and language in multiethnic federations, here refers to the possibilities for the citizenry to join freely any political group, to contest without intimidation and persecution in political stages etc and also embraces the multiplicities of politico economic ideologies and ideas.



competencies. Here, as indicated above, the five years development plans adopted by the central committee of EPRDF plays the overriding role.<sup>66</sup>

The states' lacking of power in the central lawmaking (because the Upper House of the federal Parliament is not a legislative chamber), the constitutional division of revenue sources that favour the centre and other factors mentioned in this paper envisages the non-federal features of the Ethiopian twenty (20) years federal experiment. Thus, some tend to conclude that, the Ethiopian federation is:

***“A federation of constitutionally established and divided powers, but operating under a single political union.”<sup>67</sup>***

Like in former communist federation, federalism in the Ethiopian context may mean the existence of some features associated with the division of power in constitutional form rather than in operational reality. It is obvious that the system the political elites put together has some federal semblance, but there is absolutely no political freedom at the state level. Today, exactly 19 years after the introduction of federalism, the government of Ethiopia operates more like a unitary state.

Whatever the reasons, failure to devolve power has undermined the federal arrangement. For the arrangement to work, it needs to be accompanied by genuine decentralization and democratic governance.<sup>68</sup> Otherwise, the purpose of the arrangement is lost. As the *Economist* sympathetically remarked, the appearance of devolution while real power is retained at the center and used repressively leads to the perpetuation of or even increases in disharmony between ethnic groups.<sup>69</sup>

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<sup>66</sup> This has changed its name now to the five years Development and Transformation program and now televised at least once in a day in addition to being adopted as the national law of the country.

<sup>67</sup> Minassie Haile (*supra* note 38).

<sup>68</sup> Kidane Mengisteab, *Ethiopia's Ethnic-Based Federalism: 10 Years after*, *African Issues*, Vol. 29, No. 1/2, Ethnicity and Recent Democratic Experiments in Africa (2001), at 20-25.

<sup>69</sup> The *Economist*, August 16, 1997 at 14.