



**Conference on  
Constitutionalism & Human Security  
in the Horn of Africa**

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## **Foreword**

It is conventionally recognized that historically the significance of constitutions has fluctuated. However, the expansion of democratization and political liberalization has overall renewed the importance and instrumentality of constitutions and constitutionalism. Democratic governments by and large are measured in terms of their success or failure in adhering to and protecting the principles enshrined in their constitutions. This development has increasingly become a critical issue in the Horn of Africa where countries, such as Kenya, Ethiopia and Sudan, have adopted constitutions as instruments to transition to democracy and to power sharing.

In view of this reality, Inter Africa Group (IAG) had organized its first conference on constitutionalism in October 2007, to exchange views and draw lessons from the constitutional experience of the countries in the Horn, with a particular focus on issues critical to peace and human security in the sub-region. The deliberations of this conference resulted in a host of queries that demanded further research and articulation.

- i. What are the legal mechanisms that ensure adherence to constitutions and provide protection of them against abuse by elites in power?
- ii. How can the tension between citizenship and ethnicity are harmonized, or how would a balance between civic and ethnic nationalism be achieved?
- iii. How could federal constitutional arrangements effectively deter conflicts in the countries of the Horn?

IAG's second conference on Constitutionalism and human security was organized to address the complex issues related to the latter Queries. Accordingly, we trust the proceedings and the paper presented in this publication will provide the reader valuable insight on the role of constitution as vital instruments to advance democratization and to ensure equitable power sharing.

In closing, I would like to acknowledge Oxfam-Novib for funding the research papers and the second Conference on Constitutionalism and Human Security in the Horn of Africa.

Tamrat Kebede  
InterAfrica Group, Executive Director

**Proceedings of Conference on  
Constitutionalism & Human Security in the Horn of Africa**

InterAfrica Group's (IAG) second conference on Constitutionalism and Human Security took place on August 7<sup>th</sup> 2008 at Sheraton Addis. The presenters included Ato Tsegaye Regassa, Dr. Assefa Fisseha, and Dr Sarah Vaughan. The discussants included Ato Getachew Assefa, Dr. Aaron Tesfaye, and Dr Zerihun Mohammed. The conference covered many facets of constitutionalism in the African context, including discussions on legitimacy of the constitution making process, the political makeup of federalism, and the constructs of nationalism. Some concerns that emerged from the conference include the nature of power in African politics and the impediments this presents to the constitutional process, the accommodation capabilities of federalism, and the possible solidification of ethnic identity in the federal setup.

Mr. Tamrat Kebede, executive director of IAG, gave the opening remarks for the conference. He portrayed some of the fundamental issues surrounding this topic, namely, the intertwinement of democracy and the expression of constitutional rights, as well as, the linkage between power sharing and constitutional management. He highlighted the increased importance of constitutions with the expansion of democratization. This is especially pertinent in the context of the Horn of Africa where constitutions were adopted as part of the process of democratization in countries such as Sudan, Ethiopia, and Kenya. Mr. Kebede reiterated some of the concerns that were brought up in the first conference on constitutionalism and human security, namely, what the legal mechanisms are that assure adherence to constitutions, how tensions between citizenship and ethnicity can be harmonized, and the balance between civic and ethnic nationalism. The three presentations would address these concerns, as well as, tackle the ability of constitutions to create equitable power sharing mechanisms and aid in the deterrence of conflict.

The chair for the remainder of the conference, Dr Asmalash Beyene, agreed with the statements of Ato Tamrat and added that the need for periodical change of leadership, or the transfer of power was another important aspect of constitutionalism that needs to be addressed. Following these remarks the first paper, entitled “Between Constitutionalism Design and Constitutional Practice: The Making and Legitimacy of Constitution in Ethiopia.” by Mr. Tsegaye Regassa, was introduced. Mr. Regassa is an instructor in constitutional law at the Civil Service Law Faculty as well as, at the Addis Ababa University Law Faculty. He is conducting a doctoral research on ethnic federalism and legal pluralism.

Mr. Regassa’s paper addressed the gap between the design of constitutions and their practice and the lack of legitimacy imbued in that gap. Legitimacy is coalesced with acceptability by means of consensus and is found in the process, content and context of the constitution process. Legitimacy is also concurrent with a broad based, participatory, and inclusive constitution-making process. Problems relating to legitimacy can arise from the challenges in the practice of constitutionalism, namely the divide between victor and vanquished; the creation of the constitution, if often carried out by the winning party, lacks the derivative practices in the implementation of constitutionalism.

Mr. Regassa also outlined the different processes involved in constitutional design and the constitutional process. The course of constitutional design involves a number of factors, namely, the nature of the polity and the constitutional model. He ascribed to Daniel Elazar’s three interpretations of state creation. One type of state is created through force via a hierarchical power system; the second category is created through historical evolution via cultural, religious, interactions; in the third category states are created through evolutionary progression i.e. reflection and choice. There are four possible models of constitutions: firstly, they are contract-like documents; secondly, revolutionary manifestos; thirdly, political ideals tempered by noble aspirations, and lastly are constitutions based on the adaptation of ancient polities.

There are two primary stages in constitutional design; drafting and ratification. These can be divided further in the technical process: the drafting, deliberation, adoption, and ratification phases.

Mr. Regassa related these issues to the process of constitutionalism in Ethiopia. There were four constitutions in Ethiopian history and the current one is created on a liberal democratic basis. In the process of constitution formation a constitutional commission was set up to deliberate and ratify the components. The presenter mentioned the scholar Ugo Mattei's assertions that there is nothing fundamentally new in the constitution; he countered this statement by mentioning some of the unique characteristics of the document. Mr. Regassa ultimately concludes that the constitution-making process in Ethiopia exhibited both weak legitimacy alongside weak implementation and that the process of redemptive constitutionalism may alleviate these issues. The practice of redemptive constitutionalism applies propriety to the process of creating constitutions; in his conclusions he outlines the process of redemptive constitutionalism as primarily a reinterpetative process. Alongside this process, implementation should address the issue of legitimacy, strongly entrenched constitutionalism, and efficacy.

The discussant, Ato Getachew Assefa, followed the presentation by positing and critiquing some components of the paper. Firstly, there is the setting of the post Second World War period where a tendency was developed towards incorporating different constitutions in the creation of one constitution. Thus Daniel Alazar's systems compartmentalized the different models while ignoring the convergence of systems following the post cold war period. Secondly, the discussant stated there is a need to connect other matters to these theoretical concepts; even if the setting for designing constitutions is ideal, implementation is a major issue. Finally, Ato Getachew reintroduced the concept of transfer of power, the possible entrenchment of power among elites, and the consequent breach of constitutions in the maintenance of power.

The first round of discussions dealt with three questions. One participant asked how the three components mentioned, i.e. efficacy, constitutionalism and legitimacy, could be practically implemented on the ground. A second participant asked for further elaboration on the nature of constitutional government. He highlighted some of the major features of constitutionalism, including, the separation of powers, accountability of government, judicial review, respect of civil rights...etc. In light of these processes, the participant asked what the present day law-making process within constitutionalism is like. The third question targeted fidelity. This was in relation to the association of pre-existing democratic conditions as a necessity for constitutionalism. The participant related this issue with Ethiopia; commenting that while the country's constitution was marked by participation, there is an evident gap between constitution and constitutionalism.

Mr. Regassa first responded to the Ato Getachew's comments on Daniel J. Elazar's classification of constitutions. He stated that these classifications are for heuristic significance and convergence can be found elsewhere. Legitimacy is an important concern for the African continent, especially, in the post independence period. Although this was an ideal environment for the creation of constitutions, it didn't foster long lasting initiatives. This showcases the fluidity of legitimacy: allegiance is dependent on the evidence on the ground. Periodic constitutional processes are necessary to attain and maintain legitimacy. The withdrawal of commitment usually comes due to a deficiency of gravity ascribed to the process. Amendments can exacerbate this deficiency in some cases due to arbitrary abuses which can result in the reflection of personal gains as opposed to concerns over the social contract.

Mr. Regassa next addressed the practice of redemptive constitutional traditions. Fidelity is directed two ways: firstly, the devotion to ideas secondly, the loyalty to the initial interpretations of the constitution makers. This in turn relies on maintaining continuous discourse and faith. The former reinforces and reinvents the existent mechanism while the latter provides the necessary foundation to

live up to the standards of tradition. Mr Regassa went on to address the discrepancy between constitutionalism and constitutionism. Constitutionalism refers to an ideal that focuses on the limits of government, as well as, the excesses of democracy. Constitutionism refers to a literal interpretation, marking a dramatic adherence to the text of the constitution. Essentially constitution-making is about choice; if someone has a greater right to make that choice, there is a flaw in the process which redemptive constitutionalism attempts to resolve.

The second round of discussions began with questions surrounding the nature of governance. The first participant questioned the power relations between state and society; remarking that sometimes, state authority is relinquished to other important players within society, such as the military. This directly impacts the ability of government to legitimate constitutional standards. The participant also introduced the issue of external pressures evident in the process of constitution creation, especially, in the context of Africa where Western influences may have considerable effect. The second participant asked the presenters how they viewed the current anti-corruption laws. The third participant presented the three part process of legitimacy, namely enforcement, interpretation and implementation. A fourth participant returned to the issue of redemptive constitutionalism. The historical institutions that created constitutions did not accept the full participation of the citizenry, therefore the process of constitution creation and evolution may need further articulation or institutions that would provide further elaboration.

Mr. Regassa answered these concerns by stating that one should look at process, content, and context in understanding legitimacy. He agreed with the assumption that power can lie outside government in African politics which can be symptomatic of the culture of imperialism. The dispersal of power is also reflected in the method through which constitutional amendments are carried out, *vis a vis* informal bodies. Mr Regassa next addressed the topic of process and the need for a will in government, especially, in the legislature

for the implementation of constitutional practices. This should be combined with citizenry who are constitutionally responsible. The entry point for initiating such a process should include an interpretive approach that should be employed by elected officials. The use of elected officials is crucial in this process because they are endowed with trust.

The last round of discussions in this session returned to the issues of legitimization and the institutionalization of constitutionalism. “The dominance of the lawyer phenomenon” was brought up by one participant as an example of the monopoly over knowledge. This monopoly elevates technicians over other disciplines. Reducing constitution design to a technical field increases the crisis over identity due to the multiplicity it promotes. Another participant agreed that the process should not be a technical matter and returned to the concern over the arbitrariness of amendments which can forward undemocratic provisions in search of personal gain.

Mr. Regassa acknowledged that there is a monopoly over knowledge by some disciplines and this needs to be scrutinized. He returned to the issue of the Ethiopian experience in constitution construction and stated that the 1990’s was an era of the politics of recognition and accommodation. But the actual level of constitutional space for indigenous groups was very small, even though affirmation of ethnic/cultural sovereignty has led to involvement in the public sphere. Mr. Regassa continued by agreeing with the second participant’s observation on the legality of the constitutional process which he affirmed by stating that legal finesse can overshadow the process. This can be amended by separating the constitutional process from politics, as well as, professionalizing lawyers. The injection of undemocratic provisions can be amended by weeding out these provisions.

Mr Regassa’s presentation was followed by Dr. Assefa Fisseha’s presentation on “Federalism, Diversity, and the Regulation of Conflict in the Horn.” Dr. Asmalash introduced him by stating some of his accomplishments which include directorship of the Institute of

Federalism and Legal Studies, as well as, authorship of one book and six journal articles. Dr. Asmalash also introduced the discussant of the paper. Dr. Aaron Tesfaye, who is a professor at the William Paterson University in New Jersey and is currently working on the politics of the Nile Basin.

Dr. Fisseha began with a definition of federalism; it assumes a constitutionally guaranteed division between constitutional bodies and the federal government. The paradox of the federal idea is two part. Internationally, the collapse of the USSR led to the adoption of federalism as a solution to nationalist uprising. In the 1950'- 60's there was a general sentiment that the melting pot and democratization will wither away ethnic identities. This was combined with globalization which unties international pressure with local calls for responsibility. However, evidence from the post World War period has shown that diverse identities were reinforced through new aspirations within modernity. Some other problems in federalism included, the inefficient prescription of the process by colonial powers and the consequent lack of institutions to support it.

Dr. Fisseha next discussed the different example in Ethiopia and Sudan briefly mentioning the Ethio-Eritrean federation. The Ethiopian case shows the continuation of a decentralized system throughout different political ideologies following the communist era. The current system is founded on an ethno-linguistic base, and there was a domination of ethno nationalist movement in the set up of the constitution. This presents one challenge in the whole process of formation, namely, the problem of diversities within diversities. Each movement had different capabilities and institutional strength leading to differences in the level of creative involvement. Another problem found in the implementation of the process is the power allotted to constituent states is significant, but in practice it is constrained by the party system, as well as, the evolution of the federal system, (which is dominated by the federal government). This is partly due to the inability to integrate the different constituents into a holistic political process. Diversity is not so much a problem unless there is a failure to integrate different constituents politically.

This relates to a third challenge, namely, the existence of minorities within minorities and the possible relegation of these groups.

The presenter went on to discuss the strength and weaknesses of the Ethiopian federal makeup. He began by posing two different approaches in analyzing the system, the description of the system as a perfectly functioning mechanism; and others that claim the system will result in fragmentation. Dr Fisseha stated that reality lies in between these two claims. There is a danger that nation building can result in accommodation to the major group, as opposed to expression of different ideals. However, there is also a danger in having a weak political center because this can result in a weak state, ultimately producing havoc. The possibility that ethnic federalism will strengthen ethnic identities, as opposed to Ethiopian citizenship is also a pertinent topic pin pointing secession and extreme military decentralization as credible threats. One possible solution to these sentiments is the incorporation of strong institutions already existent in the regions.

The presentation on the case of Sudan began with a portrayal of the conflict there. Dr Fisseha stated that the north versus south schema ignores marginalized groups within the northern region. The core of the crisis instead is the failure to follow up the promise of federalism following independence and marginalization. The Addis Ababa agreement (1972-1983) was a peaceful period, but it lacked the proper institutions to enforce it. In addition the federal government assumed the dual role of representing the state, as well as, the north which created contradictory responsibilities for the government. The CPA was inherently flawed because it ignored other parties in the conflict and allotted 80% of power to the two participants resulting in the asymmetrical dispersal of power.

The presenter concluded by generalizing the discussion to the Horn of Africa. Federalism in Sudan and Eritrea need appropriate institutions in both examples governments assumed dual roles. This goes against the idea of third body regulation in the implementation of federalism. Three other problems evident in these states is the lack

of political will in the central government to maintain federalism, the inability to construct democratic institutions, and a narrowly constructed idea of nation building. All countries in the Horn are tackling the possibility of secession and the marginalized groups that want it. There are two possible solutions to this namely, the promotion of proper federalism; a need for marginalized groups to realize that a new state may not solve their problems rather contextualize them to a different setting. Finally, instability in the Horn should not be constrained to an analysis of internal problems, as evidenced in the ability of external factors to have a prominent role in the internal functioning of a state.

The discussant for this paper was Dr. Aaron Tesfaye. He explained that he had confronted these issues as a Fulbright Fellow in 1994 when he had an opportunity to travel to different areas in Ethiopia. The “elephant in the room” in the context of Africa is the process of state building. In Ethiopia nation building and state building occurred in coalescence. Dr Fisseha claims that national integration was based on homogeneity and it hasn’t worked. Professor Aaron further commented that “...the genie of ethnicity can’t go back into the bottle...” The constitution has given autonomy to different groups, but at the same time, it has checked these powers via physical impediments. For example, the central government still controls most of the important issues such as export taxes.

The international dimension of the issue begs the questions to what extent are nations free to carry on their own practices and whether there is a congruency between international and federal development goals. Other questions that were recommended by the discussant for further dialogue were whether the centralized vision of the EPRDF contradicted divisions of power and whether federal units could bestow viability on marginalized units.

This coincides with the larger topic of minorities in majority communities. The contradiction between federal constitutions and regional constitutions is another area of concern. Dr Assefa had also stated that federalism may be one of the best conflict resolution

mechanisms, however, there is a lack of institutional support, such as, judicial review. There is a persistent lack of democratic traditions and exclusionist political culture among elites. There is also a lack of political will at the federal level, especially, in relation to Sudan.

Participants raised questions about the structure of federalism in Ethiopia. On the one hand, millions may be categorized in a zonal administration while groups numbering thousands are given state status. There seems to be a discrepancy in the allotment of status. The same participant requested clarification on the description of the May 5<sup>th</sup> 2006 events in Ethiopia, stating that the author seems to place the issue of timing over the issue of general will. Another participant stated that anomalies are hard to avoid when constructing delineations along ethno-linguistic lines. The participant alleged that this is due to the blurry lines between party and government, competing loyalties, and the differing allegiances to national and ethnic identities. The participant concluded by stating that Ethiopia is crucial in this process due to the country's dominant role in the region. A fourth participant asserted that recognition of the different ethnic identities in the country undermines national identity. However, there may be the following two explanations for this: on the one hand this could be due to a mismanagement of ethnic identification; or on the other, the lack of democratic tradition. A fifth participant stated that the conflicts in east Africa may be a consequence of the search of federalism, but questioned the association between federalism and equal opportunity. The participant also questioned the accommodation capabilities of federalism in relation to diversities and the adoption of federalism via a referendum.

Dr Fisseha stated that the paper delves into his conclusion more extensively. He is cautiously optimistic that ethnic federalism may work, but some guidelines are needed in order to be aware of the challenges. Opening political space is important in attaining this.

The presenter next responded to the query on his description of the events surrounding May 5<sup>th</sup> 2006. He was not portraying it as a threat, rather he made a distinction between disengagement and

engagement. The post election period reflected the negative elitist political culture on both sides.

Dr Fisseha went on to the question of nation building and state building by stating that the former should be abandoned by multi-ethnic societies. Internal boundary lines produce anomalies in numerous places-one is the uncommon use of many languages at the federal level. The line between party and government needs to be analyzed because it may effect the autonomy of the state. But regions also lean on states for solutions, so the dependence is two sided. The implications of secession are worrisome, therefore, pragmatic reasons for inclusion are needed. Secessionists need to see that the creation of a new state will face old challenges, and chances are that problems will be transplanted. Another clear challenge is the creation of second rate citizens via marginalization or discounting minorities/majorities.

The second round of questions started with a participant stating that these issues are not only a question of equal opportunity, rather there is a regional dimension to the problem. The fear of fragmentation may have many consequences. A second participant stated that the failure to deal with minorities is a question of political institutions and practice. The third participant reiterated Dr Tesfaye's description of state formation in Europe, i.e. states creating nationalism, and that there was a correlation of this process in Africa. This assumes states came before nationalism. The participant asserted that the sociological nation was created before the colonial state and whether African citizenship can be seen as the majority group attaining control.

Dr Fisseha responded to the comment on fragmentation by referring to the example of Sudan. The CPA contains a secessionist clause allowing the south to secede in 2011, but most political elites from the south still believe that this provision is only half way to partition. Moreover, if the largest population group in Sudan believes that they are part of south Sudan, this presents a huge problem for the future resolution of the conflict.

The collision between federal and regional clauses is problematic because there is no clause stating that federal clauses can override regional causes. Citizenship, as majority rule, has not been successful because political elites are hijacking the process and applying the concept in the wrong way.

The last session began with Professor Asmalash introducing Sarah Vaughn, a political scientist by training, who has done extensive work on politics of power and the state in the Horn. The paper presented is entitled, "Civic and Ethnic Nationalism." Dr Vaughn began by referring to the brief provided by InterAfrica Group which provided a framework for the conference on constitutionalism. The presenter further expounded the dual nature of nationalism, i.e. civic and ethnic nationalism, by positing two authors, Marcus Banks and Thomas Erikson. The former states that nationalism cannot be constructed without the foundation of ethnicity, while the latter states that these two ideals are not codependent. These stances define the challenges on the way we think about ethnicity. There are generally two types of nationalism good and bad, as in patriotic versus exclusionary. Civic nationalism is often correlated with modern statehood while ethnic nationalism is related to sub state nationalism fundamentally based on dissent. This is viewed negatively due to the narrow and exclusivist sentiments associated with it. However, there are many ideas contesting these delineations. For example, Walker Conner states that the definition of civic nationalism is actually a repackaged form of patriotism. Dr. Vaughn suggested that the best way to avoid the dualism of nationalism is viewing differences in degree, as opposed to differences in type. The relationship between ethnicity and nationalism needs to be investigated.

The presenter went on to discuss the second part of the paper which deals with the notion of nations as constructed entities. She referred to Calhoun who stated that there is no good basis for determining which nations are real. "Nation" is a particular way of defining a community and placing it in the international realm. Joseph Stalin was one of the most popular personages to define na-

tions, nationalities and people, and it is found in the current Ethiopian constitution. The idea that nation is willfully constructed assumes that state building is a precursor of nationalism. There are three ways of constructing nationalism: discourse, practicality, and ideological evaluation which claims superiority for a particular nation. The third type of construction is problematic because it assumes right and wrong with one entity entitled to categorize right and wrong.

Dr. Vaughn went on to discuss how to keep the inclusive quality of ethnicity via democracy. She provided five different ways to manage multi culturalism/nationalisms. These are as follows: nation building from above and below; [consociationalism](#); federalism; and neutral/difference blind state. The presenter targeted multinational federalism for further discussion. Federalism has many positive areas, however, it devolves power to patronage systems and can result in political tribalism. There is also the problem with internal migrants versus ethnic groups, i.e. the former have to deal with forcible resettlement. There are two specific challenges in the Ethiopian context there is the reflective and expansive approach to ethnic territory there is the power relation between federal and political elites. One reason for expression of dissent among different groups is the evidence of political empowerment but lack of economic empowerment. This discrepancy is one future source of friction. The presenter concluded that ethnicity needs to be re-conceptualized in terms of what we want to deliver for multi-governance. Identity will always require creative management. Some components of ethnicity are seen as fixed, however, when perceptions of interests change, identity changes too. There needs to be a reconfiguration of the view that ethnic groups are predecessors of the modern condition; rather, they should be viewed as a conventional process. There needs to be a change in the incentive and reward system to a more systematic and collective reward scheme.

The discussant Dr Zerihun Mohammed introduced himself as a former PhD candidate in Cambridge who did work on resource competition. He began by addressing the provocative nature of civic

and ethnic nationalism. Firstly, there is the theoretical reanalysis which requires a renewal of theoretical underpinnings. Ethnicity on the other hand has emerged as a powerful political contender. The discussant stated that the paper links theory with empirical evidence. However, Dr Mohammed questioned Dr. Vaghaun's criticism of dualism. He argued that since these nationalisms are presented as two part, they are inherently dual. However, if the argument can be expanded to debate the idea of antithesis between the two, the argument would be more credible. The discussant next debated the presentation of ethnic federalism which he stated has really only been practiced in Ethiopia. Therefore, constructing an overarching analysis of the system may be very difficult. Thirdly, Dr Zerihun portrayed the case of ethnic nationalism as often associated with the regional level while civic nationalism is often associated with the federal level. There could be an evaluation of civic nationalism at the regional level.

The last three points made by the discussant targeted the conclusions of the presenter. The need to define the interests of ethnicity is contentious because ethnicity may be a situational marker in some cases and exploited for varied reasons. As opposed to redefining ethnicities, there may need to be a redefinition of nation building and clearer legal boundaries, therefore, promoting law as the mediator between nations and ethnicities.

The last round of discussion began with three questions and observations. One participant stated that the presenter was using terms from colonial anthropologists and that this promotes the idea of exclusionary nationalism as an identity marker of primitive people. A second participant asked whether there could be middle ground between civic and ethnic nationalism. A third participant asked for a historical classification of events based on the premise that in the past groups used to live together peacefully.

Dr Vaughn responded to the first issue of her using terms, such as political tribalism, and ascribed them to technical usage. She acknowledged the racist connotation in civic and ethnic nationalism,

the former being associated with Western society, the latter with primitive society. However, she reiterated that her usage of the term ethnic nationalism applied to non-cultural constructs; as seen in the designation of movements in places like Canada as ethnic nationalism. Dr Vaughn concluded by stating that issues of identity should be approached in an open ended manner.

Mr. Tamrat Kebede gave the concluding remarks for the conference stating that the obvious abundance of questions indicate there needs to be more research in the area. The inputs of valid constitutions seems to be clear, however, the outputs are still a contentious area that needs further deliberations.

## **Between Constitutional Design and Constitutional Practice: The Making and Legitimacy of Constitutions in Ethiopia**

*Tsegaye Regassa\**

### **1. Introduction**

Constitutionalism and constitution writing is gaining salience in recent years.<sup>1</sup> Interest in writing or rewriting constitutions is on the rise.<sup>2</sup> This is even truer in post-conflict societies, in societies that emerged out of protracted conflicts where the trauma and tragedy of violent conflicts still reverberate.<sup>3</sup> In such societies, constitutions come primarily (and more immediately) as instruments of truce, as a peace document, or a pact between warring factions.<sup>4</sup> They come as a tool of conflict resolution, a tool of peace making/peace keeping for the present and of peace building for the future. They serve as an instrument of conflict transformation.<sup>5</sup>

The making and legitimacy of constitutions is of pivotal significance in such societies. At least, it is as important as it is in societies that are being constituted anew as fresh polities. Of course even in post-conflict societies, to the extent that they view the post-conflict moment as a moment of rapture and a radical break with the past, because the constitutions mark the remaking of polities, the making and legitimacy of constitutions continue to be as pivotal as they are anywhere else. This is no different in Africa, where recent years witnessed the rewriting of post-independence constitutions in such a way that they can redeem an authoritarian past or they can heal the conflicts that emerged as a consequence of that authoritarian past.<sup>6</sup>

Writing or rewriting of constitutions is not a rare phenomenon in Africa. What is rare is implementation, at least to the satisfaction of most of their peoples. The quest for more constitutional practice is what is often called for more than the quest for a new constitutional writing. But implementation rests not on the beauty of the constitutions written but on the commitment to give effect to the letter and spirit of the constitutions.

In the context of Ethiopia, the issue of the making and legitimacy of constitutions is no less important. Although Ethiopia has adopted a new constitution in 1995 and has been trekking on the way to implementing it, the legitimacy of the constitution is not without controversies that surround it. There were times when it was said that the constitution is nothing more than the program of the party in power.<sup>7</sup> There were also political parties who sought, if elected, to amend a number of provisions of the constitution. These arguments were only symptomatic of a larger question, the question of legitimacy of the constitution.<sup>8</sup> These questions unveiled the fact that the constitution's legitimacy is not an entirely decontested 'truth'. [The question of legitimacy gains importance in Ethiopia also because, as in all other federations, the existence of a legitimate, supreme, and rigid constitution is a vital component of the federal experiment.]

This paper is about the making and legitimacy of constitutions. It is about the relation that making and legitimacy have to constitutional implementation. It is about the link between constitutional design (making) and constitutional practice (implementation). The assumption is that the right approach in the making helps foster legitimacy. A better or 'optimal' degree of legitimacy fosters better enforcement. The making and legitimacy better foster fidelity to the constitution. Fidelity makes the constitution not only a "basic law, or a higher law," but "our law."<sup>9</sup> This in turn helps us engage in the enterprise that Jack Balkin calls redemptive constitutionalism (or constitutional interpretation<sup>10</sup>).

In this paper, I seek to address myself to the following set of questions: What does constitutional design (the making of constitutions) involve? What does it take to design a legitimate constitution? What are the steps involved? What are the factors that help ensure better constitutional implementation (the practice)? How does the making impinge on the process of redemptive constitutionalism? Of course all these questions are addressed by drawing from the recent experience of Ethiopia. Thus I will discuss, albeit in an outline format, the making and legitimacy of the Ethiopian constitution.

I will address these questions in the following order. Following this introduction, in section two, I will discuss the issue of what constitutional design involves. In the third section, I will deal with the issue of what factors foster good constitutional practice. Thus an attempt will be made to identify the factors that contribute to the effective implementation of constitutions. In section four, I discuss descriptively, the making of the Ethiopian constitution. In this section, I will also explore the issue of legitimacy of the Ethiopian constitution. In section five, I discuss the issue related to fidelity to the constitution to see whether redemptive constitutional practice (and interpretation) can help better enforce the values and principles behind the constitution. In section six, an attempt will be made to draw some conclusions.

## **2. Constitutional Design: What does it involve?**

Designing a constitution is “more than the arid preparation of a constitutional document.”<sup>11</sup> Depending on the “character” of the polity for which it is designed, and the model of constitution we adopt for the purpose, the process of constitutional design might take different forms. Often the process involves the structuring or restructuring of the political landscape of a nation. Often it happens at a rapturous moment, a “constitutional moment”.<sup>12</sup> In old polities that have had a chequered past, a new written constitution serves as an instrument that synthesizes both change and continuity, with an accent on the change.<sup>13</sup> In a polity that has a history that current political actors seek to contradict (perhaps because they have supposedly suffered from it),<sup>14</sup> constitutional drafting marks a break with the past.

Speaking of ‘national character’, Daniel Elazar<sup>15</sup> identifies three types of polities, namely 1) those formed through conquest; 2) those formed through evolution; and 3) those formed through design, i.e., ‘reflection and choice’. The first category of polities is exemplified by authoritarian and imperial polities that are wielded together by force. In such polities, power is concentrated and structured *hierarchically* at the top of the *pyramid* of which is the (executive) leader.

Power is centralized. In such systems, constitutions are often viewed as a *grant* given to the people by the rulers.<sup>16</sup> Consequently, the process of constitution making is relatively easier in this system than in the other two categories of polities. The legitimacy of the exercise of governmental power emanates from the use of force which, under a constitution, is only given a legal basis. Legitimacy of governmental power rests outside of the text of the constitution, often in the efficacy in the mobilization and utilization of military skills.<sup>17</sup> Legitimacy of the constitution rests not on the consent of the people but rather on the political will of the rulers or the extent to which the constitutional texts validate the politico-military sources of legitimacy in the country. The authority of the constitutions is compromised to that extent. At best, they will only have an asserted authority in such systems.<sup>18</sup>

Returning to Elazar's categories of polities, the second category, the category of those formed *through accident* are *organic polities* that came to be what they are through a long gradual process of history. Constitutions are often made through imperceptible processes, mostly in conventions and incremental legislative enactments and habits. The legitimacy of the constitution and of the power of government rests in these invisible threads of tradition. The constitution-making process does not manifest any rapture. There is hardly a constitutional moment one can out rightly point to. The constitution invisibly evolves. Change happens silently. Nevertheless, the constitution (which is often unwritten) has an exerted authority that binds everyone principally because the vast majority of the people know the "constitution" by heart, or if they are late comers to the polity—like most immigrant communities in the West—, they acquiesce in it.

The third category is a category of polities *formed by design*, i.e., through popular reflection and choice. These are polities in which people, at least theoretically, come together to form the polity and determine the nature, function, and operation of their core governmental structures. In such polities, the making of constitutions involves a (constitutional) choice to be made among negotiating partners. The end result of the process is a written text which is often

made fundamental (constitutive of the governmental institutions) and supreme. The written constitution that emerges out of this process serves, again at least theoretically, as a contract that binds not only the government to the people but people to people. Popular consent is a key factor in these kinds of polities both in the formulation and amendment of the constitution. Popular and democratic legitimacy is vital. Participation in the process ('coming to the table of covenant' can be used as a useful metaphor here) is important.

From among these kinds of polities, the ones in the third category are the ones in which the need for a rational legitimacy is predominant. In countries formed through the instrumentality of force, both the government and the constitution hardly need legitimacy apart from the force that created the polity in the first place. In organic polities, the making of the constitution is an unconscious activity. In polities founded by design, however, one needs to make sure that the *process*, the *content*, and the *context* are all optimal for the adoption of the text of the constitution. In other words, the makers should agree on both the process that led to the production of the constitutional text and the substance of its content. They also must agree on the socio-cultural and political context in which they anticipate the text to apply. Furthermore, they must agree on the values, causes, ideals, and aspirations they seek to promote by/and in the polity are establishing. Finally, they must agree on the frame they lay down for the government that they seek to set up and run.

In order to achieve these, countries may choose one or more models of constitutions. Elazar<sup>19</sup> identifies five major models of constitutions that are made use of the world over, namely: 1) Constitution as frames of government and protectors of rights (such as those of Anglophone North America); 2) Constitution as code (such as those in Continental Europe and India); 3) Constitution as a revolutionary manifesto (such as those in former Soviet bloc countries and former Yugoslavia); 4) constitution as a political ideal (such as those in Latin American and African countries); and 5) Constitution as adaptation of ancient tradition (such as those in the UK, Israel, Iran).<sup>20</sup>

The first two models continue to operate in their home countries, sometimes even having to be transplanted elsewhere. Interest in the third model is subsiding or has subsided since the collapse of the Eastern bloc countries as most of their constitutions have been replaced by either one of the first two models or by a creative amalgam of values extracted from both. The fourth model is tempered (and often overwhelmed by the drift to the first model) but seems to linger both in Latin America and Africa.<sup>21</sup> The fifth model continues to operate in the UK and Israel.<sup>22</sup>

While the choice of the models depends on the objective the makers seek to achieve through the instrumentality of the constitution, the socio-political, cultural, and economic context they are in, and the ideals the makers seek the constitution to embody and immortalize, etc; a country's constitution making process will vary depending on the model adopted. Thus if one chooses one of the first two models, then the process will involve a written constitutional text that serves either as a (general and brief) frame of government or a (detailed, often lengthy) manual of government. (The more the choice tilts to the continental European model, the more the making process ends up becoming an exercise in technical legal professional legal elegance and finesse whereas the more it tilts toward the Anglophone American model, arguably the less preoccupation with technical legal professional elegance and finesse.<sup>23</sup>) The consequence of having to adopt a written constitutional text is to methodically and circumspectly determine the mode of preparing the draft, deliberating upon the draft, adopting the draft, and finally ratifying the draft so adopted. This in turn leads us to the steps involved the design of a written constitution.

Generally, scholars classify the steps in constitutional design into two: that of *drafting* and *ratification*.<sup>24</sup> More technically, the mechanics of constitution-making might involve three or four steps, namely that of: a) drafting; b) deliberation; c) adoption; and d) ratification. If constitutions have to serve as an instrument of founding a polity by design and if it has to generate a moral, sociological, and legal legitimacy that backs them in the long run, we need to note the fol-

lowing few points.

First, the *drafting process*--<sup>25</sup> owing to the central significance the question of who should be the makers of the constitution as well as who is in and who is not in the polity--must be inclusive<sup>26</sup> of the choices of the dominant actors. The drafting body so constituted, as a technical body, must be accommodative of all the concerns and be able to capture the visions of all the stakeholders. As a technical work, it benefits from being non-political, although it is often difficult to be politically neutral at such a juncture in the history of a nation. The existence of pre-existing principles on which the "founders" agree upon will aid the drafters by serving as guiding sign posts to the progress of its work.<sup>27</sup> Thus there needs to be an agreed upon terms of reference. Needless to say, drafting being primarily a technical work, technical professionalism predominates the process at this stage.<sup>28</sup>

Secondly, the *deliberation stage* must be broad-based (and thus inclusive), participatory, free, and a bi-way traffic. Thus, all the relevant political actors and other stakeholders must be engaged. People must have the basic freedom to speak their mind (and so the pre-political right of expression must be guaranteed), to organize themselves, and be able to participate in the making process. They should also be allowed to make an in-put. As so often is sadly the case, it should not be a process in which the elite rather condescendingly 'educate' the mass.<sup>29</sup> The popular discussion can be done in the form of seminars, workshops, symposia, etc. After such a discussion, a representative group might also discuss the document as enriched by the popular discussion before it finally submits it to adoption by a constitutional assembly or through a popular referendum that ratifies afterwards depending on the process agreed upon for the adoption and ratification.

Thirdly, the *adoption* of the draft document must be done by a body that is fairly representative of all the political actors and other stakeholders. Thus the election that leads up to the constitution of such a constitutive body, the mandate of such a body, and the degree of

openness, freedom, and vitality with which such a body makes its deliberations are key to the making of the constitution. Such an institution may complete its task when it approves the draft submitted to it for deliberation. Or it may itself complete the process of constitution making when by its adoption of the draft also ratifies it, on behalf of the peoples of the country, as a final constitutional document. If the latter is the case, the members of the constitutional assembly become the founders of the polity. But countries may choose to require a further step.

The fourth stage then will be *ratification* through popular referenda or through the interposition of the legislative assemblies of the units that constitute the larger polity intended to be established through the new constitution. The latter happens if there are units that antedate the constitution or the polity that the constitution seeks to create.

For the *content* of a constitutional text, drafters might be dependent on a diverse array of sources. The easier choice, but not necessarily the most appropriate and the most effective, will be *borrowing and transplantation* from other countries or the rich realm of international (human rights<sup>30</sup>) law.<sup>32</sup> This guarantees international recognition, legitimacy, and the possibility of securing fund (in the form of loans or otherwise). The other choice is to look to *traditions* of a country, the only problem being that if a polity wants to break with its traditions and chart a new track for itself, there is little we can take from the tradition. A yet other option is to look into the *experiences* (of the immediate past) that led to the process of constitution-making. This option of course runs the risk of excessive politicization of the document that will be produced. Often, an *eclectic combination of choices* is done without being glibly syncretic. But it needs to be underscored that, no matter which choice we make, we need to look into the *social, moral, cultural, political, and even religious fabric of the society* as we contemplate on what should (not) go into the content of the constitution. It is also necessary that we see if there is the economic facility to back the system is available, or will be available in the long run.

Needless to say, one also needs to make an assessment of the context in which the constitution is anticipated to operate so that it will not be culturally alienated. The constitution needs to be careful in how it deals with traditional sources of legitimacy (such as religion, tradition, or even force), especially in polities where the legal system manifests layers of legal orders (such as the rule of traditional law--alias customary law--, the rule of political law, or the rule of professional law).<sup>32</sup>

As has been hinted at earlier on, constitution making is more than concocting a constitutional text. Indeed, as Elazar says, “constitution-making involves the embodiment of the constitutional traditions of the body politic in appropriate binding rules of the game that properly reflect the polity model, basis, and socio-economic distribution of power.”<sup>33</sup> This impels us to be very methodical about the choices we make as to the models of the polity and its constitution, the processes of its making, the substance of its content, and the context in which it applies.

It is important to note that if the process is flawed, the content is hardly looked into. Often, the “baby is thrown with the bathwater”. In such circumstances, as I shall argue later, original legitimacy becomes weak. Derivative (or earned) legitimacy—that which is derived from content cum practice (hence derivative) alone comes to the aid of saving the system. Original legitimacy is absent often because makers do not enjoy a perfect ‘constitutional moment’. Often transitions are tumultuous, full of turmoil (perhaps the last stage of an age old conflict, or war) marked by instability, confusion and depression,<sup>34</sup> poverty, foreign occupation,<sup>35</sup> international pressure, a rigid time line,<sup>36</sup> etc.

In these moments, leadership is in dire need. Factions abound. Ambitions are raucous. Political pull and push seems to be commonplace. The passing and the abiding are indistinguishable. Sobriety is rare. Social adolescence tends to be on the rise. The orthodoxy of the victors seeks to gain ground to establish itself as the hegemonic idea in the country. The orthodoxies of the vanquished seek to sur-

vive often subverting the new and threatening that, without it, the nation collapses. It is thus important to note that constitution-making, happening as it does in imperfect moments (not to say in the worst of times), is a difficult process that demands, creativity, skill, and patience. More importantly, it is a non-ideal time during which an attempt is made to embellish the text by taking note of the crisis situation it is emerging out of while also keeping an eye on designing a project to build a 'more perfect' polity.

### **3. Constitutional Practice: What Factors Determine it?**

Constitutional practice, the process of applying a constitutional text to 'real life' situations of a polity, may generally be viewed as the function of the factors that went into the constitutional design. But it is more. Often, it is assumed that ratification of a constitutional text spells the culmination of constitution-making process. However, in reality, it is not hard to realize that constitutional practice is partly an extension of constitutional design. In a sense, it is a continuation of the design. For in the process of implementation, constitutions are interpreted, reinforced, reinterpreted, and re-created. (In a sense then, the making of a constitution is a continuous process that never ends.)

The extent to which the design is 'right' of course will have an impact on what the constitutional practice will turn out to look like. If there is a basic agreement on the question of who the makers are (and the extent to which they are representative of the peoples, actors, and groups of a country), on what process the making ought to go through, on what the core contents of the text of the constitutions should look like, and on the extent to which the text has to resonate well with the socio-cultural moorings or contexts, then there will be the likelihood that the process of constitutional practice will go smoothly.

But what are the factors that determine constitutional practice? An interplay of multiple factors contribute to a good constitutional practice. Legitimacy and the entrenchment of constitutionalism can be mentioned as one of the most important factors. The existence

of sufficient degree of separation between the constitution and the day to day politics, the dominance of the idea of autonomy of law and politics, the existence of a vibrant positive constitutional culture, the socio-cultural relevance of the content of the constitutional text[input], the degree of effectiveness and efficiency of constitutional institutions, efficacy (compliance by officials and obeisance by the majority of the public, etc contribute to implementation of constitutions.

But all these factors can be made to fall under the three rubrics of 'legitimacy', 'constitutionalism', and 'efficacy'. The term legitimacy connotes *acceptability*. It is about popular *recognition and acceptance*. It refers to the *belief* among a large number of people that the constitutional text needs to be obeyed by all.<sup>37</sup> As Wiarda says, in relation to legitimacy of governments or their exercise of power, it is "a wide spread acceptance"<sup>38</sup> of a system. Often, regime legitimacy may be rooted in the political culture of a polity, the "community-held beliefs, feelings, and values that influence political behaviour"<sup>39</sup> which in turn depends on "the knowledge of the way in which the system operates, its personnel and its policies."<sup>40</sup> Traditionally, the three types of legitimacy that Weber identified as "traditional", "charismatic", and "rational", are considered to be by far the most descriptive of the sources of regime legitimacy.<sup>41</sup>

Shively identifies four major sources of regime legitimacy, namely the capacity of the system to deliver results (e.g. physical security, security from external aggression, economic security, national pride, etc); habit of obedience (not knowing how to behave otherwise, especially when the country is new and loyalty to the founders is the norm); connection to the religion or ethnicity of the majority of the people; or the procedure of decision-making (e.g. democracy).<sup>42</sup> Legitimacy of a system is also tied to consensus. Consensus, "acceptance of a given political system"<sup>43</sup>—addressed as it is to "the basic rules that define, establish, limit, and channel political power"<sup>44</sup>-- converts "power into authority, and the legal enactments emanating from the government into legitimate orders".<sup>45</sup>

There are varying conceptions of legitimacy. Often, this varying conception has led to confusion in relation to the term. Four conceptions of legitimacy may be readily identified: legitimacy as a democratic process; legitimacy as a legal authority; legitimacy as reliability (to produce a just and fair decision); and legitimacy as based on a public reason rooted in shared common humanity. The unclarity over these conceptions and the fact that the concept of legitimacy itself is undertheorized has contributed to the confusion. The many misconceptions and the confusion aside, the legitimacy of constitutions remains to be an issue of key significance.

Constitutions' legitimacy is assumed to emanate ultimately from the sovereignty of the people who, at least theoretically, are the makers. But more particularly, what makes a constitution legitimate? To this question we now turn. The legitimacy of a constitution is rooted in the moral, legal, and sociological foundations. Richard Fall Jr., for example argues that while the legitimacy of a constitution is often sought in the legal propriety of its making, a fuller understanding can only come when we explore its sociological and moral bases.<sup>46</sup> As Bilgin argues, "[l]egitimacy of a constitution... requires a genuine social acceptance, where the relevant public reveres and honours both the political intention and expression behind the constitution and legal forms and foundational institutions instituted by the constitution."<sup>47</sup> One can thus maintain, concurring with Calvert, that a constitution's legitimacy comes from its appropriate framing, the authority it commands, the justification it carries, the legality it endows, and the consent it refers to.<sup>48</sup>

Constitutions' legitimacy is a matter of degree, not a matter of absence or presence.<sup>49</sup> Over time, legitimacy might have its own ebb and flow. Those constitutions which are born in the context of an overwhelming consensus that engendered the participation of all sectors of the population, and has as a result developed a content that is entirely compatible with the socio-cultural and political context might have a strong *original legitimacy*. Often it is said that no constitution obtains such a strong legitimacy in its formative years. It takes a while until the honour, reverence and allegiance that con-

verts a constitution into a ‘scripture’ of a sort emerges. But constitutions also gain a legitimacy that emerges as their clauses are implemented to the satisfaction of most of the members of the polity. This kind of legitimacy is an *earned legitimacy*, legitimacy that is derived from a consistent application, and so one derived from fidelity to the text (hence *derivative legitimacy*). This implies to us that we cannot take legitimacy for granted. While those constitutions with a deficit of original legitimacy might earn a derivative legitimacy over time, it is also possible that those with strong original legitimacy might gradually lose it when the constitution’s authority is compromised through defiance that goes unpunished.

The second important category of factors for an effective constitutional practice, which is closely related to legitimacy, is the entrenchment of constitutionalism. Broadly, constitutionalism can be viewed as a principle that limits the exercise of power through the instrumentality of a constitution that serves as a constraint.<sup>50</sup> Constitutionalism is more than a dogmatic application of the letter of the constitution. Being also rooted in the wider culture, it requires a mindset of a citizenry who assert their rights under the constitution to tame power; a belief in one’s constitutional institutions; and a trust in the fundamental fairness of the constitutional process. For this, civic education (which political scientists refer to as ‘political socialization’)<sup>51</sup> is of help. The extent to which constitutions are divorced from political action (which they seek to control and regulate), and the bigger issue of the autonomy of law from politics is an aspect of the extent to which constitutionalism is entrenched.

The third category of factors relate to the efficacy of the constitution. This relates to the capacity to command obedience. This, to a large extent depends on the strength of the constitutional (and generally, state) institutions. The degree of autonomy, political-neutrality, and effectiveness of such institutions as constitutional interpreters (be it a court or otherwise) are all very important. These things in turn depend on (and contribute to) the extent to which the constitution has an exerted, i.e., operative, authority, as opposed to that which is merely asserted. The degree to which officials are will-

ing to comply with constitutional norms and the people are willing to obey them are keys to the efficacy of the constitutional system. But one now notices how obviously this points back to the issue of legitimacy and constitutionalism.

#### **4. The Making and Legitimacy of the Ethiopian Constitution**

Ethiopia has had four major written constitutions in the 20<sup>th</sup> century alone.<sup>52</sup> The first two written constitutions (the second is supposedly only a revised version of the first) of 1931 and 1955 were both Imperial *grants* to the (“beloved”) people of Ethiopia.<sup>53</sup> The third, the 1987 PDRE Constitution, was more like a *revolutionary manifesto* with socialist overtones in its fundamental values and was, at least theoretically, made by the “Working peoples of Ethiopia”. Ethiopia, being an old polity principally formed through military conquest and incorporation of vast lands with diverse peoples with equally diverse linguistic and cultural identities into the Ethiopian empire,<sup>54</sup> the source of legitimacy of state power has never been a written constitutional text. It is often said that the key sources of legitimacy in Ethiopia’s past were force (conquest, military expansion), religion (i.e. Orthodox Christianity), and tradition (i.e. right genealogy).<sup>55</sup> Both in the 1974 revolution and in the drift to liberal constitutionalism in the 1990s, there was a declared intent to break with this past and set the country on a ‘republican’ road with a socialist and a liberal touch, respectively, to the democracy that were to be experienced.

The 1995 constitution (and the Transitional Charter that preceded it) was especially keen on bringing about a rapturous break with the hitherto dominant mode of organizing the polity as a centralized unitary form of government with no recognition to the ethno-linguistic groups that constitute the demographic whole of the Ethiopian polity. It was nothing less than a total restructuring.<sup>56</sup> This is mainly because of the recognition of the ethnic diversity and the valorisation of the same by converting the old oppressed ethnic groups into sub-national sovereignties.<sup>57</sup> The process culminated in the adoption of a written constitution that envisages the establish-

ment of a federal, secular, human-rights sensitive, democratic republic that is constituted of explicitly ethno-nationalist sub-national units.<sup>58</sup> But what does the process that led to the constitution look like? How was the Ethiopian constitution of 1995 made? What kind of legitimacy does it command? We now turn to these questions.

*Historical Backdrop.* The making of the Ethiopian constitution had its beginnings in the transitional period which lasted from 1991 to 1995. During this period the public life was governed by the Transitional Period Charter, a brief document of no more than 20 articles which served as the interim constitution. The Charter was more like a *pact* negotiated between ethno-nationalist liberation fronts that, through armed struggle, toppled the regime in power until May 1991.<sup>59</sup> As such, it was primarily a peace document, an accord. But it was also more. It aimed at rebuilding the country and restructuring the state democratically.<sup>60</sup> It also sought to mark a break with the past and usher in a new chapter (of respect for human rights, equality, and self-determination, rescue from subjugation, etc) in the history of Ethiopia.<sup>61</sup> The establishment of peace and stability, the ensuring of just peace, the dismantling of the repressive institutions of the preceding regime, and the urge to transit to a democratic order were the major goals intended to be achieved through the Charter.

*The Charter* readily recognized both individual rights and freedoms (under art 1) and group rights (of “nations, nationalities, and peoples”) to self-determination (art 2).<sup>62</sup> After setting the foreign policy principles of the transition (arts 3-4) and acknowledging the right of sub-national entities to directly forge a relation with foreign relief institutions (art 5), it ventured to form a government with a unicameral legislature called “Council of Representatives [hereinafter COR] (with a maximum of 87 members composed of liberation fronts and other organizations) and an Executive organ (made up of a Council of Ministers and a head of state acting as a Chairman of the Government) (arts 6-9). Thus a quasi-parliamentary government was set up.<sup>63</sup> More importantly, it envisaged the establishment of a Constitutional Commission [hereinafter

Commission] entrusted with the task of drafting a constitution (arts 10-11). Thus the Commission was to prepare the draft and submit it to the Transitional Council of Representatives, who on adopting it, was to present it to the people for discussion. The final draft that is prepared after such a popular discussion was to be adopted by a constituent assembly to be elected for this very purpose (but in accordance with the provisions of the final draft of the constitution) (art 11).

The Charter went on to state that the transitional government will engage in the rebuilding of war-ravaged infrastructure (art 15), according “special consideration to hitherto neglected and forgotten areas” (art 16), and making efforts to dispel inter-ethnic mistrust and hatred (art 17). The Charter also had arrogated supremacy unto itself (art 18). The government formed through the constitution oversaw the drafting of the constitution by statutorily forming the constitutional commission in 1992.<sup>64</sup>

It is interesting to note, incidentally, that the Charter omitted the matter of courts and that of regional self-governments.<sup>65</sup> It also omitted the issue of charter interpretation. Of course, for a constitutional instrument of a modest objective (of primarily establishing peace and stability and charting out the route the transition is to take), that will not be too big an omission.

*The Making of the Constitution.* The process of the making of the 1995 constitution was principally guided by the provisions in the Transitional Charter. According to the Charter,

*“The Council of Representatives shall constitute the Constitutional commission to draw up a draft constitution. The Constitutional Commission shall submit to the Council of Representatives the draft constitution.”(Article 11)*

*“Upon adoption of the draft constitution by the Council of Representatives the constitution shall be presented to the people for discussion. The final draft shall be presented for adoption in the constituent assembly to be elected pursuant to the final draft of the constitution.”(Article 12)*

These two provisions guided and permeated the constitution making process in Ethiopia. One notes that the issue of the composition of the drafting commission was not detailed in the Charter. One also notes the important role the Council of Representatives is anticipated to play in the deliberation on the constitutional draft, in addition to its role of establishing the Commission, deciding on the commission's budget, and overseeing its activities.

In 1992, the Constitutional Commission was legally established. Proclamation no. 24/1992, alias, "Constitutional Commission Establishment Proclamation" was adopted by the Council of Representatives. Physically placed in the premises of the Institute of Ethiopian Nationalities<sup>66</sup> (as per article 3), the Commission had the mission preparing the draft, submitting the same to the COR, presenting the draft as adopted by the COR to the people, incorporate the comments in the final draft as may be deemed necessary, and finally submitting the final draft to the Constituent Assembly (art 4). The tasks (art 5) included drafting the text, conducting seminars, symposia, and educational discussions (perhaps with a view to creating the festive mood that attends to a 'constitutional moment'), disseminating the draft constitution to the public, gathering comments (especially from the regions and districts<sup>67</sup>), explaining the draft to the public in the course of the discussions, preparing the final draft, submitting periodic reports to the COR, and others. Moreover, the Commission was given the mission to prepare the draft "*in conformity with the spirit of the Charter*" (art 4). It was obvious that the constitution was meant to be an instrument of advancing the aspirations of those who negotiated the Charter. To that extent, then it was the extension of the Charter.

The Commission was organized in such a way that it has 29 members General Assembly (GA), an Executive Committee, and various other (expert) committees (art 6). The composition of the GA was as follows (as per art 7): 7 members from the COR, 7 members representing various political parties, 3 members from Trade Unions 2 members each from three professional associations (of Teachers, Lawyers, and Health Professionals)<sup>68</sup>, 3 members from the

Ethiopian Chamber of Commerce, and 3 members representing women.<sup>69</sup> It was not clear if political parties represented in the COR were also to be part of the GA thereby doubling the representation of the dominant party in the COR. The GA was granted the powers and duties vested in the Commission (art 8). So the GA was a proxy for the Commission. The Chairs (both the Chief and the Deputy) and the Secretary of the GA were to be appointed by the COR.

*Steps in the Making.* Like everywhere else, the making of the Ethiopian constitution underwent the stages of *drafting, deliberation, adoption, and ratification*. More or less in a manner the proclamation dictates, the drafting process was accomplished in the Commission. The draft was presented to the COR in 1994, and there the first phase, the phase of *drafting*, was completed. At the COR, there was a lengthy discussion on every provision of the draft<sup>70</sup> for almost a month. Most of the sessions of the discussion and the (at times spirited debates) were nationally televised. The discussion was informative in many ways.<sup>71</sup> After the draft was deliberated upon and was eventually adopted by a majority vote in the COR, it was presented by the Commission to the public. Thus, discussions were staged in the Kebeles.<sup>72</sup> At the end of the public discussion, the second phase, the phase of *deliberation*, was closed although a new discussion meant only for adoption is yet to start in the Constituent Assembly).

The third phase, the phase of *adoption* of the draft constitution (as enriched by comments from the COR and the people, much less by the latter), started immediately upon the election of the members of the Constituent Assembly. The discussion in the Constituent Assembly was also lengthy. The discussions ended with the adoption of the final draft submitted by the Commission to the Constituent Assembly apparently after incorporating the comments in November 1995. With it ended the third phase and the entire process of constitution-making in Ethiopia. One can take the adoption by the Constituent Assembly as a form of *ratification* of the constitution by the people albeit only indirectly through their representatives. Consequently, unlike it is the case in other systems, there wasn't a popu-

lar ratification of the constitution through *referendum*.

*Who are the makers?* Formal legal analysis aside, who are the real makers of the constitution? Who are the key actors involved at the drafting, deliberation, and adoption stages of the constitution-making process in Ethiopia? The question of who, the ‘political question’ (a la Rorty<sup>73</sup>) is important in constitution-making perhaps because, as Elazar says, constitution-making is the “pre-eminently political act”.<sup>74</sup> The answer to the ‘who’ question requires a substantive research into the identity, the political affiliation, and the educational orientation, etc of the members that constituted the GA of the Commission, the COR, and the Constituent Assembly. (This is not undertaken by this research.) But one can conjecture as to the political-party composition of the COR and the Constituent Assembly; at least one can state without exaggeration that the EPRDF was a dominant partner in both institutions, and so in the entire process.<sup>75</sup>

*Content of the Text.* The constitution that was so adopted, the FDRE constitution, came into force in 1995. When it did, it set up a federal polity that imitated the trend to decentralization during the Transitional period. True to the “spirit of the Charter”, the rights of “nations, nationalities, and peoples” to self-determination was reaffirmed in article 39 of the FDRE. They were granted sovereignty (art. 8). It sought to redesign the symbols (e.g. the name<sup>76</sup>, flag,<sup>77</sup> anthem<sup>78</sup>) in such a way that they resonate well with the new dispensation. The constitution recognized equality of all languages but maintained Amharic as a working language of the Federal Government (art 5). It enshrined the principles of ethnic sovereignty, constitutionalism and constitutional supremacy, human rights, secularism, and transparency and accountability of government as the basic pillars of the constitutional system (arts 8-12). It recognized human rights extensively (arts 13-44). It established a federal political system of nine units and an autonomous city administration of the federal capital (arts 46-52). It established a parliamentary system of government (arts 45; 53-68). It organized a strong executive body composed of a Prime Minister, Council of Ministers, and Ministries

who operate under a sovereign parliament and a President who has a predominantly ceremonial power (Arts 69-77). An unlegislating upper house that is in charge, among other things, of constitutional interpretation (aided by a Constitutional Inquiry Council) is established (art 62; 82-84)<sup>79</sup>. A three-tiered, dual system of federal and state judiciaries is set up (arts 78-81). A set of policy objectives and directive principles that serve as the conscience of the system are also incorporated in arts 85-92. Provisions on emergency powers (art 93), finances, expenditure and revenue responsibilities (arts 94-100), and amendment (104-105) were included. The ideally non-partisan institutions of the Auditor General (101), Election Board (103), Census Commission (104) were all established.

In many ways, the constitution is like other constitutions. Its major *distinctive features* are its recognition of *secession, its unique process of constitutional adjudication, the use of ethno-linguistic criteria as the predominant basis of carving the states that constitute the federation, the little, if any, involvement of the upper house in legislation, its ready recognition of indigenous and religious law systems on matters related to personal and family issues.*<sup>80</sup>

Mattei<sup>81</sup> charges that the constitution is an “old house made of new bricks” and sees nothing new in, or autochthonously Ethiopian about, the constitution except the provisions on prohibition of applying the statute of limitations for offense of genocide (art 28) and the right to secession (art 39(1)). He asserts that the rest of the corpus of the text is a mere transplantation (from the US, Germany, Scandinavia, and international human rights law). He is thus sceptical of the applicability of such a transplanted law in a legal and cultural context that does not resonate well with the ‘imported’ values.<sup>82</sup>

*Legitimacy.* As has been hinted at earlier on in section two, legitimacy can be assessed in the light of the constitution-making process, the content of the text, and the compatibility of the text to the context. The making process, which—as indicated earlier—was dominated by the EPRDF, has resulted in a discontent among some political factions in Ethiopia. The discontent has affected the level of popu-

lar acceptability the constitution commands. The fact that there was little popular participation at the time of the deliberations (which can be explained by a number of reasons) and the consequent lack of active engagement with the process has also contributed to the lack of original legitimacy.

The *content* is not often debated. But at least among academic and some political circles, some provisions are raised as politically divisive and to that extent as rendering the legitimacy of the constitution contested. The recognition of secession,<sup>83</sup> the adoption of ethnically oriented federal set up (the use of ethno-linguistic criteria of state formation),<sup>84</sup> the fact that a political body, i.e., the House of the Federation, is the ultimate arbiter of constitutional disputes, and not the courts,<sup>85</sup> the issue of state ownership of land,<sup>86</sup> etc are a few of these.<sup>87</sup>

More often, the questions raised are the lack of commitment to implement the constitutional values, principles, and rules. The alleged (factually true or merely perceived) violations of the constitution create an intense discontent. Such a discontent is one that emanates from the gap between constitutional law and constitutional practice, or between design and implementation. This discontent presses the uninitiated citizen into disowning the constitution *in toto* thereby enhancing the sense of lack of legitimacy.

Irrespective of the fact that most of the values are imported ones, there is hardly a risk of cultural incompatibility that delegitimizes the constitutional system. What critics of transplantation (such as Mattei) tend to neglect is the changing reality of the host legal system, the fact that while there is a sub-culture of the rule of traditional law (in countries such as Ethiopia), the dominant culture at least in the formal-urban legal system and among the informed voting public is friendly to (if not enthusiastic supporters of) transplanted values such as human rights, constitutionalism, and democracy, etc. (In the age of information and television, the lure of modernity should not be underestimated.)

Nevertheless, given the fact that, owing to the lack of original legitimacy and the discontents created by the gap between the law and practice, there is a consequent weak exerted authority of the constitution makes one wonder if the environment is congenial to the constitutionalism. One wonders, following the tack of Mattei,<sup>88</sup> if “the armed men will obey the unarmed man”, if the politicians will have a reason, an incentive, to obey the judge.

### **5. Constitutional Fidelity: Basic Law, Higher Law, and Our Law**

Jack Balkin<sup>89</sup> says that three things are pivotal for the effective implementation of a constitution, namely that the constitution is (or is perceived to be) a basic law, a higher law, and “our” law, i.e., the law of those who try to implement it.<sup>90</sup> These three elements are necessary as an expression of fidelity. Constitutional fidelity is necessary to its effective implementation. Constitutional fidelity, conformity of our actions, decisions, and practices to the letter and spirit of the constitution is a means to an end, the end being the achievement of constitutional legitimacy.<sup>91</sup> Through such fidelity, decisions (both the creative and interpretive ones)—that is, the legislative and judicial ones—can contribute to the ‘production’ of derivative legitimacy. This in turn fosters the efficacy of the constitution. Efficacy reinforces the strength and independence of constitutional institutions. In time, this ‘emancipates’ the constitutional legal institutions from subservience to the politics. This process further entrenches constitutionalism. The end result, as Mattei suggests, will be that “the armed men” will at last “obey the unarmed ones.”<sup>92</sup>

What does fidelity require? In simple terms, it requires faithfulness<sup>93</sup> to the constitutional text. This faithfulness needs to be practiced at various levels, namely at the legislative level (where supposedly political fiat, or will predominates), at the adjudicative level (where supposedly reason predominates), and at the electoral level (where voters’ interest and passion predominates). A constitutionally attentive legislator, a constitutionally informed interpreter, and a constitutionally responsible voting public are a sine qua non to constitu-

tional fidelity. The question arises, however: how can we be expected to be faithful to a constitution that lacks original legitimacy? The question, reframed, is: how can fidelity exist when legitimacy is dubious? The question suggests that legitimacy is necessary for fidelity.<sup>94</sup> But fidelity must be looked at as a means, and legitimacy must be looked at as an end. Fidelity has the potential not only of generating a (derivative) legitimacy but also of redeeming the deficit of (original) legitimacy that was caused by a flaw in the process of the making of the constitution. The answer to the question, then, is: through (more) faithfulness. More fidelity bolsters a redemptive constitutional practice. Such a practice helps bridge the gap between constitutional design and constitutional practice.

## 6. Conclusions

By way of conclusion, let me attempt answers to the questions I raised at the beginning of this paper. That constitution making is more than a mechanical act of producing a written text is noted. That it involves a careful choice of constitutional models befitting the core character of the polity is also underscored. In polities founded by design (be it those emerging out of a conflicted past or otherwise), the notion of popular consent is important. In post-conflict societies, the constitution serves as a peace document that makes, keeps, and builds peace thereby transforming conflict into a positive reconstitutive force. In such societies, the design of the constitution is as important as, if not more important than, its practice. All the relevant political actors, all the sectors of the concerned public, and all the stakeholders must come to the 'table of covenant' as they seek to make their constitution. They also must be able to participate in the process and to express their consent freely so that they develop a sense of trust and confidence not only in the process but also in the outcome. Exercise of choice is needed for constitutional design. Contractarian perspective is important.

The design of a constitutional text involves the practical stages of drafting, deliberation, adoption, and ratification. At all these stages, inclusiveness, participation, and a 'bi-directional traffic', in short, *consent*, are needed. Who is involved at the drafting, deliberation, adoption and ratification stage (and who is excluded at one or more

of these stages) determines (the perception of) whose constitution it is, and to that extent, determines its legitimacy. Legitimacy, having a moral, legal, and sociological founding, can come about from the acceptability that the constitution obtains from the vast majority of the people. This is because, of course, in principle, ultimately legitimacy emanates from the sovereignty of the people. For legitimacy, the process must be (democratically) acceptable, the content must be able to capture the principles, ideals, aspirations, and goals of the majority of the people, and the context in which it applies must be optimally compatible to the values in the content.

The implementation of a constitution depends to a large degree on legitimacy, entrenchment of constitutionalism, and efficacy of the constitutional system. Legitimacy determines the authority of the constitution. This in turn impinges on constitutionalism, the principle of limited government whose activities are guided and constrained by the constitution. Efficacy, which is rooted in compliance (of officials) and obedience (by the people), comes depending on, inter alia, the strength, autonomy, and neutrality of constitutional institutions. The interplay of the three creates a congenial environment for a better constitutional practice.

In Ethiopia's history, constitutional legitimation of power was rare. Historically, legitimacy is endowed on a regime by force, religion, and tradition. The polity was a product of an amalgam of force and evolution. The first two written constitutions of the 20<sup>th</sup> century (of 1931 and 1955) were more like a grant from the rulers to the ('beloved') people. Their authority was more symbolic (of modernization) and merely asserted, not exerted. The third (1987) was more like a revolutionary manifesto. It was also a grant with an asserted supremacy and authority. The 1991 Transitional Charter and the FDRE constitution sought a rapturous break from this tradition. They sought 'to restructure the state and democratize the government'. Having this as a historical background, the FDRE constitution was made in the time between 1992 and 1995.

The process of the making of the FDRE constitution had its roots in the Transitional Period. The Charter set the tone. The Transitional Government oversaw the process. A Constitutional Commission statutorily established by the Transitional Government prepared the draft and submitted it to the legislature of the time (known then as the Council of Representatives). The draft was discussed in detail in the legislature for about a month (from 12 April-10 May) 1994 and was adopted before it was presented for popular discussions. The discussion often looked more like ‘educating’ or explaining. Subsequent to the discussion and formation of a constitutional assembly in 1994, it was further discussed in the Assembly before it was finally adopted in November 1994 to come into force in August 1995.

Because the drafting, discussion, and adoption was overseen by the Transitional government which was dominated by the EPRDF, to that extent, the original legitimacy of the FDRE is undermined. Among comparative legal scholars, the content of the constitution being predominantly a result of indiscriminate transplantation, has no local legitimacy, i.e., does not resonate well with autochthonous traditions in Ethiopia. The constitutional system being part of the legal tradition that is termed as ‘rule of political law’, where law is subordinate to politics, the constitution commands minimal authority and efficacy among the Ethiopian public. (Or, so they argue.) One also notes that while conceding that original legitimacy is weak, the system needs to make the effort that, through aggressive implementation, the constitution *earns* its own (*derivative*) legitimacy. For this, fidelity to the constitution is needed. Constitutional fidelity must be seen as means to bringing about constitutional legitimacy. This in turn leads to an exercise in what scholars call ‘redemptive constitutional practice’. The interpretive institutions play a pivotal role in calling us all to fidelity so that the constitution, in the words of Jack Balkin, is not only a ‘basic’ law, or a ‘higher’ law, but ‘our’ law, thereby reconstituting the Ethiopian polity. But the point needs to be stressed: between constitutional design and constitutional practice stands a gap that needs to be filled. That gap can be filled only through legitimacy, constitutionalism, and efficacy.

### **Endnotes**

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1. This salience dispelled the constitution-scepticism that pervaded the era preceding the 1990s. After the collapse of the Soviet Union and the former eastern bloc countries, interest in constitutionalism became especially acute in those countries. This also became a pattern in other countries who sought constitutional renovation elsewhere. See Bruce Ackerman, *The Future of Liberal Revolution*. New Haven, CT: Yale University Press, 1992 for a description of how with the liberal triumph, constitutionalism became once again prominent. For the salience of constitutionalism and interest in it in the West itself, see for instance, James Fleming, "The New Constitutional Order and the Heartening of Conservative Aspirations," 75 *Fordham L. Review* 537 (2006). See also Mark Tushnet, "The New Constitutional Order and the Chastening of constitutional Ambition" 113 *Harv. L.Rev.* 29 (1999).
2. This is the case in post-communist East and Central Europe. It is also the case in Africa. In Africa, Namibia, South Africa, Uganda, Ethiopia, Eritrea, Puntland (or Northern Somalia) all engaged in constitution-making since 1991.
3. Afghanistan and Iraq come readily to the mind. But there are others in Africa such as Eritrea Somalia, Rwanda, Ethiopia, and others.
4. As such, they stand in contrast to contracts among peoples and between them and their governments. When constitutions are viewed only as pacts, they tend to be an agreement between conflicting factions rather than as covenants among the peoples that these factions they represent. They mark deals between self-proclaimed representatives of their supposed constituencies. In such circumstances, they serve as an inter-elite "treaty" rather than as an inter-popular covenant that binds a polity together.
5. As instruments of conflict resolution, they mark the end of an overt and violent conflict. As tools of conflict transformation, they mark the beginning of new relations on the basis of mutual understanding of what led to the conflict in the first place and in such a way that it can guarantee the protection of the interests that were at stake.

6. Rwanda is a good example of this. But the recent constitutional negotiations in Kenya, and the interest in amending the constitution in Zimbabwe can also be mentioned as part of the quest for redemption through a constitution.
7. This is a sentiment shared by many “opposition” politicians. On the wake of the 2005 election, a senior but retired member of the TPLF said, in an interview with the Voice of America (Amharic Service), that the constitution is nothing more than TPLF Program.
8. The Coalition for Unity and Democracy (CUD) has had a manifesto in which it argued that there are provisions of the constitutions it seeks to change should it assume power. The ones oft-referred to were article 39(1) (on the right of ethnic groups to secession) and article 40 (3) (on the right to state ownership of land).
9. Jack Balkin, “original meaning and Constitutional Redemption” (Yale Law School, Public law Working Paper No. 140) 24 *Constitutional Commentary* 1 (2007).
10. Ibid
11. Daniel Elazar, “Constitution-making: The Pre-eminently Political Act” p.12. See also his *Federalism and The Way to Peace*. Queens: Center for Inter-governmental Relations, 1994.
12. Joseph Weiller, *The Constitution of Europe: “Do the New Clothes Have an Emperor?” and other Essays*. Cambridge: Cambridge University Press, 1999. P. 3.
13. This is partly because the continuity is maintained unconsciously to, among others, preserve the core identity, alias the ‘national character’ of the country, to reaffirm its territorial expanse, to affirm the traditional sources of legitimacy, etc.
14. This is often the case in countries where history, owing to the multiplicity of historical narratives, is contested, and where revisionist history becomes dominant among the makers—as a consequence of which the past is doomed to be thrown away. One can see a typical example of this in the salience of ethno-nationalist histories in Ethiopia and Eritrean nationalist history in the course of the making of the Ethiopian transition to the 1995 constitution and Eritrean independence respectively.
15. Daniel Elazar, *Federalism and the Way to Peace*. Queens: Center for Intergovernmental Relations, 1994, Chs I and II. See also his “Constitution-making: The Pre-eminently Political Act” pp.
16. Note however that even in polities where constitutions are more like a contract than a grant, the people “give” themselves a constitution.

Consider the example of India and Ireland in this regard. The preamble of the Irish Constitution of 1937 reads as follows: “We the people of Eire, do hereby adopt, enact and give to ourselves this constitution” The Indian Constitution, apparently following the tack of the Irish example, reads: “We the people of India, ... in our Constituent Assembly, ... do hereby adopt, enact, and give to ourselves this constitution”

17. Ugo Mattei refers to the importance of the military effectiveness (in the war for independence) of the Eritrean People’s Liberation Front (EPLF) as the source of legitimacy, as distinct from a democratic process typified by election or a constitution (which has never been signed into force anyway). See Ugo Mattei, “Patterns of African Constitution in the Making” (unpublished paper presented at the International Conference on African Constitutions at the University of Bologna, 27 July 1998), p. 12, for example, where he says: “In Eritrea elections have been promised but never actually carried on. They have been felt useless. Legitimacy of the leadership is grounded elsewhere, typically in the war. Generally speaking traditional legitimacy and skilful use of force are still leading legitimating factors in Africa.”
18. Walter Murphy distinguishes between constitutions’ *asserted* and *exerted* authority to refer to the authority they claim on the one hand and the authority that they actually have respectively. See his “Constitutions, constitutionalism, and democracy” in Greenberg et al (eds) *Constitutionalism and Democracy* (1993?) at pp. 7-12.
19. Elazar, “constitution-making: the Pre-eminently Political Act”, ...
20. One might add Imperial Ethiopia in the fifth category.
21. It is not uncommon for one to hear people quip that the constitution is “an expression of aspirations” even in Ethiopia whose constitution tends to have adopted the first model.
22. The debate on whether Israel needs to adopt a written constitution and break with its traditionally unwritten but adaptive constitution continues unabated.
23. One can also conjecture that the more professional, the less political the process becomes.
24. See, for example, Rais A. Khan and James D. McNiven, *An Introduction to Political Science* (3<sup>rd</sup> ed). Scarborough, Ontario: Nelson Canada, 1990, who say “The process of enacting a written constitution is composed of two separate activities: the formulation of the draft and its ratification by the people” at pp. 148-149.
25. Drafting is often done by an executive body, or a legislative/deliberative body of a pre-constitutional moment. Or it might as well

be by a body specially convened to do the drafting. See Khan and McNiven, in note 24 above, at p.149.

26. Louis Aucoin, a member of the drafting team of the Iraq Constitution is reported to have said: “inclusiveness is key and if the constitution making process is dominated by a particular political faction, it is doomed from the start.” (Lecture at the Fletcher School of Law).
27. Such was the case in South Africa where 34 principles were agreed upon by all the parties involved to be heeded to in the making of the final constitution under the ‘certification’ power of a Constitutional Court that pre-existed the constitution itself. See Alexander Johnston, Siphon Shezi, and Gavin Bradshaw (eds), *Constitution-Making in the New South Africa*. London and New York: Leicester University Press, 1993, especially pp.1-12; and 54-66.
28. At this stage, among other things, a search for a constitutional ingenuity tried and tested elsewhere is sought. Comparison, a search for an analogue, adaptation of foreign institutions, doctrines, and principles; the adaptability and transplant-ability of the same is explored.
29. Mattei refers to the process of popular discussion the Eritrean constitution makers had with the people on the draft prepared by the Commission as one in which the former were teaching the latter in a manner that is patronizing. See his “Patterns of African Constitutions in the Making”, p.9.
30. In more recent years, the guarantee of fundamental (human) rights and freedoms is considered the sine qua non of legitimacy of constitutions as a result of which constitution making has to be mindful of them.
31. Note that borrowing and transplantation requires a rich capacity to adapt the ‘borrowed’ values, institutions, doctrines, etc. It also requires compatibility of the host country to the borrowed ‘commodity’. Note further that Pierre Legrand argues that transplanatation is impossible as we can’t borrow the mindset, or the *mentalité* even when we can transpose the norms, the institutions, and the concomitant procedures, doctrines, etc. See generally Pierre Legrand...
32. I owe this classification to Mattei in his “Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems” 45 *Am. J. Comp. Law*, 5 (1997). According to Mattei, the rule of professional law is that which is dominant in the Western legal tradition where the legal professionals (judges, lawyers, etc) “control” or influence the politicians. The rule of political law is one that is dominant in the developing countries, countries in transition, where the politics subordinates

the law and the former “controls” or influences the latter. The rule of traditional law is one in which religious or customary traditions dominate. Most countries of the East such as Japan, China, and large parts of Africa and Latin America are in this category.

33. Elazar, as in note ..., above, p.13.
34. Mainly because of the division and polarization between the victors and the vanquished.
35. Such is the case, for instance, in the case of Iraq since 2004 until the time the new constitution has been in the making.
36. The transition may have a deadline at which time it must exit the realm by letting the new constitution fill the void. One recalls the transition in Ethiopia to see how the two year time limit for the transition has pressurized the process of constitution-making from 1992 to 1994.
37. W. Phillips Shively, *Power and Choice: An Introduction to Political Science* (6<sup>th</sup> ed). Boston: McGraw Hill, 1999. P.136.
38. Howard J. Wiarda, *Introduction to Comparative Politics: Concepts and Processes*. Belmont, Ca: Wadsworth Publishing Company, 1993. P. 87.
39. Michael Curtis, “Introduction” in *Introduction to Comparative Government* by Michael Curtis et al (eds). New York: Harper & Row, 1985. P.6. Curtis also says that political culture also depends on the “bility of people to participate in the political process.”Ibid.
40. Ibid.
41. Max Rehinstein’s *Max Weber on Law in Economy and Society* (2<sup>nd</sup> ed) (Trans. By Edward A Shils). Cambridge, MA: Harvard University Press, 1954.
42. W. Phillips Shively, in note 37 above, pp-137-138.
43. Bernard E.Brown and Roy C. Macridis, *Comparative Politics: Notes and Readings* (8<sup>th</sup> ed). Belmont, C: Wadsworth Publishing Company, 1996. P. 86.
44. Ibid
45. Ibid
46. See Richard H. Fallon, Jr, “Legitimacy and the Constitution” *Harvard Law Review*, Vol. 118, No. 6 (April 2005). Pp.1789-1853.
47. M. Bilgin, “Democratic Legitimacy and Constitutions” (paper presented at the annual meeting of the Law and Society Association, TBA, Berlin, Germany, July 2007.Unpublished manuscript.)
48. H. Calvert, *British Constitutional Law*. London: Blackstone Press, 1985. P.35.

49. Shively , in note 37 above, argues that such is the case for regime legitimacy. p. 137
50. See Walter Murphy, “Constitutional Interpretation as Constitutional Creation” (paper given at UC, Irvine, November 1, 2000) on the meaning of constitution and its difference from constitutionalism, which is a mechanical adherence to a constitutional text. One also notes the fact that constitutionalism is not synonymous with constitution although the former often includes the latter. See, M.P. Jain, *Indian Constitutional Law* (4<sup>th</sup> ed). Agra: Wadhwa & Co, 1994. Pp. 3-4 where he says: “A country may have a ‘constitution’ but not necessarily ‘constitutionalism’.
51. See Khan and McNiven, as in note--- above, pp.58-59, 71; Curtis et al, note ---above, pp.6-7; Shively, note 49 above, pp.... They all refer to the concept of ‘political culture’ referring to the work by Gabriel Almond & Sydney Verba, *The Civic Culture*. Princeton: Princeton University Press, 1963 who in turn classify cultures into ‘parochial’, ‘subject’, and ‘participant’.
52. This is without considering the Draft Constitution that was prepared after revising the 1955 constitution on the eve of the 1974 revolution which overtook the process; and the Transitional charter of 1991 which, being the “supreme law of the land”(art 18), served as the interim constitution for the time from 1991-1995. This is also without considering the set of public law legislations that governed the pre-constitutional days of the Derg.
53. The Preamble of the PDRE Constitution opens with the words: “We the working People of Ethiopia,...”. The Constitution of the Peoples’ Democratic Republic of Ethiopia. Negarit Gazzeta, ...
54. This fact implies that in Elazar’s scheme, Ethiopia is a polity formed by force; but it is also important to note that the traditional core of highland Ethiopia (which is associated with Tigray and Amhara states today) manifested a character of organic polities with a “constitutional culture” that has evolved in myths of Biblical proportions, that also tied the kingdom and its administration in accordance with a Judeo-Christian tradition.
55. Ugo Mattei, “The New Ethiopian Constitution: First Thoughts on Ethnic Federalism and the Reception of Western Institutions” in Elisabeta Grande (ed), *Transplants, Innovation, and Legal tradition in the Horn of Africa*. [...: ...], 1995.
56. Perhaps it is in recognition of this restructuring that Wendy James and Donald Donham entitled their re-edited book (now with Esei Kuri-

moto and Alessandro Triulzi), REMAPPING ETHIOPIA: SOCIALISM AND AFTER. Oxford/Athens, OH/Addis Ababa: James Currey/ Ohio Univ Press/ AAU Press, 2002. This is not to suggest that there aren't critics who say not much has changed at all, or if there is any change, it is one for the worse. See, for example, Hinassie Haile's, "Comparing human Rights in Two Ethiopian Constitutions: The Emperor's and the "Republic's"—Cucullus non Facit Monachum" 13 *Cardozo J. Int'l & Comp. L.* 1, (2005)

57. This is done by primarily guaranteeing their right to self-determination in the Transitional Charter in 1991 (article 2) and by extending sovereignty to them in the 1995 constitution (art 8) in addition to reaffirming their right to self-determination (in the now famous/ infamous [?] art 39).
58. This can be gathered from the constitution's provisions: art 1 (on the name and its federal structure), art 11 (on secularism), art 8 (on democracy), arts 10 and 13-44 (on human rights), and others.
59. The fronts posed as "the peace loving and democratic forces". (See the preamble of the Charter, paragraph 6.)
60. Paragraph 1 of the preamble.
61. Paragraph 2, Preamble.
62. The UDHR was directly endorsed. Civil and political rights such as freedom of association, expression, assembly were explicitly mentioned and guaranteed (art 1). The now divisive issue of the right to secession was tempered by conditions that need to be fulfilled before a group can assert its right to "independence". (art 2(3)).
63. The COR had the power to make laws and "oversee the work of the Council of Ministers" (art 9).
64. Constitutional Commission Establishment Proclamation No. 24/1992 was instrumental in this regard.
65. There was no provision dealing with the judicial power. The matter of regional self-governments was legally dealt with later in the "National/ Regional Self-Government Establishment Proclamation No.7/1992".
66. One cannot help to note that this was also the place where the PDRE Constitution of 1987 was also drafted, and speculate on whether there is more continuity than we normally assume.
67. It is interesting that art 5(5) says that the commission has "to receive comments from national/regional and Woreda councils on the draft constitution". This was perhaps meant to make sure that the exercise is not going to take merely a top-down approach.

68. One wonders why only these three professional associations are singled out for participation in the constitution-drafting process.
69. It is unclear as to how, and from where, these representatives of women are to be selected.
70. There is a bulky body of compilations of the minutes of the meetings of the COR on the constitution for those of us who would like to learn about the substance of the discussion and about who said what. The details described rather copiously, I assume, are rather staggering.
71. To most of my contemporaries, there was much more fun than something that determines the destiny of the polity for years to come.
72. In Addis Ababa, school premises were used for the popular discussions. The turnout was low. Interest was at its minimum for a constitutional deliberation. (This is based on personal observation of the situation in the Summer of 1994).
73. Richard Rorty, "Moral Universalism and Economic Triage" (2005?).
74. Elazar, "Constitution-Making: The Pre-Eminently Political Act"
75. This is partly the cause of the discontent seen among some political corners. Not entirely unexpectedly, the discontent undermined legitimacy.
76. Article 1 says: that "Federal Democratic Republic of Ethiopia" is the official name.
77. Article 3 (2) requires that the emblem reflect the hope of 'nations, nationalities, and peoples' and religious communities to live in equality and unity. Art 3(3) declares that states can have their own flags.
78. Art 4 requires that the national anthem be reflective of the common destiny, the ideals of the constitution, the commitment to live in a democratic order.
79. This is perhaps an Ethiopian novelty in the realm of contemporary constitutional design.
80. See Tsegaye Regassa, "Ethnic Federalism and the Right to Self-determination as a Constitutional Legal Solution to the problem of Multi-ethnic Societies: The case of Ethiopia" (Unpublished LL.M Thesis: Faculty of Law, University of Amsterdam, 2001) for details on the distinctive features.
81. Ugo Mattei, "The new Ethiopian Constitution: First Thoughts on Ethnic Federalism" In Grande (ed), ...
82. That they do not resonate well with each other more an assumption than an empirically validated claim.
83. Art 39(1).
84. Arts. 46 and 47
85. Arts 62 cum 82-84

86. Art 40(3)
87. Political parties such as the Oromo Federalist Democratic Movement (OFDM) seek to see a Presidential form of government installed in the constitution. Others seek to see a proportional representation system of election to be adopted. Some people also raise the issue of why the number of times the prime Minister runs for office is not fixed in the constitution as important. Questions as to whether it is proper to allow forming political parties on ethnic lines is also raised, but I think this latter concern is extra-constitutional.
88. Mattei, *Patterns of African Constitution in the Making*, p. 12
89. Jack Balkin, “Original Meaning and Constitutional Redemption” as in note 9 above.
90. Jack Balkin, as in note 65 above, says that when the constitution becomes ‘our law, it (re) constitutes the polity by linking the generations past to the generations to come in the interpretive process of the present.
91. See Frank Michaelman, “Fidelity and Legitimacy”. (Paper presented at a conference of the American Constitution Society for Law and Policy, July 2007.). PP 1-2.
92. See Ugo Mattei, “Three Patterns of Constitution in the Making”, p.12, where he asks rather cynically, “why should the armed man obey the [courts]?” given the fact that the courts have neither the purse nor the sword.
93. Prior to fidelity, there must be a faith in the legitimacy of constitutions. That, apparently, takes a leap on the part of the faithful. So even when there is no reason that evidences the existence of original legitimacy, we just want legitimacy into existence and remain true to it. Or so I understand Jack Balkin as saying.
94. See Robin West, “Constitutional Fidelity and Democratic Legitimacy” (paper presented at a conference of the American Consti

## Federalism, Diversity and the Regulation of Conflict in the Horn

*Dr. Assefa Fiseha*

*Given the fact that many of the countries in the Horn are inhabited by many nationalities, ethnic groups, tribes, regions and the main source of instability/ conflict are related to concentration of power and resources by some sections of the society who were also responsible for the failed "nation building project" that aimed at forcefully assimilating others into a narrowly defined values of the state that was less inclusive and incompatible to multiethnic context, ideally federalism appears to be the best conflict management device with its promise of shared power and space for multiple identities/loyalties. Yet its prospect among other things, seems limited because of lack of appropriate institutions, the lack of democratic traditions that make it work, exclusionist political culture within the political elite and lack of commitment to the federal will and to operate in a pluralist atmosphere. Both countries seem to be facing as well the challenges of transition: in the case of the Sudan designing an all inclusive democratic and genuine federal solution that has the potential of averting the ensuing threat of fragmentation and in the case of Ethiopia the challenges of transition to multi-party democracy.*

### **I. Introduction: The Popularity of the Federal Idea**

Despite the horrific experience of interethnic tension and conflict following the end of the Cold War in the former USSR and Yugoslav federations,<sup>1</sup> in the contemporary world, federalism as a political idea remains still popular for reconciling unity and diversity under a single political system. Some twenty-five countries of the world covering 40 per cent (two billion) of the population live in countries that claim to be federations. The European Union with its currently expanding vision seems to be evolving into a hybrid of confederal as well as federal institutions.<sup>2</sup>

There are a number of reasons for this increased interest in federalism. Federalism as a political concept and federations in the form of institutions seem to provide 'the closest institutional solution' com-

binning shared rule for some commonly shared purposes and self-rule for other purposes of regional interest in the world today. The reason is simply that there are double pressures calling on the one hand for larger political organizations due to rapid developments in transportation, social communication, technology and other shared values and due to growing awareness of worldwide interdependence. On the other hand there is pressure for smaller self-governing political units<sup>3</sup> established not only to guarantee expression to various forms of diversity but also in some cases resulting from ethno-linguistic dissatisfaction with the present organization and operation of the "nation-state" and global world. Indeed, the late Daniel Elazar spoke of the world as in the midst of a paradigm shift<sup>4</sup> from a world of states (nation-states) to a world of diminished states. There is a global interdependence among highly unequal states and increased interstate linkages of a constitutionalized federal character. This development began after WWII but it was not until the collapse of the former Soviet Union that the extensive and decisive character of this paradigm shift became discernable to most people.<sup>5</sup>

One could add to this the fact that the oldest federations in the West as well as some emerging stable federations like India have been able to survive and adapt to the changing realities in the world. The relative peace and stability together with economic prosperity of these federations contributed to attract the attention of those involved in state restructuring elsewhere in the world.<sup>6</sup>

Although it is at times difficult to pursue it with a lot of force, federalism is also getting popular because it is employed as a means<sup>7</sup> for managing conflicts. Earlier on, modern-ization and economic development were believed to absorb all sorts of diversity. But the 'melting pot' hypothesis and modernization at times simply reinforced rather than diminished forces of diversity. In situations where there is tension between those who want to maintain existing *status quo* and other forces that would like to restructure the state and even secede, federalism presents as a possible solution accommodating both interests. It has the potential to allow national mi-

norities some measure of self-govern-ment within the contours of existing states.

After the collapse of the Cold War and at a time when globalization is penetrating traditional nation-state territories, differences arising from ethnic and religious backgrounds within states, have become a serious cause of violence. According to some studies there are 5,000 -8,000 ethno cultural groups in the existing 200 or so states. Of these, one-tenth of them are estimated to have interest for self-rule and some form of autonomy.<sup>8</sup> Indeed this is more acute in Africa where boundaries were hastily and artificially drawn during the scramble for the continent. One could thus see the obvious tension between those who want to maintain the status quo and those who want to adjust it and that is where federalism comes as rescue.

Earlier on it was argued that ethnicity or group affiliation would be weakened with the modernization of societies.<sup>9</sup> Surely that was the objective of the "Melting Pot" and "homogenizing Nation State Projects." However, this appears to be only half true because the success of modernization in weakening group identity depends on its ability in eliminating or minimizing group exclusion. "As far as there are losers and winners and the basis of winning or losing is attached to group identity, modernity has no positive role in reducing ethnic conflicts".<sup>10</sup> Furthermore, post Cold War developments as well as empirical evidence from multicultural societies hints that *identity does not necessarily vanish from the face of the political discourse even if political and economic situations are favorably accommodative, let alone when it is a state target of destruction under the guise of "nation- building."*<sup>12</sup> Yet although federalism resolves some of the issues the question of integrating different ethnic and cultural groups as well as the issue of accommodat-ing religious and other minorities within the boundaries of existing states have remained one of the main challenges in the contemporary world.<sup>13</sup>

It is in this context that some still consider the federal idea attractive, not only to accommodate diversity but also as a means to contain such conflicts. Yet, one can not deny the fact that the idea of

federalism in Africa does not enjoy the popularity it enjoys elsewhere. Even the Ethiopian federal system that was introduced formally as of 21 August 1995 was adopted against a widely skeptical view about federalism at home and across the continent. Although the central government in many parts of the continent is associated with inefficiency, it is considered by many as soft and corrupt and despite the continent's pluralistic nature and federalism's promise to accommodate diversity, the overriding aim almost everywhere in Africa is the nation-state model giving no political expression to diversity.<sup>14</sup> The pursuit of political unity and territorial integrity at the expense of ethno-linguistic and religious diversity has been a leading objective of African statecraft. For instance, ethnic parties are often outlawed; African states have consistently complied with OAU's principle of upholding colonial borders.

Nor is the postcolonial federal experience in Africa a happy story. Federation failed in francophone West (Cameroon), Ghana, and the Central African federations (Northern Rhodesia, now Zambia, Nyasaland, now Malawi, and Southern Rhodesia, now Zimbabwe)<sup>15</sup> and was aborted in East Africa (Kenya, Tanzania, Uganda). Several factors are accountable for this. In many of these federations, it was the outcome of a former colonial power bequeathing it as a means of maintaining links after independence with little support from inside. It is very much interlinked with the colonial policy of "divide and rule." The units of colonial governments were often merely the product of historical accidents, of the scramble for empire, or of administrative convenience. As a result, the colonial political boundaries rarely coincided with the distribution of ethnic, linguistic or religious communities or with the locus of economic, geographic and historical interests. It is not surprising then that the federations established under this context were doomed to fail.<sup>16</sup> Imposing a federal solution goes contrary to the principle that a federal system is based on a covenant. This certainly is one of the biggest challenges to the success of a federation unless supported by wider section of the society.

In others it failed because the newly emerged federal system failed in the hands of strong one-man leadership (in the case of the attempted East African federation because of competition for power between President Nyrere of Tanzania, Prime Minister Obote of Uganda and President Jomo Kenyatta of Kenya) in general and the lack of commitment to the federal principle in particular. This certainly went contrary to the federal idea of dispersion of power among several decision-making bodies. Lack of sufficient common interests to hold the federation together as well as the lack of balance between the units and the federation also contributed to this failure.<sup>17</sup> Except in Nigeria, the failure of the federal experience resulted in centralized unitary governments of one kind or another.

Thus federalism in Africa is often seen with a lot of skepticism and mistrust. One probable explanation, among others for such widely held skeptical views about federalism has been that political leaders of such a diverse continent thought too much delegation of authority might lead to polarization. This may in the end put territorial integrity at stake.<sup>18</sup> Others have suggested that while in the West after centuries of attempts to suppress claims of national minorities within the nation-state, there is a dramatic change towards accommodating them. In Africa the conditions that brought about the changes in the West are not favorably in place. In the west, after the end of the Cold War and with the expansion of NATO, the traditional fear by states that a national minority will conspire with a neighboring enemy to facilitate invasion or annexation is not an issue and accommodating national minorities poses no risk to the basic geopolitical security of the state. Besides, in virtually every case of multicultural federalism in the west sub-state governments are subject to the same constitutional constraints as the central government. As a result, there is no fear that self-governing units will use their power, culture and religion to impose them on other minorities. In short, the threat of local tyranny is minimized, if not avoided.<sup>19</sup>

In Africa, the security situation as well as the human rights condition, it claimed, are not favorable for generously granting minorities

with a federal system in each of the respective countries. This is not without repercussions. The African state was maintained at a considerable cost. Monopolistic political arrangements such as military government, one party rule, systematic suppression of human and political rights were often rationalized as inescapable means of safeguarding unity. Yet ethnic diversity has not been banished. Bitter wars for secession as well as ethnic conflicts, at times amounting to genocide, were common in many parts of Africa. In general an attempt to forge political unity that disavows diversity survives intact throughout most of Africa. This was further reinforced by the horrors in the former multi-ethnic communist federation of Eastern Europe and the former USSR. Economic dislocations, ethnic transfers and the cleansing that followed, created black spots on the federal image in the context of multicultural states. Federalism was viewed as a recipe for disaster. Yet, neither democracy based on individual liberty nor economic prosperity compensated the claim for accommodation of diversity. In Africa, as one author noted, the economic picture is bleak, democracy is often devoid of content, and there is unfair distribution of wealth among social, class or religious groups.<sup>20</sup>

The post 1991 Ethiopian federal experience taken in this light, stands to be an exception or perhaps a breakthrough against this prevailing trend in the continent. The current Prime Minister is quoted to have said, 'A feudal monarchy and a repressive dictator could not hold Ethiopia together. Now we are trying another way. If Ethiopia breaks apart, then it was not meant to be.'<sup>21</sup> The ruling party seems to be firm in its position that Ethiopia, being a multicultural and multi-religious country, never had a state that reflected its local context and the way forward is towards accommodating these diversities. Yet, many of the concerns and challenges associated with the way federalism operated in the continent as we will see later, remain as challenges even in the Ethiopia's case.

## **II. The Ethio-Eritrean Federation (1952-1962)**

The Ethio-Eritrean federation and the crisis related to its dissolution remained to be the central challenge to three consecutive Ethiopian governments, including the present one. Much has been written about it, but as it goes some way to explaining the operation of a federal system in the continent, we must devote some words to it as well.

The territory now called Eritrea was historically an integral part of Ethiopia since the Axumite Era in the first century AD. Eritrea did not exist as an entity of its own prior to 1890 when it was created by Italy.<sup>22</sup> The historical and cultural background of the Christian Eritreans is identical to those in Tigray. The language Tigrigna is the same as the one spoken in Tigray and belongs to the family of Semitic languages.<sup>23</sup> The Tigray-ans, therefore, form a solid bridge connecting Eritrea with the rest of Ethiopia. The death of Emperor Yohannes in 1889 and the shift of center of power from Tigray to Showa created a favorable condition for Italian colonial expansion.

Between the years 1869-1889 Italy insisted on expanding southwards, despite suffering defeats brought upon them by Ras Alula at Dogali. As early as 1887, Menlik the King of Showa had expressed readiness to negotiate with the Italians about supplies of arms in exchange for cession of territory, if this would ensure his speedy accession to power.<sup>24</sup> Menlik seized the opportunity provided by the political vacuum created and sealed an Italo-Ethiopian pact, the treaty of Wuchale, in May 1889. As a result, part of the territory was ceded and in January 1890, Eritrea was born as an entity. In spite of the treaty of Wuchale, Italy continued expanding southwards and occupied some territories leading to the famous Battle of Adwa in 1896. Even after the battle of Adwa, the treaty of Addis Ababa (October 1896) which abrogated the treaty of Wuchale, recognized the independence of Ethiopia, but confirmed the Italian possession of Eritrea until 1941.

Menlik was in no position, according to some writers, to expel the Italians from Eritrea and he left Eritrea in Italy's possession.<sup>25</sup> Controversies exist as to why Menlik did not insist on expelling Italy from the whole of Eritrea as a victor of this famous war in history. One version of the controversy states that he was compelled to halt further Italian expansion into his territory owing to geopolitical and logistic reasons. If Menlik pursued pushing the Italians out as *Ras* Alula had wished, then Italy could send more reinforcement and the hard won victory could be lost.<sup>26</sup> Whereas the other version states that the territorial cession is seen from the angle of the then existing rivalry between Tigray and Showa. One should note the fact that Menlik was consolidating his power both in terms of weapons and territory when Emperor Yohannes was busy fighting foreign forces. Because of this, they believe Menlik gave the territory to Italy in a bid to weaken his northern rivals. For instance James Paul recently wrote: 'Menlik's 1896 post Adwa treaty with Italy guaranteed Ethiopia's independence within settled borders in exchange for its recognition of Rome's sovereignty over the territory still occupied (even after Adwa) by reinforcing Italian armies based in Asmara. Thus was created in a legal sense a new typical artificial colonial territory, which Rome named Eritrea. Menlik was praised for his *realpolitik* but in appeasing Italy's colonial appetite he had sanctioned the partitioning of the Tigrayan peoples: those north of the Mereb River became subjects of an Italian colonial rule and those to the south remained independent Ethiopians but were governed by a new monarchy from distant Showa.'<sup>27</sup>

As a result, from 1890 until its liberation in 1941, Eritrea was administered as a colony by the Italian colonial Ministry, under a governor nominated by the Italian king. After liberation Eritrea remained under British rule till 1952. After World War II Italy renounced all right and title to its colonies and the Treaty of Peace signed in Paris in 1947 provided for the final disposal of the former Italian colonies to be determined by agreement among the four allied powers, the USA, USSR, UK and France. Failing agreement, the matter would be submitted to the UN General Assembly for disposition. The four victorious allies established an investigating

committee to come up with a proposal on the future of Eritrea. The United States based on its interest in the region and good relations with the Emperor was keen to see Eritrea joined to Ethiopia in unity. The USSR and some Afro-Arab countries were on the other hand opposed to this move. They took the position that only separate existence could guarantee the sovereignty and progress of Eritrea. At the same time, however, they were sympathetic to Ethiopia's need for access to the sea. Because of disagreements the matter was referred to the United Nations.<sup>28</sup> In November 1949 the General Assembly set up the United Nations Commission for Eritrea, constituting members from Burma, Guatemala, Norway, Pakistan and South Africa whose task was to visit Eritrea and after taking into account the interests of the inhabitants and the interests of all the countries involved to report its findings to the UN. The findings were however divided. Burma and South Africa proposed federation with Ethiopia, Norway proposed union with Ethiopia while Pakistan and Guatemala proposed UN trusteeship for ten years and independence to follow thereafter.

In the period preceding the federation, the demand of political parties in Eritrea was diverse concerning the destiny of Eritrea. Many Eritreans demanded unity with Ethiopia, others requested for immediate independence and still others urged for a partition or at least a different status for the western side of the province. In short, the internal situation was divided.<sup>29</sup>

On the Ethiopian side, Haile Selassie demanded the full incorporation of Eritrea and nothing less. Ethiopia's claim was based on her need for access to the sea and by the claim of historical title and cultural affinity of the two populations. Furthermore, Ethiopian diplomats successfully invoked the OAU principle of non-territorial intervention in the internal affairs of the state and the need to respect the territorial integrity of African States whose territories were defined by colonial borders. Ethiopia argued that if Eritrea's plea received a hearing, it would upset the entire post-colonial African state system as legitimized by the Cairo Resolution of the OAU in 1964.<sup>30</sup>

The proposal by South Africa, Norway and Burma, constituting a majority, was finally approved by 46 to 10 with four abstentions. The Eritrean domestic situation, the inter-national context and Ethiopia's case finally brought what is commonly described as the '*compromise formula*,' which became UN General Assembly Resolution 390 A (v).

The UN General Assembly passed this resolution on December 2, 1950 and the Resolution stated that Eritrea should form 'an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian crown.' The first seven Articles of the Resolution passed by the UN General Assembly on December 2, 1950 formed the Federal Act. A draft constitution prepared by UN experts was submitted to an Eritrean Assembly and the latter adopted it on 10 July 1952. By proclamation Number 124 of 11 September 1952 the Eritrean Constitution with the Federal Act was put into force in *Negarit Gazetta*. At this point in time, the federation of Eritrea with Ethiopia came into effect.<sup>31</sup> The Federal Act as well as the Eritrean Constitution provided for a 'federal arrangement' between the two governments. According to the Constitution 'Eritrea is an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown'.<sup>32</sup> The government of Eritrea was authorized, as a manifestation of its autonomy, to exercise legislative, executive and judicial powers.<sup>33</sup> The actual division of power under the federal act vested a number of basic functions in the federal government: notably defense, foreign affairs, currency and external trade while reserving residual powers to the Eritrean government. These included civil and criminal law, police, health, education, natural resources, agriculture, industry and internal communication.<sup>34</sup>

Many controversies arose over the ambiguity of some of the concepts included in the documents as well as over the whole federal compromise. For instance, sharp differences of interpretations were revealed between the Ethiopian Foreign Minister and the Commissioner of the UN on the matter. Among others, "The Ethiopian Minister stressed that the truly essential powers rested with the Ethiopian Government, while the Commissioner was of the opin-

ion that Eritrea was to become an autonomous unit with its own legislative, executive and judicial powers. Ethiopia saw a close tie between the Emperor and the executive of Eritrea, even envisaged his appointment by the Emperor. In contrast the Commissioner insisted the resolution permitted neither appointment nor control by the Emperor, since there was to be no limitation to Eritrea's autonomy.<sup>35</sup> As will see later these and other contradictions were simply reflections of the fact that the federation was introduced in the absence of consensus between the parties and was simply, a short term strategy for unity (means to an end) rather than a genuine solution to the problem. There seemed a consensus though that the term autonomous unit signified not a sovereign state but rather a politically organized unit linked federally with Ethiopia and that the phrase under the sovereignty of the Ethiopian crown implied that the federation, not the autonomous unit, enjoyed sovereignty.<sup>36</sup>

More controversial were the status of the federation and its subsequent dissolution in 1962. Closer observation of the 1955 Constitution and the Eritrean Constitution seems to suggest that Eritrea was only an autonomous region rather than a full-fledged unit in a federation, as we understand it today.<sup>37</sup> The Resolution characterized Eritrea as 'an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown'. It did not accord Eritrea the status of a state in a federal union with Ethiopia.<sup>38</sup> In a federation resulting from two units, one would expect there to be three institutions. The two constituent units and one other overarching federal government for both of them. Furthermore, a supreme constitution which both units submit to, is a requirement. None of them existed in the UN sponsored federal compromise. The Resolution had provided for a Federal Council, an institution that was a faint approximation of a federal body. This body was to comprise Ethiopian and Eritrean representatives in equal numbers and *advise* the Emperor on matters of the federation. The Council was simply ignored and practically done away with before it could even start functioning. As a result, the federal powers belonged to the Ethiopian government. The Ethiopian Emperor was the sovereign, the Ethiopian courts were the federal courts and the Ethiopian Ministers were the minis-

ters of the federal government.<sup>39</sup> Tekeste states, 'For all intents and purposes the resulting relationship between Ethiopia and Eritrea was not in the least federal. Even according to the intentions of the union, Eritrea was not granted a federal status but only a status of autonomy.'<sup>40</sup>

However, this constitutional ambiguity could not serve as a justification for not implementing even the regional autonomy. Even Eritrea's mere status of autonomous region was not tolerated by Haile Selassie's regime.<sup>41</sup> The reasons as stipulated by many writers seem to relate to the nature of the two incompatible Constitutions. Ethiopia by then had a feudo-monarchical system of government, ideologically sustained by some notion of the divine right of kings. It was imperial. The emperor ruled as an absolute monarch and as head of an empire every part of which he sought to subordinate to himself. The government had a notion of territorial integrity that was incongruent with federal or other structures of decentralization and hence the dissolution was no surprise. By contrast, the Eritrean Constitution was one modeled on those of Western democracy. It provided for three branches of government based on rule of law, it stipulated for fundamental freedoms and a multi-party system.<sup>42</sup>

Haile Selassie demonstrated a considerable diplomatic success when he orchestrated a federation between Ethiopia and Eritrea with the approval of the UN. However, the regime lacked *the political wisdom and political will* to maintain the regional autonomy. As early as 1955 the Emperor's representative in Eritrea already hinted at the fact that 'there are no internal or external affairs as far as Ethiopia is concerned...' and pointed out that 'the affairs of Eritrea concern Ethiopia as a whole and the Emperor.' In 1958 the Eritrean Assembly voted "unanimously" to abolish the Eritrean flag and use only the Ethiopian flag. In 1959 the Ethiopian penal code replaced the existing legislation in Eritrea. In 1960 the Eritrean assembly voted "unanimously" to change the name Eritrean *government* to Eritrean *administration* and other adjustments connoting its lower position than a federation. On 14 November 1962 again the Assembly

voted "unanimously" for the abolition of the federation. Whether this important series of events was undertaken with full backing from the Ethiopian side or not is a troublesome question. But few seem to doubt the fact that these events were taking place with full knowledge and influence from both sides of the 'federation.' In as much as the Imperial regime had wanted to terminate the federation, the Eritrean Union party,<sup>43</sup> the then governing party in Eritrea, cooperated equally to the demolition of the autonomous status.<sup>44</sup>

The controversial debate among Ethiopian and Eritrean intellectuals as well as foreign writers begins with the status of the 'federation' that was in force from 1952-1962. The controversy gets reinforced with the impact of its dissolution in 1962. Many believe that by virtue of this compromise formula, the Resolution formalized the decolonization of Eritrea at this moment in time. Others believe that Eritrea was formally decolonized in 1993.<sup>45</sup>

The bulk of Ethiopian intellectuals believe that the Eritrean case is a case of secession rather than decolonization. The argument is that neither the terms of the Resolution nor international opinion following the dissolution allow the General Assembly to reserve residual power to itself upon any violation.<sup>46</sup> The arrangement under the Resolution merely conceived of Eritrea as an autonomous decentralized unit, which is conceptually different from confederation and federation. Legally speaking, such an autonomous status can be modified by the central government and the Ethiopian Crown being sovereign, had every right to do what ever it wanted, though politically it was not advisable.<sup>47</sup> Consequently, Eritrea did not have a legal personality under international law until 1993. Regarding the charge that the re-incorporation of Eritrea in 1962 was illegal, it is important to note that it was the elected Eritrean Assembly that decided to terminate the federation in the first place. A minority of Eritreans also shares this view. Tekeste for instance wrote, 'the war in Eritrea had neither [a] colonial character nor that of [a] war fought against [a] foreign dominator. It was an internal war for power sharing or control of state power.'<sup>48</sup>

Another point of equal importance is the fact that parallel to the series of measures indicated earlier on, the Muslim League was more or less consistently opposing the measures taken by the Eritrean assembly. It is no surprise therefore that the first armed opposition came from this group. It was to constitute the Eritrean Liberation Front (ELF). As a protest to the dissolution of the federation, a clandestine movement started around the same period first by the ELF and later by the (Eritrean People Liberation Front) EPLF and continued until 1991. Many consider the dissolution of the federation a cause of the protracted war that stayed for thirty years until the EPLF *de facto* controlled Eritrea in 1991 and a referendum held in 1993 resulted in Eritrean independence.<sup>49</sup>

Considering Haile Selassie's ambition of centralizing power, the failure of the Ethio-Eritrean short-lived autonomous experience was no surprise. What is more remarkable is that the regime was not willing to tolerate it even though there were clear indicators of the probable long-term consequences of the collapse. The failure of the decade of federal experience also fits the hypothesis that a federal system should be based on a covenant, should have internal support and should not result from outside. Political actors also need to show the *political will* to make it work. As noted already, most post-colonial federal experiments in Africa failed for similar reasons. There is another bitter lesson for those who still claim to follow the Eritrean example of secession. Secession or the emergence of an independent state does not necessarily result in the establishment of a stable and democratic state. This is evident not only from the experience of post-independence Eritrea but also from many other of the post-independence African states. Secession or independence simply replicates the nation state without resolving the controversial and normative question of how to politically integrate, share power and resources among several contending forces.<sup>50</sup>

### III. Federalism, Diversity and Conflict Management in Ethiopia

#### 1. Introduction

Ethiopia is widely known as a country that succeeded to escape Western colonial domination in the African continent. Ethiopia is a multicultural state- hosting more than eighty of what the 1995 constitution calls "nations, nationalities and peoples" and multi-religious where fifty percent of its population being Orthodox Christian, an estimated forty percent Muslim and the rest belonging to other minor religions. It has a population of 79.2 million making it the second most populous country in Africa next to Nigeria.

The more than 2000 years of long standing independent history has left strong unifying legacies. For example, the common history of all Ethiopians in defending the sovereignty of the country from colonial aggression at the famous battle of Adwa in 1896 and other similar cases seems to symbolize one of the fundamental values which people still cherish and respect as their common legacy. Despite the wealth of differences among the different ethno-linguistic groups, the two oldest religions Orthodox Christianity (since the 4th Century) and Islam (since the 8th century) have by and large served as unifying factors crosscutting ethno-linguistic boundaries. The long years of independence means that it is a country with its own written script *Geez*, its number (*Kutur*) and own calendar.<sup>51</sup> Ethiopia is a founding member of the United Nations, as it was of the defunct League of Nations, Organization of African Unity and home to and a leading member of the African Union.

Except for the 20<sup>th</sup> century and leaving out some exceptions,<sup>52</sup> Ethiopia existed for the most part of its long and independent history,<sup>53</sup> principally under a monarchy with the Orthodox Christian faith serving as pillars of unity and various kinds of regional forces representing diversity and exercising important powers such as taxation on some economic activities, maintenance of local security and regulation of trade. Such *de facto* decentralization is not only

enshrined in the oldest constitutional documents such as the *Kibre Negast* (Glory of the Kings) but is also reflected in the imperial design. The plurality of kings, with the *Niguse Negast* (king of kings) above them signified some kind of federal or confederal government structure. Thus the seeds of what Livingston calls “federal Society”<sup>54</sup> (regionally grouped diversity) has been there for long. These are essential features of what we understand today as the federal principle. Suffice to emphasize here that before the emergence of the modern federal system in the United States in 1787, its features were never as clearly articulated as they are today. The more amorphous confederate form was predominant.<sup>55</sup> The decentralized feudal state structure changed dramatically with the emergence of strongly centralized Imperial regime (1930-1974) and the Military regime (1974-1991) that replaced it giving rise to a protracted civil war and political instability.<sup>56</sup> Even after the 1974 sweeping Revolution, except for the change of ideology from Solomonic genealogy to Socialism, the centralist character of the state remained intact and was even strengthened to a degree that far exceeded the imperial regime.<sup>57</sup>

The process of centralization, some would prefer to call it “nation building” was not without consequences. Firstly, the incorporation of the South, the Southwest and the Eastern sides from their previously autonomous position to complete absorption meant that the notion of the state, its values, institutions and culture were imposed on the incorporated kingdoms. Secondly, it brought about all sorts of diversities in terms of religion, language, tradition and culture. However, as the state failed to accommodate this diversity, the religious, lingual, cultural as well as political and economic dominance gave birth to the “question of nationalities.”<sup>58</sup> Thirdly, the state became extremely centralized at the expense of regional rulers. The political marginalization of the bulk of the community led to civil wars whose cause fundamentally differed from earlier ones. This time resistance not only called for state reform but even at times challenged the state itself.<sup>59</sup> Several studies hinted that conflict in traditional Ethiopia was mainly an instrument for asserting some level of regional autonomy and not for upsetting the

whole system, nor was it for separation.<sup>61</sup> “God can not be blamed, the King can not be accused” was the main tenet. The opposition, whatever form it took, mainly looked for adjustment and restoration of violated rights like better administration, lower taxes, respect for local autonomy and reduction of corruption. By and large the legitimacy of the Monarch and its ideological roots were not attacked. In the 1960s, however, things started to change. The new forms of resistance that took shape in the form of “national liberation fronts” changed significantly in terms of leadership, social composition, motivation and ideological orientations.<sup>61</sup>

### **Explaining the Crisis<sup>62</sup>**

With the emergence of centralized administration, Ethiopia faced serious state crisis.

Attempts at explaining the cause of the state crisis have not only been less satisfactory but are also found to be diverse ranging from those who even today consider it was all a normal process of “nation building” and hence consider the liberation struggle as a form of tribalism to the instrumentalists<sup>63</sup> that focus on the concentration of political and economic resources at the center as a core source of tension and that emphasize the proliferation of ethnicity as an erroneous comprehension of political and economic deprivation and the ruling party- Ethiopian Peoples Revolutionary Democratic Front (EPRDF), a product of the 1960s Ethiopian Student Movement that focused on the “operation of nationalities,” that is, a ruling elite dominantly from one nationality controlling power, resources and narrowly defining the values and institutions of the state as a main cause. A few political elites even went further to state that it must be seen as a form of “internal colonialism.”<sup>64</sup> Needless to say all approaches seem to have their own serious limitations.

Certainly the advocates of the “nation building” process and the instrumentalists fail to grasp one of the central issues of the debate

in diverse societies like Ethiopia. The Ethiopian state that emerged as a result of the centralizing trend was qualitatively different from historic Ethiopia not only in terms of its territorial size but also in terms of ethno-linguistic composition and religious diversity. The majority of the ethno-linguistic groups incorporated were told in no ambiguous terms to assimilate into this state. Rather than attempting to forge a state from the newly introduced diversity, the regimes imposed a narrowly defined state, whose cultural, social, political and religious foundation and its institutions failed to reflect the existing diversity on the ground. It is not surprising then that the legitimacy of the government, its institutions and the values upon which it is established remain one of the sources of tension and at times the cause of its terminal crisis. In other words, the challenging issue is how to constitute a legitimate government from all the ethno-linguistic groups that do not squarely fit the usual notion of national majorities versus national minorities.<sup>65</sup> The traditional “nation-state” project certainly assumes the existence of a dominant national group and in country’s like Ethiopia where there is no such clear dominant majority, it becomes a mask for the “majority’s” culture, language, religion to become the national culture, language or religion.<sup>66</sup> Perhaps the absence of such a numerical majority that dominates the political process at the center has a lot to explain for the persisting regime instability, the interethnic tension and rivalry among the groups for exclusive control of power. One need to note how other multicultural societies<sup>67</sup> like India and Switzerland faced this reality.<sup>68</sup>

Thus depending on the strength of the claims, identity and history of minorities, however, decentralized or federal system of government appears to be the genuine solution if the state is to survive by accommodating diverse groups while maintaining unity and avoiding fragmentation.

There is additional crucial point that the “nation builders” and the instrumentalists fail to realize. Post Cold War developments as well as empirical evidence from multicultural societies hints that *identity does not necessarily vanish from the face of the political discourse even if political and economic situations are favorably accommodative, let alone when it is a state*

*target of destruction*<sup>69</sup> under the guise of “nation- building.” Thus, while the nation builders have a point as they emphasize on the shared values and the difficulties of integration and the instrumentalists by focusing on the economic and political factors, two of the core causes of political instability, they often fail to consider the identity factor as a cause of tension in multicultural societies.

On the other hand, the ruling party has for long advocated that it is the oppression of nationalities that is at the heart of the crisis and the political and economic marginalization is a consequence rather than a cause. Although in the early 1970s there has been an intense competition between ethno-nationalist parties and class based parties, the former dominated the scene. The present ruling party, EPRDF as a coalition of ethno nationalist parties and as a main architect of the transition (1991-1994) and the 1995 Constitution long advocated for nationalities right to self-determination up to and including secession as a decisive remedy for the resolution of Ethiopia’s long standing problem of the “nationality question.”<sup>70</sup> Yet, this in itself fails to underscore the point that in the end political and economic factors are crucial factors behind every conflict. Besides, this perspective fails to address adequately the problem of minorities within the different units and cities that often are inhabited by ethnically intermixed individuals. Thus an approach that combines the accommodation of diversity with genuine sharing of power and resources among the diverse groups and the commitment to human rights will better explain the success or failure of the state in multicultural societies in general and in Ethiopia in particular.

The federal system that started *de facto* since 1991 and *de jure* following the adoption of the 1995 constitution attempts to end the cycle of political crisis by decentralizing power and resources to nine constituent states and two autonomous cities and by ensuring self rule to the ethno-linguistic groups at various levels.<sup>71</sup> The essence of this section is that given Ethiopia’s diversity and its source of political instability, ideally federalism appears to be the best conflict management device. However, although the federal system created a political space for the different ethno-linguistic groups, it seems to

be facing series of challenges that include the lack of appropriate institutions, democratic traditions that make it work, exclusionist political culture within the political elite and issues related to the protection of minorities within the regional states.

## **2. Division of Powers, Institutions, Policies**

In terms of origin, while some contend that it is a ‘coming together’<sup>72</sup> federation, the Ethiopian federation as it appears on text reflects both aspects of ‘coming together’ and ‘holding together.’ Some of the features of the coming together include: first, the Preamble, distinct from many other federal constitutions, commences with the phrase ‘We the Nations, Nationalities and Peoples of Ethiopia ... are strongly committed in full and free exercise of our right to self-determination ... ‘ Furthermore it is stated, ‘All sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia.’<sup>73</sup> Elsewhere it is indicated that ethno-linguistic criteria are the sole basis for organizing the units that constitute the federation.<sup>74</sup> If the federal government abuses their right to self-administration, they are entitled to reassert their powers of sovereignty by changing or abolishing the government. This collective right of nations, nationalities and peoples is clearly spelt out as the right to self-determination.<sup>75</sup> This right is not even subject to derogation during national emergency.<sup>76</sup> Thus the foundation of the Ethiopian state as well as its continuance now requires the consent of each nation, nationality and people.<sup>77</sup> This gives one the impression that the federal state is a union formed through the free consent of each of the nations, nationalities and peoples.

However, there are also ‘holding together’ aspects and the mere emphasis, as if it is a federation built from the nationalities, will be an exaggeration. Although some parts of the country experienced a *de facto* autonomy in the pre-1991 period, many of the constituent states that now form the federation had no such experience previously. The Preamble, taken together with other provisions of

the text, may be considered as evidence to prove the considerable importance that the accommodation of diversity has in contemporary Ethiopian politics. Nevertheless, the federation is incomparable to the states and cantons, for instance, of the United States and Switzerland. Surely, the present state organization, is not something that reflects the previous organization of the provinces. In fact it is meant to introduce a significant and deliberate departure from the former provincial experience as the provinces were not convenient to ensure self-rule to the nationalities. In short, it is a federation established from a formerly unitary state. And the states have had no prior existence as states and if any one existed, it is only as a province in a highly centralized imperial state, a military dictatorship, or during brief transitional period (1991-1994).<sup>78</sup> Besides the overriding power of the federal government in practice, the limited role of the constituent states in influencing the federal law-making process, explains its 'holding together' aspect.

With a view to addressing the age old cause of the state crisis, the federal system intends to decentralize power and resources and resolve the "nationalities question" by accommodating the country's various ethno-linguistic groups. Among other things, the Constitution states that the federal government and the states shall have legislative, executive and judicial powers.<sup>79</sup> Although it is a fact that none of the constituent states existed as autonomous entity, owing to the aggregate nature of the federation, the federal government appears to be one with enumerated and limited powers<sup>80</sup> and the states hold residual powers.<sup>81</sup> The Constitution also comprises a brief account of some state powers in addition to the reserve power. It might appear that, by virtue of the reserve clause, any power not mentioned in Article 51 belongs to the states. But the Constitution gives other powers<sup>80</sup> to the federal government, powers which are not mentioned in Article 51 but which are distributed through out the text. These include the power to enact labor, commercial and penal codes, to approve federal appointments submitted by the executive and to establish federal institutions. So the reserve powers of the states only apply after discounting all the powers of the federal government, which are

enumerated through out the text of the Constitution, and not just in Article 51. It is also worth noting that the Constitution provides neither 'a necessary and proper clause' as in the United States Constitution, nor a comprehensive list of shared powers as in the German Basic Law. Even those powers that appear to be exclusive federal powers seem to have some limitations in terms of the extent of their scope.

The Constitution empowers the federal government to *'formulate and implement the country's policies, strategies and plans in respect of overall economic, social and development matters...; ...establish and implement national standards and basic policy criteria for public health, education, science and technology...'*<sup>82</sup> One may state that this is perhaps more than the 'necessary and proper' clause for it grants the federal government with wide powers on economic, social, health and education aspects. It seems to put primary responsibility on the federal government to determine major policy directions and standards. This expressly covers all economic and social issues that were federalized during the 1930's in the United States. There is no doubt that these powers cover the bulk of concurrent power on a vast field of social and economic affairs as stated in other federations. However it is also possible to argue with equal force that if one follows the terms closely, the powers of the federal government even in these vital areas do not seem exhaustive. The same Constitution also empowers the states, among other things 'to formulate and execute economic, social and development policies, strategies and plans for the state.'<sup>83</sup> There is obviously a lot of overlap between the powers of the federal government and the states concerning economic, social and development plans as well as health and education. But the extent of power of the respective governments is not clearly stipulated. To what extent could the federal government outline the national standards and policy criteria or the breadth and depth of the nationwide policies? It is consequently also not clear what is left for the states. But it seems clear from the provisions that the federal government cannot exhaustively legislate on all these matters. The wording of Article 52 (2) seems to suggest that the states are endowed *not merely with*

*administrative power* but with the power to formulate and execute economic, social and development policies. No doubt that this power is the basis for shared/framework power covering the bulk of social and economic sphere.

The federal system operates within a parliamentary form of government.<sup>84</sup> At federal level there are two Federal Houses: The House of Peoples Representatives (HoPR) and the House of Federation (HoF).<sup>85</sup> The former is composed of members elected by the people for a term of five years in a direct and fair election and contains 547 members, 20 of which are allocated to minorities. The members of the House are believed to be representatives of the Ethiopian people as a whole and not of a specific group.<sup>86</sup> Although on appearance one may get the impression that the two-chamber parliament is responsible for policy-making at federal level, it is only the HoPR which has the sole power of legislation in all matters assigned to the federal government. The same House is the highest authority in the federal government.<sup>87</sup>

The federal executive consists of the ceremonial president and a powerful Prime Minister along with his cabinet who is elected from among members of HoPR and in this sense is not necessarily the party leader.<sup>88</sup> Both as a result of constitutional principle (Article 39-3) and from practice, there is every attempt to reflect the country's diversity in the establishment of the executive. The federal President, who is the head of state, is nominated by the HoPR from among its members but approved in a joint session of the two Houses by a two-thirds-majority vote for a term of six years. The powers of the President are nominal and symbolic. The President opens a joint session of both Houses every September, signs a draft law before its promulgation and receives credentials of foreign ambassadors.<sup>89</sup>

The institutions of the regional states (legislative, executive, taxing powers, civil service) indicate enormous resemblances and most of the capital cities, including the federal capital- Addis Ababa are so far the political, economic and cultural capitals, the balance being

heavily in favor of Addis Ababa. At constituent unit's level, the legislative bodies are uniformly uni-cameral except in two states (Harar and the Southern, Nations, Nationalities, Peoples and Regional State-SNNPRS) where second chambers exist mainly addressing concerns of specific groups. According to Article 50 sub 5 states are empowered to draft, adopt and amend state constitutions. The states are entitled to frame and ratify their own constitution subject to some restrictions stipulated under the federal constitution<sup>90</sup> and the state constitutions cannot contradict the federal constitution.<sup>91</sup>

There is another point that the constitution shares with other multicultural federations like India and Switzerland: in its attempt to forge unity in diversity, it has adopted a pluralistic approach towards language.

### **Language Policy**

The issue of adopting one or more official languages is one of the thorny points in multicultural federations. Regional and ethno-linguistic groups usually press for the official recognition of their language, both at regional and federal levels. One reason is that language is seen as highly related to the cultural self-identity, and survival of groups.<sup>92</sup> Another is that it is intertwined with the power position of ethnic groups. To a certain degree it affects access to national jobs and therefore the participation of members of ethno-linguistic minorities at the center.<sup>93</sup>

The adoption of more than one official language may be a substantial burden, but it is a necessary price, which must be paid where otherwise only an imposed single language is likely to disrupt the state.<sup>94</sup> The counterargument is that a single national language serves both as lingua franca and as a means for promoting national unity. Multicultural federations have often adopted either of the two approaches at federal level to settle the issue of official language.<sup>95</sup>

Pre-1991 Ethiopia's regimes insisted on having one official and national language for all affairs of public life. Indeed the issue of language is one of the areas where one clearly observes the lack of any sign of commitment to pave the way for pluralism. Both the emperor and the military regimes in line with the century of assimilation policy insisted on imposing Amharic on the majority of the ethnic groups leaving no room even at local levels. Formally Amharic was the official language,<sup>96</sup> but for all intents and purposes, it was also the national language. Apparently, the 1987 Constitution imposed an obligation on the state to ensure the equality of languages of nationalities,<sup>97</sup> but like all other provisions it was not taken seriously. The implications of the provisions in a unitary state with an assimilationist mission are clear. All cultural, educational and identity matters were required to be expressed in Amharic. All other languages being relegated to a secondary status.

The 1995 Federal Constitution attempts to balance the interest of maintaining national unity on the one hand and the ethno-linguistic groups demand for cultural preservation and distinctiveness on the other. It declares Amharic as the working language of the Federal Government but does not spell the official language for communication between the federal government and the states although as a matter of practice, Amharic remains to be so.<sup>98</sup>

At first sight, the present constitution may not seem to be significant departure from the 1987 Constitution, which also gave all Ethiopian languages equal state recognition. The present Constitution entitles member states to determine by law their respective working languages.<sup>99</sup> This opens the way for the states to adopt their own official languages. Looking at the practical records of the regional states, three different approaches seem discernible. First, some states have adopted their own majority language as the working language of their respective regional administrations. Amhara, Tigray, Oromia, Afar, and Somali fall into this category. Other states which do not have a majority ethnic group (Benishangul -Gumuz, SNNPRS and Gambela) have chosen Amharic as their respective working languages. The third trend is the one adopted by

the state of the Harari Regional State, where Harari and Oromiffa have been chosen as official languages.<sup>100</sup> What is particularly interesting in this development is its significance in portraying how sub-regional political actors may opt to deal with the language issue under the general constitutional framework.<sup>101</sup>

The position taken by the federal constitution is considered by some as too much, while for others is too little. Some contend that given the ethno-linguistic lines the federation claims to follow, it was not unexpected to have some of the dominant languages serve as equal working languages.<sup>102</sup> Others argue that even this midway position is unacceptable and contend that this has created the biblical Tower of Babel in Ethiopia. They even go further and state that Amharic should have been considered as the national language of Ethiopia.<sup>103</sup> While the former observation seems to be correct in light of other multicultural federations like Switzerland with seven million people and well-developed economy, in the Ethiopian context, it should be seen against the background of seventy nine million people, more than eighty languages and poor economy. The latter view simply closes its eyes to the fact that accommodation of diversity is an equally important value in federations.

In terms of religion, the federal constitution declares secularism (Article11), strict separation of state and religion in response to historical marginalization of the Muslim population and other minor religions. However, these general features of the Ethiopian Constitution have to be understood along with several other distinct features.

However, these general features of the Ethiopian Constitution have to be understood along with several other distinct features.

### **3. The Explicit Recognition of Nations/Nationalities as Building Bricks of the Federation and Its Implications**

One feature one notices throughout the Constitution is the utmost importance given to the ethno-linguistic groups within the Ethiopian polity. Unlike many constitutions, the Preamble of the Ethiopian Constitution does not commence with the traditional constitutional formula of “we the people,” but with “We the Nations, Nationalities, and Peoples of Ethiopia” and somewhat vaguely the Constitution grants ethno-linguistic groups a kind of ‘confederate’ position, in the federation. Dealing with the fundamental principle of the constitution, chapter two, the text declares, “All sovereign power resides in the Nations, Nationalities, and Peoples of Ethiopia.”<sup>104</sup> The amendment procedure (Articles 104-105) as well is very rigid requiring the consent of all the states by majority votes for some matters or two-third of the states for other cases. The same Constitution grants the nations, nationalities and peoples the right to self-determination. It insists that there must be some congruence between the nation, nationality and territory they inhabit.

A consequence of this is the fact that the Constitution organizes the constituent states on “the basis of settlement patterns, language, identity and consent of the people concerned.”<sup>105</sup> While this provision does not in so many words state that they are organized along ethnic lines, most analysts and practice so far make it clear that the key factor in delineating the states seems to have focused mainly on the criteria of language.<sup>106</sup> Accordingly, the Constitution enumerates nine member states of the federation.<sup>107</sup> The Constitution employs the term “state” but in common usage they are called regional governments (*kilil*), a name carried over from the transitional period (1991-1994). They are the states of: Tigray, Afar, Amhara, Oromia, Somalia, Benshangul/Gumuz, the SNNPRS, the Gambela Peoples and the Harari people. The notion of granting to the nations/nationalities their own “mother” states as enshrined in the Constitution entitles every nation/nationality (to those who have not yet been granted a state) the right to establish their own

state<sup>108</sup> at any time. This is an expression of the idea that the right to self-determination and the right to self-rule can best be realized through the creation of states whose borders coincide with the nations/nationalities. The federal system, therefore, takes the territorial principle seriously.<sup>109</sup> Theoretically, therefore, every nation/nationality can have its own state and hence we can imagine no less than eighty states. It is important to point out that seven out of the nine constituent states (the only exceptions being the SNNPRS and Gambela) are named after the major nationalities that “dominate”<sup>110</sup> the respective states. Addis Ababa<sup>111</sup> and Dire Dawa<sup>112</sup> are specially administered autonomous city-states directly accountable to the federal government and do not fall within the territory of any of the constituent states. Their position is, therefore, less autonomous compared to the constituent states.

Many multicultural federal systems like India and Switzerland provide one way or another recognition and accommodation to groups. But the most striking feature of the Ethiopian federal system, from many others, is the “explicitness, at constitutional level, of its affirmation of the national self-determination and the logical consistency with which it attempts to institutionalize that principle.”<sup>113</sup> Not only are nations and nationalities granted the right to form their own states but they are also guaranteed the right to walk away from the federal pact after going through some strict procedures. Interestingly, it is the state and the Constitution itself that encourages any group to think itself as a nation/nationality and promote it as a candidate for statehood. The granting of “mother” states to some of the major nationalities is a logical consequence of this. In principle there is no constitutional asymmetry among the states, although there is some level of political asymmetry.<sup>114</sup> The institutions of the regional states (legislative, executive, taxing powers, civil service) indicate enormous resemblances and most of the capital cities, including the federal capital- Addis Ababa are so far the political, economic and cultural capitals, the balance being heavily in favor of Addis Ababa.

### 3.1 Viable Federal Units/ De Facto Asymmetry?

There is a peculiar feature related to the explicit recognition of the nationalities as building bricks of the Federation. In many other multicultural federations, the federal outcome arose in response to a particular sort of problem, namely the problem of competing nationalisms within a single state. It evolved out of piecemeal democratic negotiation and in response to particular nationally mobilized groups.<sup>115</sup> To borrow Richard Simeon's phrase there is bound to exist "diversity of diversities"<sup>116</sup> both within the global context and within each respective federation. The strength of the claims of these diverse groups is, therefore, expected to be different requiring flexibility in the design of the constitutional solution. In the case of Ethiopia, the state structure represented by the central government was forcefully dismantled in the hands of national liberation fronts (in 1991) that fought against the system representing the ethno-linguistic groups in different parts of the country. The decision to create the federation came from the victorious national liberation movements under a circumstance where the military and security apparatus of the unitary state was practically abolished. The Ethiopian approach is therefore, revolutionary in its straightforward grant of self-determination and self-rule to all nations and nationalities. Certainly, there were dozens of ethno-nationalist movements claiming some form of regional autonomy and even at times secession.<sup>117</sup> However, it is also true that not all groups within the Ethiopian state were mobilized and if mobilized, they were not necessarily mobilized on ethno-nationalist basis. The point is that federal autonomy has been accorded to groups that had not in fact been politically mobilized.

This is not without implications. Because the groups have not mobilized for it and because some of them failed to articulate regional interests as political entities, not as anthropological units, some of the constituent units have not yet been able to evolve into viable entities as expected, even after a decade of federal experience. Certainly, there are many contributory factors to their crisis.<sup>118</sup> It must be noted that the federal system was introduced after the fall

of the most centralized regime that neglected the bulk of the ethno-linguistic groups. Thus, from inception most of the constituent states lacked skilled manpower and resources to man the newly established local institutions. There were only a few hundred experts, for example, in Afar, Somali, Gambela and Benishangul-Gumuz regional states in 1995/1996 and the situation remained the same until the Ethiopian Civil Service College took the responsibility of training civil servants for these regions with a view to breaking the historic marginalization from political power and resources. Historic marginalization also meant that there was little or no infrastructure in the less integrated regions, making self-rule difficult. Less integration in historic Ethiopia also implies that the inhabitants of low land regional states, in relative terms, being mostly pastoralists lacked the tradition of indigenous settled administration and a disciplined ruling party capable of articulating regional interest. Thus there is lack of not only disciplined and institutionalized local parties but the local politics operates under a socially fragmented and sectarian political elite.<sup>119</sup> As some of these low land regions are also located on the borders with neighboring states, local politics is very much interlinked with regional politics (the Somali region being the classic case) and thus subject to manipulation and maneuver by internal and external forces. These and other factors facilitated governmental and party interference from the center. The low level of political development in these regions means that the ruling party plays a greater role in local administration than in other constituent states.

Thus close observation of the performance of some of the states suggests that they have not yet been able to articulate distinct regional interests, a viable political unit that can compete with the federal government in intergovernmental relations. In short, some do not seem to have acquired the status of nation/nationality, which the Constitution seems to generously grant them.<sup>120</sup> This reflects that the federal system is in practice asymmetric in many respects. For instance, as far as intergovernmental relations is concerned, the constitutional principle "Member states ...[of the Federation]... shall have equal rights and powers"<sup>121</sup> is compromised to a considerable

extent in relation to some of the member states. The fiscal competence of the states, the court structure, their representation in the second chamber, the political implications of Articles 46 and 47 (constituent states for some and not for all) are clear evidence of an already existing political asymmetry. Whether these calls for an asymmetric arrangement with greater powers of the federal government or whether it should be seen as a transitory challenge is a thorny issue but in the short run it seems to legitimize the *de facto* greater intervention of the federal government in these regions than others.

### 3.2 More of “Building Out” than “Building in”

There is another consequence of the emphasis on the territorial principle (Articles 46 and 47). In as much as a federal system is about self-rule (building out) it is also about shared rule (building in). The balance between the two has always been subject to debate but their importance is beyond doubt. The grant of “mother states” may be important in terms of concrete recognition of diversity,<sup>122</sup> but the recognition and promotion of diversity as can be observed from the Swiss federal experience does not stop there. What is important is the *political expression/integration of diversity*. Several studies have indicated that diversity as such is not in itself a threat to integration<sup>123</sup> but it becomes a fertile ground for federal instability if the political system is not able to give it political expression. Political integration of diversity (building in) requires that federal institutions, civil service, security system, education and cultural institutions etc need to proportionately incorporate (with out necessarily compromising quality) employees from all sections of society. In the long run this is hoped to enhance allegiance to the state, its institutions and its laws. In other words, it is building the glue that keeps the nation together. The federal arrangement by territorializing the state concretizes self-rule and as some critics indicate, “fragments” the state. With a view to ensuring the right to self rule to the nationalities, the Constitution either grants “mother states” to the nationalities or as in the case of the SNNPRS ensures self-rule to the nationalities at local government level. Thus it takes the right to self rule seriously.

Yet there is an important aspect that is missing. It fundamentally fails to integrate what it “fragments.” The emphasis on self-rule should be complemented by proportional representation in elections,<sup>124</sup> in the civil service, in the executive and the judiciary. Surely there is a constitutional clause (Article 39-3) to that effect but has serious limitations in practice. As is noted below, the second chamber (HoF) has little or no role in relation to policy making and even then its representation is far from the desired.

In the area of fiscal transfers for example, the role of the smaller nationalities is becoming less significant and the HoF that is supposed to be their guardian is evolving along the interests of the more populous states and nationalities. The fact that its composition is more or less similar to the lower house is creating a problem in the decision-making process. The most populated states are pushing the House to increase the weight of population size in the allocation of shared revenues and grants. The less populated states are consistently becoming the losers and it seems it is hardly possible to reverse this trend.<sup>125</sup> As a result, while the HoF might have been envisaged as the most legitimate body to decide on fiscal transfers, it is becoming less relevant to the less populated states. It is for this reason that one might be tempted to conclude, as far as the less populated nationalities are concerned, the federal principle is not taken seriously. In this regard, the much-politicized right of nationalities has not been translated into political realities. These are crucial factors of integration that focus on shared rule and that counter balance the emphasis on self-rule. Thus while ensuring self-rule to the nationalities is a step in the right direction, this measure needs to be complemented by institutional arrangements that give effect to power sharing schemes to the various actors at federal, regional and local levels.

Several seminars on the Ethiopian federal system held between 2003-2008<sup>126</sup> have shown that federalism in Ethiopia has already become a point of national consensus. This is to say that, at this stage, virtually all sheds of opinion are agreed that the federal option

is the only viable and reasonable alternative for Ethiopia. It has been argued further that the existing consensus has developed as a result of the dramatic change in the attitude of people towards the practical results of the system, particularly the relative peace and good performance in the socio-economic sector (access to education, health and improved infrastructure being the prime examples). At the initial stage, there had been anxiety in some quarters as to the possible consequences of the reforms introduced by way of addressing the historical grievances of the different ethnic groups. Now, it seems clear that events of the last one and half decade have shown that the country would not fall apart because of the freedom of the different ethnic groups to portray their sub-national identities, cultures and values within federal Ethiopia. Never the less, the federal system with its overriding features focusing on the right of nationalities and particular emphasis on self-rule has generated an intense scholastic interest.

The emphasis on nationalities right and the subsequent state reorganization to ensure self rule is hailed by its advocates as an aspect of democratization of state and society and as a “stroke of genius” that will reduce tension and conflict in the country and at its very best a model for governing multi-ethnic states in Africa.<sup>127</sup> Its critics however argue that the “ethnic based federation” as a sign of the first mark of disintegration.<sup>128</sup> Some analysts have warned that the dual loyalty requisite in federalism is not kept in balance. As a result, they contend that the whole arrangement is a treaty of alliance among near sovereign ethnic groups and concluded that since the adoption of ethnic based states, Ethiopia’s federation is virtually extinct.<sup>129</sup> It is stated that “regionally based ethnicity may reinforce the demands of some ethnic groups for more and more states and finally for secession.”<sup>130</sup> Brietzke too wrote that the ethnic federation gives ethnic groups too much power, placing the integrity of the federation at risk.<sup>131</sup> Overall, they underline the emphasis on the politics of difference and the subsequent threat of fragmentation.<sup>132</sup>

Yet the argument that “ethnic’ federalism tends to sharpen and institutionalize previous differences and carries with it the danger of fragmentation, although with some validity,<sup>133</sup> needs qualification.<sup>134</sup> It is a global problem that any multicultural federal system be it Ethiopia, India or any other country, carries with it two existential problems, however successful it may be. There is always the problem of integration in any country with minorities and more so in multicultural federations. There are bound to exist “two solitudes”<sup>135</sup> or “three nationalities with their backs to each other”<sup>136</sup> or the “hard and open ethnic identities.”<sup>137</sup> Multicultural federations also attempt to contain the threat of secession but by the mere fact that they are multicultural they cannot avoid it altogether. After all, multicultural federations are potentially (in the worst case scenario) many nation-states in the making. It is not, therefore, endemic to Ethiopia nor is the ruling party to be blamed for institutionalizing it. Thus whether the federal system will consolidate unity in diversity or fragment the different groups depends on several other factors<sup>138</sup> including the commitment to respect human rights, a matter that appears to have been not taken seriously by the ruling party.

A related point frequently mentioned in the debate is the idea that ethnicity or sociological diversity should be left to the private sphere. For instance an author noted, “Disagreements about one’s ethnic origin, an outcome of ethnic diversity is a private matter that should not have an effect on the way the common goods are defined and pursued.”<sup>139</sup> However, this approach of separation of state and ethnicity is not only based on a wrong analogy but is also based on the wrong transplantation of American ideas into a multicultural federal system. Will Kymlicka rightly points out that the notion of the separation of state and ethnicity, a concept drawn from the principle of separation of church and state that was used as a tool for resolution of religious conflicts in the 16<sup>th</sup> century is an incorrect analogy. Many thought that religious tolerance based on the separation of church and state provides a model for dealing with ethno-cultural differences as well. According to this view, ethnic identity, like religion, is something that people should be free to

express in their private life, but should not be the concern of the state.<sup>140</sup> In short, there should be a “benign neglect” of ethnic and national differences. But this does not work in multicultural societies like Ethiopia.<sup>141</sup> As we already noted, this is a mask for the majority culture, language, religion to become or equate itself with the national culture, language or religion which is wrong solution for multicultural federations and in the case of Ethiopia we do not even have a majority. The values of the state institutions themselves are at the center of the debate and hence it is difficult to assume for the state to remain neutral.

Close observation of the proponents of the separation of state and ethnicity in the Ethiopian context also hints that it is an attempt to transplant American style territorial federalism to Ethiopia. But implementing an American style of federal system uniformly and through-out, is incompatible with the context of multicultural federal systems. American federalism assumes a homogenous society and its core aim is political decentralization and has nothing to do with addressing ethnic demands. That the states should reflect the essential attributes of the existing diversity in a society is the crucial element that one deduces from, the experience of Switzerland and India. Post Independence India demonstrates the fact that territories should reflect major diversities that define the people inhabiting the state. The Swiss approach of dealing with ethno-linguistic demands without necessarily granting ‘mother states’ or, stated other-wise, historically evolved cantons speaking the same language but divided into different cantons, is instructive. Out of the twenty-six Swiss cantons twenty-two of them are unilingual (seventeen cantons German speaking, four cantons French speaking and one Italian speaking). Three of the remaining are bilingual and only one trilingual canton.<sup>142</sup> Yet there exists a wide range of factors cutting across cantonal boundaries. There is no single large German speaking Canton, nor is there single French speaking canton. By the same logic we can think of organizing some of the larger states in Ethiopia along the same pattern. Among other things we can think of three or more Amhara states and equally four or more Oromia and Somali states. This settles the issue of political

asymmetry as well as the limits of establishing the language based constituent states. As some authors note: ‘Ethnicity may guide efforts at drawing or redrawing regional boundaries, yet using it as a sole basis for legitimacy could have disastrous consequences.’<sup>143</sup>

### **3.3 Federalism and the Treatment of Minorities in the Regions**

One serious challenge emerging as a consequence of the emphasis on nationalities right to self rule concerns the treatment of minorities within the constituent units. Traditionally, federal systems regulate relations between the federal government and the states. Despite recent developments in some federations on the status of local governments,<sup>144</sup> the tradition has been that local governments are at the discretion of regional states. In multicultural federations, this raises the thorny issue of the position of minorities within each respective state.

The notion of majority and minority in the Ethiopian federal context is indeed confusing. Although what constitutes a minority has been contested, according to the widely recognized author Capotorti, it implies that they are less in number compared to the rest of the population of the country and as a result of the democratic game of numbers they are in a non-dominant position. The minority are nationals of the state of residence and possess ethnic, linguistic or religious characteristics (*identity stuff*) that distinguish them from the rest of the population and are interested to preserve their identity instead of integrating into the dominant group.<sup>145</sup> Yet in the Ethiopian case we observe some aberrations to this general notion. One possible approach to understand it is to figure out its meaning at federal and state levels. If majority is understood to be a numerical majority dominating a certain political process, then at federal level none of the nationalities taken alone constitute a majority. In principle the Constitution appears to transform every nationality into a majority by granting a “mother state” or local government but that applies only to some of the dominant ethnic groups. The Oromos constitute the largest ethnic group but they are by far less than fifty per cent. Perhaps the

absence of such a numerical majority that dominates the political process at the center has a lot to explain for the persisting regime instability, the interethnic tension and rivalry among the groups for exclusive control of power.

At constituent unit's level, two contradictory notions of majority and minority are emerging. In the states of Oromia, Amhara, Tigray, Afar and Somali, five out of the nine regional states, each of them dominate the political process in their respective states. Other ethnic groups in each of these regions are, therefore, minorities. However, these contextually defined majorities will become minorities in other regional states. Another dimension emerging in the city state of Harar, Gambela and Benishangul-Gumuz states is that the numerical majority remains to be a political minority in terms of its influence in the regional political process. In the state of Harar, the Hararies, constituting only seven per cent of the total population in the region play a key role as regards the rest of the ethnic groups living in the region. In Gambela despite some controversy over figures, the Nuer stand to be numerically greater than their rivals, the Anuaks, but the latter, at least until 2003, dominated the region's political process since 1991. The same holds true in the Benishangul-Gumuz state. While the Berta remain numerically larger than the Gumuz, the latter dominate the political process in the region. In these three cases, therefore, the notion of majority and minority seems to have been reversed from the ordinary understanding of the concepts.

In this context, the danger is that the respective regional states and the dominant ethnic groups consider themselves "owners" of the "mother state." Other citizens of different ethnic background or those who do not like to associate themselves with any ethnic group have practically no place, which certainly contradicts the constitutional provisions that stipulate the right to work and live in a place of one's choice. In these respect frequent conflicts between the Oromos and minority Amharas (some three million Amharas are believed to exist in Oromia region) living in Oromia region have

led to loss of life and destruction of property at different times. Bedeno, Arba Gugu and Gara Muletta are clear instances.<sup>146</sup> Recently (in 2002) a large number of Amharas were evicted from the southwest to the Amhara region and the case remains as yet unsettled.<sup>147</sup>

Despite some alarming reports and signs of abuse, the threat against local minorities has not yet been given the necessary attention from federal and regional government authorities. The incidents have been tolerated so far but could turn to explosive situations at any moment aggravating the fragile transition. There are still ample indications of this kind of tension and threat on minorities in several parts of the country. On several occasions (between 2005 and 2006) the author has observed high sense of insecurity felt by minorities in Oromia (Jimma area), SNNPRS so much so that the minorities have started to remit the income they generate from their business to places of their ethnic origin. Further confusion to this delicate position of minorities is the constitutional clauses of some of the regions issued after the decision of the HoF that further relegates their status to second rate citizenship. For example the Revised Benishangul Gumuz Regional Constitution and that of Gambela Article 34 distinct from what is provided in other state constitutions only ensure the right of minorities to work and live and do not provide for the right to elect and to be elected.<sup>148</sup> The practice combined with such constitutional anomaly simply indicates how worse the position of the minorities is in some regions.

The crisis in Gambela in 2003, and the tension in Benishangul-Gumuz, and partly in Harar and Oromia, with respect to the individual citizen's right to live and work in a place of one's choice is not because of constitutional form but because of failure to enforce constitutionally stipulated principles. The Constitution is clear in stating that every Ethiopian has the right to engage freely in any economic activity and to pursue a livelihood of his/her choice anywhere within the national territory.<sup>149</sup> The Constitution does impose an obligation on all branches of government at both levels with the duty to respect and enforce the fundamental rights and

freedoms enshrined in it. Yet these provisions seem to have been overshadowed in practice by the emphasis on self-rule and collective rights. Nor are the necessary institutions for enforcing human rights well entrenched.<sup>150</sup>

Thus in the five regional states with dominant nationalities, the dominant nationalities constitute a majority in their respective states and any one other than them is a minority. In the three remaining constituent states, the situation is slightly different from that in the other regional states. What is distinct in these regional states is the fact that the tyranny arises from a minority against the majority.

### **The Way Forward**

From the brief discussion of the issues concerning local minorities two conclusions seem to be inescapable. Firstly, there is obvious tension between a constitutional form implying multicultural federalism in which the forging of unity in diversity is the goal, and as some critics indicate an "ethnic" federal system in operation. Ethnicity is a state of mind emanating from a feeling of separate identity, which in turn is based on shared cultural markers (culture, language, religion etc.), but more importantly on the myth of common descent. It is important to point out that the myth of common descent is an essential characteristic of an ethnic group but not of national groups that share a common language, religion, custom, history and tradition but not necessarily a common descent. The subjective belief in myth of common descent is in short the essence of an ethnic group or ethnicity.<sup>151</sup> This is not without some implications when it is mobilized to attain certain goals. The myth of common descent serves as a basis for excluding people who share the culture but not the common descent or in the opposite case to include people who share the common descent but not the culture.<sup>152</sup> If we uphold the ethnic notion briefly considered here, it appears that a large number of Ethiopians are by and large excluded from some aspects of the regional political process. The case is a living example of the ambiguities and tensions inherent in the

federal system, not clear is which way the federal system is evolving. Secondly, as long as federalism is viewed as a means of sharing power and resources among contenders and a means for accommodation of diversity and peaceful coexistence of diverse groups in multicultural federations, the cases hint that a lot remains to be done in this respect. We observe not only the lack of consensus on power and resource sharing among the indigenous groups but also the exclusion of significant number of minorities at times accounting forty seven percent of the region's population from the political process.

Thus one of the key challenges is how to ensure self-rule to the different nationalities without damaging or eroding the bonds and virtues of citizenship and seen from this angle, the federal system seems to have brought mixed results. Thus whether the federal system in Ethiopia is to enhance the bonds and virtues of citizenship and reduce tensions depends on whether the federal and state institutions are keen enough to address the concerns of the minorities.

One possible solution is the setting up of two chambers at *state level*, one composed on the basis of the democratic principle (population size or one man, one vote) and another house for the protection of local minorities. Both houses should have law-making powers and the second chamber could even be granted veto power on some crucial issues of prime importance to minorities.<sup>153</sup> Secondly, the federal executive, the federal and state judiciary and the institutions of Human Rights Commission and Ombudsman have to be well-organized throughout the country if the bulk of human rights provisions enshrined in the constitution are to be enforced in meaningful manner. This is perhaps the only way to guarantee interstate mobility of labor and capital. Besides, as in Benishangul-Gumuz and certainly other multiethnic regional states, genuine power and resource sharing among the contenders for power seems the only viable solution to bring stability to the regions. The approach so far has not been satisfactory to the major contenders for power in each of the respective regions. The federal government simply shifted its alliance from one group to the other without trying to provide a solution acceptable to all groups. Federalism's

role in regulating conflicts in multicultural societies depends on whether the actors in the political process intend to use federalism in achieving those goals.

### **3.4 “Federation” within a Federation in the SNNPRS**

Our earlier presentation of the federal system as granting “mother states” to nationalities could be misleading. Despite the attempt to grant a mother state to some of the dominant nationalities, the process has not resulted in homogeneous states. In this sense, to adopt the words of Duchacek, Ethiopia like other multicultural federations is “partial ethno-territorial federalism”<sup>154</sup> or in the words of Hoekema is “indirect consociationalism.”<sup>155</sup> In the ideal (non-existent) case of perfect “integral ethno-territorial federalism” there will be a perfect coincidence of all intra-federal and national boundaries. However, in the case of partial ethno-national federalism it is a federation in which only major nationalities have and administer their own autonomous units. That certainly is the case in India with many hundred ethno-national groups but with only twenty-eight states and the same holds true for Nigeria. The Ethiopian federation as well submits to this reality despite the promise to elevate every group to a nation/nationality. While the states of Amhara, Oromia, Tigray, Afar and Somalia have clear dominant nationality groups, the other states are clearly multicultural. Benshangul/Gumuz has Berta, Mao-Komo, Shinasha, Gumuz and Benshangul nationalities. Gambela has Nuer, Anuwak and Mezenger, and Harari has an enormous number of Oromos, Amharas and Guraghes. The SNNPRS constitute of more than fifty-six “nationalities.”<sup>156</sup> The federally administered cities of Addis Ababa, Dire Dawa and many other cities found within the states like Hawassa/Awassa, Nazreth/Adama, Shashemene, to mention a few are particularly heterogeneous as they are inhabited by economic migrants. Even the states with dominant nationalities like Tigray, Amhara and Oromia have not escaped their own multi-ethnicity.

However, the SNNPRS is peculiar in some respects.<sup>157</sup> One can make two conflicting hypotheses. On the one hand, it is possible to

state that the territorial approach is less feasible taking into account the many ethno-linguistic groups. Certainly, there has been a move along that line in recent years. It has become the region in which the EPRDF has experimented party reform for the first time. The SEPDF, ruling party in the region and also a member of the EPRDF, was originally a coalition of some twenty ethnic fronts operating in the South. It has now been transformed into one party (movement), SEPDM in 2002.<sup>158</sup> Along with it, following the post 2001 state constitutional reform more emphasis was put on *Weredas*<sup>159</sup> as regards the allocation of budget. It is reported that this is done with a view to weaken the link between claims for more and more of local government as fueled by the budget allocation formula. By creating more and more sub units, the ethnic groups rightly or wrongly thought that they would share more and more of the national budget. It is no surprise then that the Prime Minister in his July 2000 report to parliament declared “they ought to have used their budget as *Maresha*” (ploughshares), implying to finance specific plans bringing returns “but they used it instead as *Genfo*” (porridge). According to sources, the move was triggered by two reasons, one because of the sudden expansion of parochial ethnic sentiments often manipulated by local elites and secondly this was aggravated by the budget allocation formula. If there are new sub-state units they will be entitled to run their own budget and so everyone wanted to have one. This led to further restructuring in the region from nine to thirteen zones and eight special *weredas*.<sup>160</sup>

Compared to the relative peace in regions like Tigray and Amhara, dominated by one nationality and relatively able to articulate regional interest in their relations with the federal government, some have suggested an asymmetric federal system, that is, a greater role of the federal government in the SNNPRS, Afar, Gambela and Benishangul-Gumuz states.

However, this argument is not without limitations and this brings the second hypothesis. The most frequent and deadly conflicts ever since the introduction of the federal system in 1995 have been in the same states: SNNPRS, Gambela and Benishangul-Gumuz.<sup>162</sup> It is true that there are many factors that brought about the conflicts

but certainly one is the failure to design adequate mechanisms for dealing with the complex multi-ethnic groups living in each of the respective states. These are the states in which the grant of “mother states” has not fully been materialized because of an alleged lack of a dominant nationality or because of constituting too many small ethnic groups. Relative peace has been restored in some of them, for instance, in SNNPRS after the Wolayta, Silte and Kaffa-Sheka were granted local governments. If this argument is convincing then it makes a strong case for further restructuring of the regional governments, along with the general view that nationalities should be granted their own “mother states” even within multiethnic regional states. The fact that there has been frequent conflicts in the SNNPRS (in other regions with similar compositions like Gambela and Benishangul-Gumuz as well) compared to other states (in which EPRDF insisted that the boundaries of the constituent states should match the boundaries of the nationalities and thereby creating a more homogenous states and hence creating relative peace) seems to suggest that the multi-ethnic states should also be structured along similar lines. The south is relatively more stable and peaceful after the series of regional state restructurings than, for instance, four years ago. But this brings with it the issue of where to begin and end the reorganization of the sub-units within the region. There are still claims for more zones and *Weredas* in several parts of the SNNPRS and the creation of a new state (the Sidama claim being potentially one) as a member of the federation as well can not be ruled out.

Both are tentative arguments and not much can be said in this very dynamic region. As can be observed from the federal experiment in the SNNPRS, the region exhibits both fear and hope. The fear is that there is continuous rivalry among some of the political elite for controlling regional power at the expense of others and that seems to be fueling those that felt marginalized at regional level to raise issues of further redrawing of new zones, *Weredas* and even new states. Thus carrying with it the threat of opening "Pandora's Box"- where to end once one begins restructuring the region with more

than 56 ethno-linguistic groups. A newly emerging multicultural federation may need to remain flexible in order to adjust territorial boundaries to meet new ethno-linguistic demands which is an expected thing in holding together federation but too much flexibility may lead to the Nigerian federation's logic of fragmentation.

The hope and rather promising point about the SNNPRS given its size and incorporation into main stream Ethiopian politics is the potential role that it can play in stabilizing the federal game. The SNNPRS being composed of relatively smaller nationalities that benefit more from interdependence and some form of self-rule than from a unitary system and independence, have a major potential role to play in bringing equilibrium to the two potential threats of the Ethiopian federation: centralism (as reflected in the 20<sup>th</sup> century) and secession (as some political elites seem to be aspiring for it).

### **3.5 Unicameral Legislature/Adjudication of Disputes**

The 1995 Ethiopian Constitution provides for a two house federal parliament: the House of Peoples' Representatives (HoPR) and the House of Federation (HoF). But this is in some sense misleading because the second/upper chamber (HoF) is not part of the law making process at federal level. In other words, federal law does not need the consent of the HoF, to be a law. It is the lower house (HoPR) that has exclusive power as far as law making at federal level is concerned.<sup>162</sup>

In terms of composition Article 61(2) of the Constitution stipulates 'each Nation, Nationality and People shall be represented in the House of Federation by at least one member. Each Nation or Nationality shall be represented by one additional representative for each one million of its population.' The provision does not even apply any rational upper limits like the German one. According to this arithmetic, the population or ethnic group with the largest number will have as many seats as its size may allow in the HoF. As

for the selection/election process Article 61(3) envisages two possibilities. Members of the HoF may be elected indirectly by the state legislatures or the state legislature may decide the members to be elected directly by the people. So far experience indicates that all members are indirectly elected by the states.<sup>163</sup>

Federal practice elsewhere suggests that a genuine federation not only should it guarantee autonomy to the states but also should incorporate the states in the central decision-making process.<sup>164</sup> Never the less the Ethiopian federal system departs from this trend and grants the HoF among other things with the power to interpret the Constitution, resolution of disputes among the regions, decide on intergovernmental subsidies and joint taxes.<sup>165</sup>

Behind the policy choice of the framers vesting the power to interpret the constitution and to review the constitutionality of laws to the HoF, not the judiciary, has something to do with reputation of the judiciary and ideological matters. Firstly, the framers of the Constitution thought that interpretation of the constitution is not purely a legal/technical matter that should be left to the judiciary. The framers of the constitution felt that, the constitution is the "political contract among the nationalities" and only a house that is composed of representatives from the nationalities should be vested with the task of determining the scope and meaning of the text of the constitution. Thus it is firmly tied with the idea that the Constitution provides an overriding place for the right of nationalities.

Secondly, in historic Ethiopia, adjudication of cases formed part and parcel of public administration. One finds a merger of functions within the executive, administration of justice and executive function proper. Indeed adjudication of cases was considered to be the principal function of the executive. For example in Menlik's era of appointment of the historic ministers in 1908, the Minister of Justice was also the Chief Justice.<sup>166</sup> The attempt to separate the judiciary from the executive was not that easy either. Long and tiring process of negotiation in 1942 led to partial victory as far as

the judiciary is concerned: only the highest benches, that is, the High Court and the Supreme Imperial Court were able to be relatively free from the influence of provincial administrators. In all other respects, the court structure reflected until 1992 the traditional practice of combining judicial and executive functions in the person of the local chiefs and provincial governors. At the apex of the court structure one found until 1974, the emperor, dispensing justice in the *Zufan Chilot* (Crown Court).<sup>167</sup>

This blend of judicial and executive function in the latter is not without implications. The crisis of the Ethiopian state for the most part of the 20<sup>th</sup> century had its effect on the judiciary as well. As a result of this historical context, thus when EPRDF came to power and started the new federal system, the prestige and reputation of the judiciary was at its ebb, associated with all forms of nepotism, corruption and worst of all, an arm of the most despotic regime on earth, well known for executing life with out any semblance of due process of law. Thus the historical context and the ideological factor contributed to the shift of reviewing constitutional issues from the regular judiciary to the HoF.

An over all assessment over the performance of the HoF in the adjudication of constitutional issues reveals that it has played important role particularly over those cases that are of high political significance- cases of the nature where the US Supreme Court would refuse to decide citing the “political question doctrine.”<sup>168</sup> This is linked with the HoF’s quasi political nature. However this is not without possible implications as to its impartiality as Ethiopia is venturing into multiparty politics. So far, as federal system operated under one dominant party system and its impartiality has not been brought to test. With the emerging multiparty politics, it remains to be seen how far the HoF will serve as an impartial adjudicator on important intergovernmental conflicts.

## **Federalism and Secession**

A related issue is secession. This is one of the highly contested provisions of the Constitution. Article 39 of the Constitution expressly incorporates the right of nationalities to secede after complying with some procedures. This right cannot even be suspended during a state of emergency.<sup>169</sup> The right is granted to the various nationalities, but one can construe this provision as equally providing the right to constituent states as well, as they are mainly defined by language criteria (the congruence argument).<sup>170</sup> In brief, the procedures for secession are as follows: First the demand for secession has to be made to the legislative Council of the nation, nationality or people concerned and has to be approved by a two-thirds majority of the same body; Secondly, the federal government has to organize a referendum which must take place within three years from the time it received the concerned council's decision for secession; Thirdly, the demand for secession must be supported by a majority vote in the referendum; Finally the federal government will have transferred its powers to the council of the nation, nationality or people who have voted to secede; and when the division of assets is effected in a manner prescribed by law. Part of the argument for secession is based on the construction of the principle included in the Preamble and the clause that declares the nationalities as sovereign.<sup>171</sup> The nation/nationalities are the founders of the constitution in general and the federation in particular and hence have the right to go away from it when they feel aggrieved by the fact that the terms of the compact are abridged by the federal government. In a way this takes us to the compact theory and the limitations hinted above.

The inclusion of such right, it may be contended, is justified by extra federal factors.<sup>172</sup> The arguments for the inclusion of secession are not based on any prior history of the states as sovereign entities but on the notion of nationalities' right to self-determination, which in turn is the outcome of the leftist oriented Ethiopian Student Movement of the 1960s, the ideology of the 'nationality question' and as implemented by EPRDF. Its exact scope is not

often clear for it has been used by different political parties to mean different things. For many it means nationalities right to self-rule within a multicultural and democratic Ethiopia in which there is equal recognition of culture, religion and language but for the ruling party it also includes secession.

Some contend that the procedures for its exercise are strict and even doubt the political will to exercise it. Andreas Eshete writes that EPRDF, though a champion of self-determination, is opposed to its exercise.<sup>173</sup> Equally Barbara Thomas-Woolly and Edmond Keller state: 'When EPRDF overthrew the military regime in 1991; ethnic groups that had been historically oppressed in Ethiopia were promised the right to self-determination but it soon became clear that what the EPRDF envisioned was regional autonomy for ethnically based sub-states within the context of an Ethiopian federal union.'<sup>174</sup> It is difficult to prove the veracity of these allegations but they hint that there is a lot of skepticism about its application. Nevertheless it is expressly singled out as a constitutional right.

However, there is a bitter lesson that one can learn from Eritrea's secession in 1993. Secession or the emergence of an independent state does not necessarily result in the establishment of a stable and democratic state. This is evident not only from the experience of post-independence Eritrea but also from many other of the post-independence African states. Secession or independence simply replicates the nation state without resolving the controversial and normative question of how to politically integrate, share power and resources among several contending forces.<sup>175</sup> It is for this reason that a genuine federal system is often preferred as it gives space for both unity and diversity, short of fragmentation.

#### **4. Party Politics, Political Culture and Challenges of Transition**

A clearer perception of the federal system can only be made if one looks at how the party system operates in Ethiopia. That is where some of the critics rightly point the most obvious limitation of the federal system, that is, the paradox between generously granted constitutional powers and a centralized federal system in practice resulting from centralized policy making process and a dominant ruling party system that is responsible for generating most of the policy documents. Most of the policies are often generated through the party at central level and then become the basis for five year plans both at federal and state level. The implication is that the autonomy of the states is limited in practice and the party structure overshadows the institutions and in this regard, they contend, it is not federal enough as promised. Some even contend further arguing that this is a continuity of the traditional form of “political control” by center.<sup>176</sup>

Ever since the establishment of the federation, Ethiopia is ruled by a coalition composed of several regionally based ethnic parties constituting the ruling party. At first sight it appears to be a party structure that enhances a federal division of power because the federal government appears to be run by an organization with a regional, rather than central basis of power. But practically, the EPRDF is controlling all the regional state governments in the Ethiopian federation either directly through the member parties or indirectly through affiliated parties that apparently look autonomous but have strong links with EPRDF.

On the positive side, given Ethiopia’s diverse society coherent and disciplined party at federal and state levels appears to be an asset, compared for example with what happened in Nigeria and what transpired in Kenya’s Kibaki government after Moi.<sup>177</sup> Yet in Ethiopia, it seems it is exceeding its limits. The largely centralized party structure appears to contradict the division of power that is expected to exist in a federation.<sup>178</sup> As a parliamentary federal

system, the party discipline combined with ‘democratic centralism’<sup>179</sup> seems to have great impact on how decisions are taken within the party. The point is that the party structure in Ethiopia undermines the federal division of power and subordinates the regional governments to the federal government. In the area of intergovernmental relations, an area not well regulated in the constitution, for example, the evolving practice indicates that it is a top-bottom approach in which the states have not yet commenced establishing forums for airing their common agenda in their relations with the center. A more serious concern however is in the impact that the party system may have on the evolution of the relevant institutions in a multiparty context. It is this factor along with its impact on the process of policy-making that explains the centralizing trend in the federal system. It is also this factor that appears to explain the fact that intergovernmental conflicts are rare, perhaps absent, from most of the contemporary conflicts that challenge the federal system.

### **Challenges to the Transition**

Very related to the topic is the challenge of transition to multiparty democracy coming partly from an incomplete process of transition and partly from an authoritarian and rigid political culture within the political elite with its impact on the federal experiment.<sup>180</sup>

The opposition, very diverse in itself, preferred for long to withdraw from the process claiming that the transition has not been open and inclusive enough hoping that this will affect the legitimacy of the process. The ruling party on its part argued that the transition to democracy has been affected owing to the absence of what it calls “loyal and peaceful opposition,” an opposition that is committed to work respecting “the rules of the game.” Added to this is the authoritarian and exclusionist political culture within the political elite on both sides of the spectrum that reigned for long in the country with its hangovers on the present.<sup>181</sup> Thus the incomplete process of transition (1991-1994) resulting from the disengagement of the opposition and the divergent perspectives had bearings on the transition to democracy making it more challenging and protracted.

The cumulative effect of such an un happy transition brought its ugly turn in the May 2005 third national election. The process commenced with historically unprecedented positive pre-election debate in which a certain section of society that felt was not part of the process made a significant comeback by joining the process. For the first time in its entire history significant numbers of opposition party members participated in the election and later joined both the federal and regional parliament. Yet this positive political development was followed by post-election crisis. The CUD (coalition for unity and democracy- a coalition of four parties from the opposition) alleging that the ruling party has rigged the election, parliamentary procedures being hostile to the opposition and doubting the impartiality of the Electoral Commission decided not only to boycott the parliament in October 2005<sup>182</sup> but also decided, according to the claims of the ruling party, to remove it by calling its supporters for all kinds of "colored revolution" along that of Ukraine and Georgia. Adding fuel to the problem the ruling party following the election out come amended via the outgoing parliament several laws transferring authority from the Addis Ababa City Government, then won by the CUD, to the federal level with significant impacts at least as far as revenue sources of the City is concerned. This reinforced the tension and led to violent demonstrations in June and November 2005 that resulted in loss of life and destruction of property and imprisonment of the principal leaders of the CUD who were released in the summer of 2007 after series of negotiations initiated by prominent Ethiopian Elders. Also aggravating this development is the intra-party politics and power rivalry among the factions of the CUD.<sup>183</sup> The cumulative effect is that it resulted in deteriorating human rights situation, refusal of the CUD to take the seats it won in the federal parliament<sup>184</sup> and in the Addis Ababa City Council,<sup>185</sup> and a political atmosphere more or less reminiscent of the upheavals we had in 1974 and 1991. Thus, despite an openly contested multiparty third parliamentary election, Ethiopia's political process did not result in happy outcome to all parties.

Thus despite a rich tradition of dispute resolution mechanisms and culture of tolerance in the society, the political elite on both sides of the political spectrum manifested *militant political culture* that seem to be the result of deep rooted authoritarian tendency inherited from the two previous regimes. This stands in sharp contrast to the *federal political culture*. While in the latter, parties and major actors are expected to work together towards the achievement of their common goals respecting their differences (that is what federalism is all about), this has not been the case for long in Ethiopia. Each of the major actors in the political process considers the other as “enemy” and do not trust one another and hence could not evolve as political partners with some common goals. This makes the public sphere less predictable.

### **Conclusion**

Seen from comparative perspective, the post election crisis and the divergence of opinions between the various forces (apart from the ruling coalition, there are a coalition of forces which are pro-center but perhaps with some decentralizing features on the one hand, and federalist forces with some policy alternatives distinct from that of the ruling party, on the other) is not without some parallels in history. Indeed it has some resemblance with what happened in the US and Switzerland in the 19<sup>th</sup> century, with some major qualification. While in the US (1861-65) and Switzerland (1847) the tension resulted because confederate forces were not willing to give way to the emerging weaker federal government, in Ethiopia, on the other hand, pro-center forces seem to be attempting to reverse the emerging federal process. In the two older federal systems, the federal forces somehow dominated the scene and the notion of “sovereignty of the states” gave way to a stronger federal system but it remains to be seen in Ethiopia (depending on balance of forces) how this will evolve in the coming years.

The large role which must be attributed to the political party running the federation since its inception, naturally leads to the question of the prospects of the federation. Because of the

confederate legal structure, which until the present has been under the firm control of the ruling party (in a way an anomaly with the federal principle of division of power and multiple centers of decision-making), a change in the party system may result in a significant change in the federal outcome. It is true that if an opposition controls (parts of) the political space there are many possible scenarios.

There are those who argue that once the ruling party loses control of the federal system, the federal system will wither away with it. This observation is mainly based on the experience of former federations like the USSR. However, the Indian federal experience offers another more positive scenario. Here the weakening of the once dominant Congress party was expected by many to lead to a reform of the federal system in favor of an increase in state power. Yet, there has been no significant change to the system despite the fact that several different parties ruled India by turn. This seems to counterbalance the 'withering away' hypothesis somehow.

Summing up, it is submitted that Ethiopia's choice for multicultural/national federalism is a step in the right direction as it has opened a political space for the different groups and has diffused the various conflicts to the local level making them less a threat to the center. But its success hinges on many factors. Firstly, the existence of a *political will* to operate in a politically diverse atmosphere is vital given the lack of a dominant majority, on the one hand and the ethno-linguistic and emerging political diversity, on the other. In other words the culture of respect and open accommodation of political and identity differences is an important infrastructure of federalism. It is a sign of commitment and demonstration of respect to others. Secondly, the establishment and strengthening of the several institutions mentioned in the study particularly, the respect for the autonomy of the regions, second chambers at federal and regional state level as well as the mediating and dispute handling institutions is vital for ensuring the rule of law and for enhancing shared rule. Thirdly, the protection of minorities in the constituent units in a manner that strikes proper balance

between the nationalities right to self-rule and the free movement of labor and capital is a matter of necessity, if one is to give effect to the notion of 'building one political and economic community' stipulated in the constitution. Last but not least, the negotiated settlement at a constitutional level among the political forces on at least some of the contentious issues is a matter that will significantly contribute towards federal stability.

#### **IV. Federalism, Diversity and Conflict in the Sudan**

Geographically the biggest in Africa, the Sudan, according to latest estimation has a population of 40 million, constituting some 68 ethnic groups. The groups that claim as descendants from Arab and that dominated the North (Sudan's post independence politics as well) represent 39 % of the total population while the Black Africans residing in several parts of the Sudan represent some 58% (6% being the Beja in the East) of the total population. In terms of religion 70% are Muslims, 5 % Christians and 25 % profess various religions of African tradition.<sup>186</sup> Although the division between the North and the South dominates the literature on the Sudan it appears that such a classification is an oversimplification of a rather complex problem. As will be indicated latter, each side to the conflict in Sudan is far from homogenous.<sup>187</sup>

The North is itself inhabited by different groups but is dominated like the rest of the country by political elites that consider themselves descendants of Arabic tradition and followers of Islam. Certainly there are many ethnic groups in the North that profess Islam but do not consider themselves as Arabs and have been marginalized like the other groups from the Southern, Western-Darfur and East- Beja region. The Southern region is inhabited by different groups professing different religions and speaking different dialects and within itself very diverse with little unifying factor except the painful history of the slave trade, discrimination, socio –economic under development and more importantly their sustained struggle against the central government that initially aimed

at secession but later seemed to have been reshaped into a genuine federal solution and redefinition of the country's identity.

Sudan emerged as independent state on January 1956 and since then the country's political history has been marked by instability, faced Africa's longest civil war between the North and South only interrupted for 11 years as a result of the Addis Ababa Accord (1972-83). Sudan's instability has recently been aggravated by insurgents from the East – Beja group, and the Darfur region.<sup>188</sup> Sudan's governance system has been dominated by military regimes except a few interruptions by civilians. Chief among the military rulers include General Ibrahim Abboud 1958-64 who was responsible for the introduction of Sudan's homogenization policy based on Arab and Islam, Colonel Ja'afar Nummeri 1969-1985, Brigadier Omar Hassan Ahmad al-Bashir 1989 to the present that continued the expansion of Arab/Islamic culture of dominance through out the country and half heartedly introduced a federal constitution in 1998.<sup>189</sup> This record in itself is not favorable condition for a working federation. There are already enough evidences indicating that federalism can survive and serve as a tool for conflict management only if supported by a genuine and democratic political institutions.<sup>190</sup> Surely some of the institutions that are established in a federation like the federal and state legislative bodies are expected to be run by elected representatives and that can only be so if there is a democratic process in place. The lack of such a democratic atmosphere and institutions indeed is one of the challenges for the success of any federal arrangement in the Horn.

The cause of the civil war in the South, the resistance against what the latter considered as unjust political and economic situation actually precedes Sudan's independence. As early as 1947, the Juba Conference that constituted representatives both from the north and south indicated that the Southern region demand for federal accommodation will be given "full consideration."<sup>191</sup> This broken promise was further aggravated by series of events that followed independence. It started with the marginalization of the South from

the civil service, neglect of their concerns including the federal option and more importantly political domination of the North and the imposition of its racial, cultural, linguistic and religious identity on the whole country that the South resented and rejected.<sup>192</sup> Nation building in Sudan was designed by the homogenization policy based on Arab and Islamic culture that was officially introduced during Aboud's military regime (1958-64) that among others changed weekly holidays from Sunday to Friday, introduced Arabic as mandatory language in schools and even changed Christian names. This is a process that more or less seemed an attempt to reverse the colonial "Southern policy."<sup>193</sup> Thus from the out set there was a failure to establish an inclusive state that gives space to pluralism as it resorted to "European model of nation building" that is premised on the existence of a dominant national group, which is not the case in many country's of Africa including the Sudan. Not surprisingly the civil war erupted in 1962 with the establishment of a Guerrilla movement the Anya Nya later became (1971) the South Sudan Liberation Movement.<sup>194</sup>

That the conflict between the North and South should not be viewed merely as a struggle between the Arabs espousing Islam on one hand and Christian/Animists Africans on the other can easily be demonstrated by the crisis in West Darfur region and other parts of the country. Darfur is a region inhabited by African and Arabic tribes and the close link of this region to the Arabic and Islamic culture of the North did not prevent the Fur from complaining against the central government. The political and economic marginalization of the region, resource conflict among the ethnic groups in the region and the wide spread allegation that the central government is supporting the Arab tribes/militia in the region fueled the crisis in the region in 2003.<sup>195</sup> Over all at least six cultural regions, two in the South-(the Nilotic and Equateria), the Fur, Nuba, Maban and the Beja seem to challenge the Government of Sudan (GoS). All seem to share the same complaint: political and economic marginalization by the Arabic group and the imposition of its racial, cultural, linguistic and religious identity on the whole

country and are urging for a federal solution that ensures some form of autonomy and political representation at the center. As far as the Southern region is concerned however, as evidenced in the CPA (Comprehensive Peace Agreement) political separation from the North is not ruled out.

The case study of Sudan and analysis of the cause of its instability seems to present a text book case for conflict study. As it is repeatedly stated in the literature,<sup>196</sup> diversity in itself is not a threat for stability or is not necessarily a cause of conflict. It becomes so, if there is political, economic marginalization in a society (structural causes of conflict) and such marginalization is combined with or coincides with identity differences (mobilizing causes). If these combined conditions exist in a diverse society then it is a time bomb waiting to erupt any time and it becomes complete if "ethnic entrepreneurs" are involved in mobilizing the marginalized at times exploiting the identity stuff.

### **The Addis Ababa Agreement**

Only colonel Ja'afar Nummeri attempted to provide a political solution to the crisis in the South via the Addis Ababa agreement.<sup>197</sup> This agreement which was later incorporated into Southern provinces Regional self Government Act of 1972 and the Constitution of 1973 granted, to use the modern notion of federalism, some form of self-rule to the Southern region coupled with power sharing mechanisms at central level. As a sign of political autonomy, the Agreement granted to the south legislative body elected by the voter directly and executive council. English was introduced as a regional language in addition to Arabic which was a national language and as a result the scheme provided a relief to the conflict in Sudan for at least 11 years (1972-1983). But with the unilateral decision<sup>198</sup> by Nummeri himself in June 1983 to divide the South into three regions and with the introduction of *Sharia* as a source of legal system, interpreted by the South as a continuation of northern dominance and politics of divide and rule, the agreement was breached and the civil war erupted again in 1983 this time led by SPLM/A.

It must be noted that the unilateral abolishment of the Addis Ababa agreement by the center contradicts with the federal principle. A genuine federal arrangement ensures political and territorial autonomy to the regions/units and any adjustments to the federal pact that may arise because of changing political and economic circumstances require the participation of both levels of governments. Federalism as it is repeatedly stated is covenant between partners and any unilateral breach violates the federal partnership.<sup>199</sup> However a careful observation of the agreement hints that it was designed more as a political expediency than as a result of the federal principle. After the agreement, two governments existed for the 11 years: the Government of the North and that of the South. A genuinely negotiated federal solution established between two parties normally would result in three governments: the two parties that will continue to constitute the regions, cantons, provinces, states depending on how one prefers to call them and the federal government. Yet this was never realized in the agreement and ironically the same institutional ambiguity seems to be repeating itself once again in the CPA signed in 2005. Two lessons, therefore, emerge from the failure of the Addis Ababa agreement: a federal arrangement can succeed only if there is a commitment by the actors to the federal principle/work according to the agreed principles and must be supported by appropriate institutions. Surely these important principles, remain, even today core preconditions for any federal success in the Horn.

Where a civilian and military rulers took turns, the search for a comprehensive and all inclusive constitutional/political formula acceptable to the various contending political forces in the Sudan has been a challenge since independence in 1956. The approach in Sudan appears to be the insistence *on piece meal solution* to the different challenges arising in several parts of Sudan. Apart from the failed Addis Ababa accord, Sudan introduced a federal constitution in 1998 with 26 states. Apparently, like any other federal system, the constitution lists down powers of the federal government, the states and what can be exercised jointly. But in reality, the center's preeminence both politically and financially is clearly visible and

whatever regions/states exist they have no effective role in the central decision making process. Only the CPA provides for a federal Council of State consisting of two representatives from each state. Nor do the states have any role in the amendment process. As we noted already, if federalism is endorsed as a partnership between the two levels of governments then any adjustment requires the participation of the states.

The nature and diversity of Sudan makes a federal option imperative yet even after the adoption of the 1998 constitution conflicts continued in several parts of the country. Thus the problem of integrating Sudan's different ethnic groups remained politically and constitutionally unresolved. No surprise therefore the GoS was forced to enter into separate peace agreements with the different rebel forces which as we will see later has its own complications.

### **The Comprehensive Peace Agreement (CPA), Interim Constitution and the Other Agreements**

The signing of the CPA in January 2005 and its incorporation into the Interim Constitution<sup>200</sup> is an attempt to bring to an end to the longest civil war between the GoS and the Sudan Peoples Liberation Movement/Army (SPLM/A). The CPA and subsequent documents, among other things, entitle the people of Southern Sudan right for a referendum to determine their future, that is, to confirm the unity of Sudan by voting to adopt the system of government established under the peace agreement or vote for secession during a transition process that lasts six years; to control and govern their own affairs and to participate in the national government. Other subsequent negotiations within the framework of the CPA as well provided for general principles for sharing revenue, natural resources and to establish more inclusive civil service and cabinet posts.

In the section on structure of government subsequently negotiated, it is stipulated that legislation that applies to states other than Southern Sudan shall have *Sharia* as a source while for the latter its

source is popular consensus, the values, traditions and customs of the people of the South.<sup>201</sup> In terms of power sharing scheme, the agreement stipulates that the ruling National Congress Party (NCP) will be represented by 52 %, the SPLM 28 %, other northern political parties 14 % and other Southern political parties 6 %. The power sharing agreement as well provides that the government shall consist of the President and two vice presidents. The current incumbent President will be the President and commander in chief of Sudan armed forces and the SPLM chairman or his successor will be first vice President and will at the same time hold post of President of the government of Southern Sudan and commander in chief of the SPLA. As noted already the fact that the CPA was signed while the 1998 constitution is in place indicates that the latter falls short of satisfying the existing challenges and raises questions on its relevance.

A lot of important remarks could be made on the CPA and the Interim Constitution when envisaged from the federal principle. Firstly, while the CPA attempts to resolve the fight between the GoS and SPLM/A two of the major protagonists, and in this regard is an important step forward, it should have been envisaged from the outset that the rigidity of the power sharing arrangement<sup>202</sup> might be a stumbling block in the search for comprehensive peace in Sudan.<sup>203</sup> Certainly the agreement left the two signatories with 80% of share in power and with only 20% for the rest (the East, Darfur etc). Thus although the CPA and subsequent negotiations between the two seem to be limited in scope between the GoS and SPLM/A, it has a wide ranging implications for the other parts of the country.<sup>204</sup> The privileged position of the GoS and the SPLA over the CPA and the failure to include other groups certainly had its own effects and predictably, those forces who were “left out in the cold” ignited awful conflicts in several parts of the country and called for active engagement in the process. This in turn led to the contested Darfur Peace Agreement (DPA)<sup>205</sup> of May 2006 and Eastern Sudan- the Beja that started their resistance as early as 1960s (the Beja Congress) but entered into armed confrontation with the GoS since 1994 claiming self-rule, power and resource

sharing. This led to the Peace Agreement of Eastern Sudan (ESPA) of October 2006. Both agreements were very much guided by the CPA and grant the two regions significant autonomy and share of national power and wealth but certainly are constrained by the CPA. Besides the DPA and ESPA do not grant self determination to the two regions concerned and hence falls short of the CPA.

Secondly, a comparison of the CPA, DPA, ESPA and the 1998 Constitution clearly indicates that Southern Sudan is accorded a special status. In the federal jargon this is called asymmetric federal system that grants a relatively higher status to Southern Sudan and accordingly reduces the role of the federal/national government. Other regions however do not enjoy the same status and may be subject to greater control and intervention by the center. This raises the question whether the other regions will in the end accept such a lower status and more importantly the Interim constitution and the CPA may, by granting a special status to the Southern region facilitating its partition.<sup>206</sup> The possibility of Southern secession could appear after the referendum takes place. Yet even if the tension is ended by the secession of the South, there are still great differences among the Southern components which can destabilize both the new southern state and the North as well. The antagonisms among the Southern components are manifested, according to some reports by the main stream SPLA dominated by Dinka and various factions of the SPLA with Nuer/Equatoria background. Many argue that the only unifying factor for the Southerners seems to be based on the common repression by and resistance to the GoS. In the even that this war is ended by establishing a new state, the minor ethnic groups will fear domination and same normative questions of how to share power and resources and how to integrate the different groups will emerge. This might led to another civil war and further fragmentation which will have an impact not only for the South but for the entire region as a whole.

Thirdly, as a result of the various complicated Peace Agreements, we have a complex set constitutional and political documents: the

1998 constitution, the CPA, DPA and ESPA. Admittedly, every federal system has its own *peculiarities* but what makes the Sudan's case interesting is that it is based on a series of treaties that look more like the several treaties that created the European Union than a federal system proper. Once again a federal system requires a single federal constitution that serves as source of legitimacy and hence supreme and that binds both levels of governments. In the case of Sudan this is not the case. Further anomaly resulting from all these Peace Agreements is that it is not clear whether the GoS is going to play dual role: Government of North and federal government/National Unity Government or another entity is yet to be created. As we mentioned already, when a federal system is established from two or more actors, it results in a newly born federal government. This was not the case in the Addis Ababa accord, in the CPA and the other agreements. This will give the chance for the GoS to dominate the process as it will allow it to play dual roles: government of the north and federal government that will certainly affect the hard won Peace Agreements. It is through the same institutional ambiguity that Emperor Haile Selassie was able to manipulate and in the end abolish the Ethio-Eritrea federation of 1952-1962. In the case of Sudan, this becomes even more thorny because of the fact that on issues of religion the National Unity Government is expected to be neutral but when it acts as government of the North, it may impose *Sharia*. This is further complicated by the fact that, the capital city is found in the North that according to the CPA is governed by *Sharia* law and consists of no less than 3 million non Northerners. Does this then mean that they will be subject to *Sharia* law or will they be granted personal autonomy or will the Sudan be, as it happened in other federations, searching for a new secular federal capital that reflects the new dynamics?.

### **“Nation-building” in Plural Societies and the Issue of Identity and Values of the State**

Part of the reason why the nation building project in multiethnic/multicultural/multinational societies becomes problematic is that

the process is based on a wrong transplantation of Western ideas that assume the existence of a dominant national group that commands clear democratic majority. In many parts of Africa including the Sudan and Ethiopia, the nation building project aimed at politically and culturally integrating the various groups into a narrowly defined state values: in the case of the former Arabic language and Islam and in the latter Amharic language and Christian religion. This raises conflicting perspectives on the identity of the state. In the Sudan for example, the dominant elite mostly from the North desires the country to be Arab and Muslim while the Southern elite needs it to be African and De- Arabized or at least heterogeneous. Interestingly both dominant elite groups (from both countries) that defined such state values by equating themselves with the state and by marginalizing others do not constitute a majority. Thus it is not only based on a wrong transplantation of Western ideas but it is also *undemocratic nation building* project that was bound to fail, only waiting for the opportune moment to happen. The attempt to homogenize also contradicts the multicultural nature of these countries and negates the idea of mutual recognition.<sup>207</sup> This has implications in the establishment of public institutions, in the design of national symbols such as the flag, national anthem, currency and values of the state. As one of the prominent experts on federalism aptly wrote, in a diverse society, the most essential element for stability and order is the acceptance of the value of diversity and of the possibility of multiple loyalties expressed through the establishment of constituent units of government with genuine autonomy for self rule over those matters most important to their distinct diversity.<sup>208</sup> Thus for the nation building to be effective, the first measure that the countries (particularly the Sudan) need to do is to abandon the concept of basing such a process on one culture and religion and embrace multiculturalism as this will open a space for mutual recognition and multiple identity which is an important infrastructure for federalism.

## **Over all Conclusion**

There are important observations that we can draw from the comparative study on the prospects of federalism in the Horn. The federal experiments in Sudan and the failed Ethio-Eritrean federation clearly indicate that for a federal system to be effective, it needs appropriate institutions. In all the cases, appropriate federal institutions were not put in place. The central government simply assumed dual role: representative of one region and a federal one and that laid the foundation for the center to manipulate and abolish it altogether. Nor were the constituent units consulted when the central government unilaterally abrogated them. A genuine federal system accepts the units as partners and respects their autonomy in so long as the federation remains effective. Secondly, the central government lacked the political will to maintain the federation and as a result both countries entered into protracted civil war. The federal agenda was aggressively pursued by the marginalized groups but was not willingly embraced by the center. This dilemma still remains in the Sudan and whether the central government is committed to it is yet to be seen. Thirdly, federalism's prospect depends on whether the polity is building institutions of democracy or not. Both countries have gone through tormenting political instability resulting in countless transitions and constitutions, coups etc and democracy seems to be far from consolidated. Federalism's prospect in such circumstances is slim. Surely, Ethiopia has gone one step as it is attempting multiparty democracy but it is facing series of challenges. Fourthly, both countries have suffered much owing to the central governments narrow based ideology of nation building. Federalism with its promise of unity in diversity is based on pluralism and mutual recognition of diversity. In as much as central government and the political actors fail to take diversity as a value, federalism will sooner or later be threatened. Fifth remark relates to secession. The central governments of the countries of the Horn seem to worry about the ugly and unhappy results of secession and are opposed to it while those who claim to have been marginalized from the political process insist on its exercise with hope of new life in the new state.

Never the less both forces need to realize that their worries and interests can safely be addressed if genuine federal system is put in place without necessarily insisting on either a centralized unitary state or secession. Those who aspire for secession also need to realize that the new state that they aspire might not necessarily address all their worries. The same old issues that triggered their secession might repeat themselves in the new state. Finally whatever positive roles federalism and democracy may have in ameliorating conflicts in the Horn, the mounting evidences of “interference and proxy wars” among the countries of the Horn and world powers hint that stability is not merely dependent on internal political process.

### Endnotes

1. By now there are enough evidences indicating that these were window dressing federations because they were operating under communist dictatorships that is opposed to the idea of autonomous decision making inherent in federalism. Nor were they supported by democratic institutions. See Thomas Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Inquiry*, Broad View Press, 2006 P. 26
2. Ronald Watts, *Comparing Federal Systems*, 2<sup>nd</sup> edn., (Montreal and Kingston: McGill-Queen's University Press, 1999): 1-10; hereinafter called *Comparing Federal Systems*; Daniel Elazar 'From Statism to Federalism: A Paradigm Shift' *Publius: The Journal of Federalism* 25:2 (Spring 1995) at 15, hereinafter called *From Statism to Federalism*. Since 1999, there is indeed an international conference on federalism in which leading practitioners and experts gather and share experiences every two to three years.
3. Ivo Duchacek, 'Antagonistic Co-operation: Territorial and Ethnic Communities,' *Publius: The Journal of Federalism* (Fall 1977): 4-25; Hereinafter called *Antagonistic Cooperation*; Watts, *Comparing Federal Systems*, *supra* note 2 at 4; Elazar, *From Statism to Federalism*, *supra* note 2 at 5.
4. Explaining this paradigm shift Daniel Elazar wrote, 'it is not that the states are disappearing; it is that the state system is acquiring a new dimension. There are now networks of agreements that are not only militarily and economically binding for *de facto* reasons but are also becoming constitutionally binding *de jure*. This overlay increasingly restricts what was called state sovereignty and forces states into various combinations of self-rule and shared rule rather than limited into federations as we understand it today.' States are now recognizing their interdependence and that rather than single centers there exist multi-centered decision-making units. Elazar, *From Statism to Federalism*, *supra* note 1 at 7.
5. Ronald Watts, *Comparing Federal Systems*, *supra* note 2 at 5.
6. John McGarry, 'Federal Political Systems and the Accommodation of National Minorities,' in Ann L. Griffiths ed., *Handbook of Federal Countries 2002* (Montreal and Kingston: McGill-Queen's University Press, 2002) at 424.
7. Since 1945 ethnic violence has played a major role in about half of all wars, caused an estimated 12 million refugees and resulted in at least 11 million deaths and because contemporary wars are between people rather than states, civilian casualties have increased tremendously. It is estimated that some three quarters of today's war casualties are civil-

- ians. Nancy Bermoe, "A New Look at Federalism: The Import of Institutions" *Journal of Democracy* 13:2 (April 2002) at 96.
8. See for instance Dimitrios Karmis and Wayne Norman, "The Revival of Federalism in Normative Political Theory," in Dimitrios Karmis and Wayne Norman eds. *Theories of Federalism: A Reader* (New York: Palgrave Macmillan, 2005) p. 13.
  9. See for instance Milton Esman, "Political and Psychological Factors in Ethnic Conflicts," in Joseph V. Montville ed., *Conflict and Peacemaking in Multiethnic Societies* (1990): 53-64.
  10. Mengistu Arefaine, *Federalism and Accommodation of Diversity: With Special Reference to Divided Societies* (Bale: Helbing and Lichtenhahn) at 53.
  11. Are not India and Switzerland living examples? What could explain the present predicament in Ethiopia as well? If Haile Selassie's and Derg's policy of forced assimilation were effective, by now we would have seen individual citizen with no group affiliation. On the Contrary however the group affiliation in Ethiopia rather got reinforced in reaction to the repression from the state.
  12. Wolf Linder, *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies* (New York: St. Martin's Press, 1994) at XVI.
  13. Although there was a major consensus about the need for a federal system (the only party that voiced its opposition was the All Amhara Peoples Organization (AAPO), there was serious disagreement about the basis for reorganizing the constituent units. For details see Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study* (Nijmegen: Wolf Legal Publishers 2006 chapter five.
  14. For long Nigeria was the only country in the continent that claimed to be federal. In many other African countries federalism is viewed as a means for disintegrating the state. Nigeria is perhaps an exception but it certainly is not a happy case, as for most of its time, the federal system has been under military dictators, which goes contrary to the spirit of negotiation, the idea of federalism as a covenant and the division of power in federal-ism.
  15. This federation lasted for a decade (1953-1963) but was not able to forge genuine unity in diversity between the whites and the blacks. It was rather a federation based on the supremacy of the whites. The situation in southern Rhodesia was particularly acute (white minority notorious for its discriminatory laws against the blacks) compared to the other two. There was thus a tension by the two northern territories that southern Rhodesia's policy affecting the blacks will be extended to them who were slightly guaranteed with native paramountcy. Thomas Franck, 'Why Federations Fail?' in Thomas Franck ed., *Why*

- Federations Fail: An Inquiry into the Requisites for Successful Federalism* (New York: New York University press, 1968): 167-200.
16. There is hardly any dispute that these federations were imposed by colonial forces. The French imposed such an arrangement in central and west Africa and the British in east and central Africa including Nigeria. Besides, they were also nation-state federations ill suited to a multi-ethnic context. Ursula Hicks, *Federalism: Failure and Success, a Comparative Study* (London: The Macmillan Press 1978) at 4.
  17. Daniel Elazar, *Exploring Federalism* (Tuscaloosa: University of Alabama Press, 1987): 240-244; Hicks, *supra* note 16: 171-196; Thomas Franck, *supra* note 15.
  18. Goran Hyden, 'Electoral Systems and Political Reform,' in *Constitutionalism: Reflections and Recommendations, Proceedings of the Symposium on the Making of the New Ethiopian Constitution* (Addis Ababa: Inter Africa Group, 1993) at 9; See Andreas Eshete, 'Ethnic Federalism: New Frontiers in Ethiopian Politics' in *First National Conference on Federalism, Conflict and Peace Building* (Addis Ababa: United printers, 2003): 142-172.
  19. Will Kymlicka, "Emerging Western Models of Multination Federations: Are They relevant for Africa?," in David Turton ed. *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective* (Oxford: James Currey, 2006): pp.
  20. Ruddy Doom, 'International Setting,' in *Constitutionalism: Reflections and Recommendations, Proceedings of the Symposium on the Making of the New Ethiopian Constitution* (Addis Ababa: Inter Africa Group, 1993) at 3.
  21. Time Magazine, November 1991, at 47.
  22. Minase Haile, 'The Legality of Secession: The Case of Eritrea,' *Emory International Law Review* 8 (Fall 1994): 479-503
  23. Tekeste Negash, *Eritrea and Ethiopia: The Federal Experience* (Uppsala: Nordiska Afrikainstitutet, 1997) at 20; see also Kinfé Abraham, *Ethiopia from Empire to Federation* (London: EIIP, 2001). It is also provided that the various nationalities in Eritrea are also affiliated with their counterparts in Ethiopia.
  24. Tekeste, *supra* note 23 at 31.
  25. The main cause of the Battle of Adwa is commonly explained as a controversy over Article XVII of the treaty of Wuchale whereby Italy claimed that Ethiopia had consented to be an Italian protectorate. Ethiopia claimed that the Amharic version of said Article of the treaty did not contain such a binding commitment and this finally led to war. Tekeste, *supra* note 23 at 14.

26. This is the version of mainstream Ethiopian historians bent not to write about any black spots on Menlik's reign.
27. James Paul, "Ethnicity and the New Constitutional Order of Ethiopia and Eritrea," in Yash Ghai ed., *Autonomy and Ethnicity: Negotiating Competing Claims in Multiethnic States* (Cambridge: Cambridge University Press 2000) at 176; see also the context of the drafting process of Wuchale Treaty in which some contend, before it took its final form, the treaty was negotiated between Rome and King Menilik of Showa much earlier than he became emperor. Sven Rubenson, *The Survival of Ethiopian Independence* (London: Heinemann, 1976): 380-400; among the prominent ones, Professor Tecola Hagos would insist that Menlik should be subject to 'high degree of treason.' See Tecola Hagos, 'A Sobering Lesson: The Menlik Factor and the New Defeatism' at <http://www.tecolahagos.com/menlikism.htm> as visited on October 10, 2004.
28. Heinrich Scholler, 'The Ethiopian Federation of 1952: an Obsolete Model or a Guide for the Future,' in Peter Woodward and Murray F. eds., *Conflict and Peace in the Horn of Africa* (Aldershot: Dartmouth, 1994) at 12.
29. At the time when the Commission of Inquiry was in Eritrea in November 1947, it spoke to the then sitting political party leaders and elders and in its report indicated that 1. The Union Party had 48 per cent support, the Muslim League that urged for independence or union with the Sudan 30.9 per cent, and the other parties had less than 10 per cent support. Tekeste, *supra*, note 23: 45; 53.
30. Minase Haile, *supra* note 22: 479-503.
31. Tesfatsion Medhanie, 'Remarks on Eritrea and a Possible Framework for Peace,' in Peter Woodward and Murray F. eds., *Conflict and Peace in the Horn of Africa* (Aldershot: Dartmouth, 1994): 21-23; Scholler, *supra* note 28 at 13
32. Article 3.
33. Article 4.
34. Article 5.
35. See Arthur Schiller, "Eritrea: Constitution and Federation with Ethiopia," *American Journal of Comparative Law* v.2 (1953) p. 378
36. Scholer, *supra* 28 at 15.
37. For a comprehensive treatment of the federal idea see Ronald Watts, *supra* note 2.
38. Tesfatsion, *supra* note 31 at 19.
39. Tesfatsion, *supra* note 31 at 20.
40. Tekeste, *supra* note 23 at 160.

41. Tekeste, *supra* note 23: 90, 98, 146. As early as by the end of 1953 Eritrean autonomy was severely compromised. The Eritrean Assembly was paralyzed for a number of reasons. It was led by an executive that had campaigned for complete union with Ethiopia. Tedla Bairu, the chief executive was also the leader of the Union Party; Eritrean autonomy under the Federal Act was perceived as a temporary hindrance to a complete union with the motherland. The move by the Union Party was consistently opposed by the Muslim League from the outset. All evidence seems to indicate that Tedla Bairu was equally determined to abolish the federation much earlier than the Ethiopian authorities.
42. Tesfayon, *supra* note 31 at 20.
43. Nationalist writers from Eritrea often state that the Union Party was much influenced and manipulated by Ethiopia but all other parties were equally financed either by the Arab world or Italy.
44. Tekeste, *supra* note 23 at 90, 98, 146.
45. For some Eritrean intellectuals like Bereket, the Eritrean demand for independence differed markedly from the claims of other groups in the region 'because the Eritrean case is not a case of secession but a case of decolonization. Eritrea remained an Italian colony and was then transferred to another colonizer and was then decolonized in 1993.' It is considered as an outright annexation and the theory of Ethiopia as 'colonizer' commences. Eritrea's forced annexation by the Emperor violates UN Res. of 1950 and was thus contrary to established principle of international law. Bereket Habte Selassie, 'Self-Determination in Principle and Practice: The Ethiopian-Eritrean Experience,' *Columbia Human Rights Law Review* 29 (Fall 1997): 99-101.
46. Minase, *supra* note 22 at 481.
47. Both countries paid dearly because of the protracted war. The implications for any process of federal constitution drafting are clear. What ultimately matters is not the formal division of powers or the legal mechanism for its implementation but rather the commitment to implement what is proclaimed and then meets the basic political needs of those who live under it. Despite its complexities, with hindsight, it was the best compromise, which both sides should have adhered to.
48. Tekeste, *supra* note 23 at 175.
49. For many optimists and those who had faith in the close military cooperation between EPRDF and EPLF, the 1993 referendum was supposed to end the 'civil war' or whatever name one may give it. However, the relationship between Ethiopia and Eritrea remains today (May 2008) as precarious as it was in 1991. The May 1998 conflict,

apparently reported as a border dispute, brought about a new dimension of devastating war between the two countries. For a more objective assessment of the latest conflict see Jon Abbink, 'Badme and the Ethio-Eritrean Border: The Challenges of Demarcation in the Post-war Era,' in *Africa* (Roma) 58:2 (2003): 219-231. Many are surprised that the Ethiopian government as victor of the war failed to dictate its terms. While some have tolerated the Eritrean independence/secession in 1993 for the sake of peace, many expected that with the act of aggression in 1998 by Eritrea, Ethiopia would insist on fresh negotiations for a lasting peace including free access to the port of Asseb. But like Adwa in 1896, the outcome of the war does not seem to have brought political or economic gains for Ethiopia.

50. See an interesting article by Allen Buchannan, 'Federalism, Secession and the Morality of Inclusion,' *Arizona Law Review* (Spring 1995): 53-63; also Donald Horowitz, "The Cracked Foundations of the Right to Secede," *Journal of Democracy* 14:2 (2003) pp. 5-16.
51. See John Markakis, *Ethiopia: Anatomy of Traditional Polity* (Oxford: Clarendon Press, 1974) Pp 43-71.
52. The exceptions include Yodit/Gudit's attack to the Christian empire in the 10<sup>th</sup> century; the campaign of Imam Ahmed (1527-1543) and the Age of Princes (*Zemene Mesafint* 1769-1855). The power at the center had to subject itself almost completely to regional forces.
53. The Ethiopian state, in its loose sense begins with Axum. The Axumite state lasted from first century AD to approximately 1150. It became a Christian state at about 335 AD making it the third political entity in history, after Armenia (301 AD) and the Roman Empire (312 AD). See Teshale Tibebe, *The Making of Modern Ethiopia 1896-1974* (Lawrenceville, New Jersey: The Red Sea Press Inc. 1995): XXI-XXVII; also Haggai Erlich, *The Cross and the River: Ethiopia, Egypt and the Nile* (Boulder: Lynne Rienner Publishers, 2002): 15; Donald Levine, *Greater Ethiopia: The Evolution of a Multiethnic Society*, 2<sup>nd</sup> edn. (Chicago: The University of Chicago Press, 2000) PP. 90-110; hereinafter referred as *Greater Ethiopia*.
54. William Livingston, "A Note on the Nature of Federalism," *Political Science Quarterly*, 67:1 (March, 1952): 81-95.
55. K. C. Wheare, *Federal Government*, 4<sup>th</sup> ed. (London: Oxford University Press, 1963) PP. 1-30.
56. M. Perham, *The Government of Ethiopia* (London: Faber & Faber Limited, 1963) at 262; Gebru Tareke, *Ethiopia: Power and Protest: Peasant Revolts in the Twentieth Century* (Cambridge: Cambridge University Press, 1991) pp. 80-83. The transition was certainly not smooth. Most of the

peasant rebellions were meant to stop this process of centralization; Donald Levine, *Wax and Gold: Tradition and Innovation in Ethiopian Culture* (Chicago: The University of Chicago Press, 1965) Pp. 177-185.

57. Despite some sweeping measures like the nationalization of land that gave a relief to the tenants living in the south, the core of the issue, that is political power and the marginalization of the large majority of the people, was almost kept as it was. See John Young, "Ethnicity and Power in Ethiopia," *Review of African Political Economy* 23: 70 (1996): 533-534; see also Ivo Strecker, "Glories and Agonies of the Ethiopian Past" review article at <http://ntama.uni-mainz.de/~aau/glories.html> as visited on 2/11/01.
58. The meaning of this notion is far from clear. Young university students in the 1960s and 1970s, influenced by Marxism-Leninism and frustrated by the age old Monarchy argued in favor liberating "oppressed nationalities" from an oppressor group but as later events indicate it meant different things to different groups. For some it meant respect for diversity but to be implemented under class perspective. For the now ruling party, Ethiopia is nothing but the outcome of the free will of the nationalities rather than abstract individuals and the nationalities have not only right to self rule but also right to self-determination, secession included. For details, see John Young, *Peasant Revolution in Ethiopia: The Tigray People's Liberation Front, 1975-1991* (Cambridge: Cambridge University Press, 1997).
59. Christopher Clapham, "Constitutions and Governance in Ethiopian Political History," in *Constitutionalism: Reflections and Recommendations, Symposium on the Making of the New Ethiopian Constitution* (Addis Ababa: Inter Africa Group, 1993): 30-31.
60. See Gebru, *supra* note 56 at 199, 203; Mesfin Wolde-Mariam, *The Horn of Africa: Conflict and Poverty*, (Addis Ababa: Commercial Printing Press, 1999): 140-141.
61. Clapham, *Constitutions and Governance*, *supra* note 59 at 29.
62. Much of the information and analysis for the introduction and this section draws from Assefa Fiseha, *supra* note 13 chapter one.
63. Such thinkers are called instrumentalists because they view religious and ethnic groups as a means to achieve some political and economic goal and having no relevance thereafter. Included in this category are John Markakis, *Resource Conflict in the Horn of Africa* (London Sage Publications, 1998); Christopher Clapham, "Ethnicity and the National Question in Ethiopia," in Peter Woodward and Murray Forsyth eds. *Conflict and Peace in the Horn of Africa: Federalism and its Alternatives*

- (Aldershot: Dartmouth, 1994) at 30-35; Jon Abbink, “New Configurations of Ethiopian Ethnicity: The Challenge of the South,” *Northeast African Studies* 50:1 (1998) at 60
64. See for example Assefa Jaleta, “Oromo Nationalism and Ethiopian Ethnocratic Politics”, *Horn of Africa* 20 (2002) p. 43
  65. For comparative details see Will Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1995).
  66. *Ibid.* at 6, 110-111; As many have indicated the passions and emotions attached to identity if fueled by some political and economic deprivations are more than enough to cause conflicts.
  67. The terms “multi-ethnic” or “multicultural” are used here to signify the fact that many states today contain a plurality of distinct ethnolinguistic and religious groups. Multiculturalism acknowledges, recognizes and at times promotes diversity against cultural unification and homogenization. See Topperwein, Nicole, *Nation-State and Normative Diversity*, 35 (Helbing & Lichtenhahn: PIFF, 2001).
  68. The situation in Ethiopia stands in sharp contrast with the experience of India and Switzerland, similarly multicultural states. See Wolf Linder, *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies* (New York: St. Martin’s Press, 1994); Harihar, Bhattacharyya *India as a Multicultural Federation: Asian Values, Democracy and Decentralization in Comparison with Swiss Federalism* (Bale: Helbing and Lichtenhahn, PIFF, 2001).
  69. This reminds us of the prominent article by Walker Connor, “Nation Building or Nation Destroying?” *World Politics* 24:3 (1972) pp. 319-355 where he argued that modernization, industrialization etc do not necessarily minimize ethnic loyalty and nation building may be nation destroying in diverse societies.
  70. See Articles 8, 39, 46, 47 of the 1995 Ethiopian Constitution. All articles referred to below are from this text, unless stated otherwise.
  71. Certainly there are some critical limitations on the new federal system and there is no attempt to discuss them here. For some of the views see Assefa Fiseha, *supra note 13* chapter 5; Maimire Mennasemay, “Federalism, Ethnicity and the Transition to Democracy,” *Horn of Africa*, Special Issue on Federation in the Horn v. XXI (2003) pp. 88-115; Alemante G. Selassie, “Ethnic federalism: Its Promise and Pitfalls,” *Yale Journal of International Law* 28:51 (2003) pp. 51-107.
  72. The terminology was coined by Alfred Stepan, ‘Federalism and Democracy: Beyond the US Model,’ *Journal of Democracy*, 10:4 (1999): 19-33. Andreas Eshete, *supra note 18*, Pp. 160-161.

73. Article 8. Indeed it is stated that the constitution is an expression of their sovereignty (Art. 8(2)).
74. See Articles 46 and 47.
75. See Art. 39.
76. Article 93.
77. Andreas contends that this aspect of the federation is not altogether a fiction. The northern part of the country during the late period of the *Derg* was practically *de facto* independent, particularly Tigray under TPLF had the experience of complete autonomy. He also states that the unitary state was completely dissolved in 1991 leaving only nationality-based parties free to reconstruct the state. Andreas, *supra* note 18 at 161.
78. Following the downfall of the military regime in May 1991, Ethiopia had a transitional government from 1991 up to 1994. The number of constituent states during this transition was fourteen. Some five regional states in the South merged in 1994 forming the Southern Nations, Nationalities and Peoples Regional State (SNNPRS). As a result, one can say some of the territorial boundaries of the regional states were drawn as in the SNNPRS following the decision to form a federal state.
79. See Art 50 (2).
80. Article 51 enumerates the classic powers of the federal government that we commonly find in many federal constitutions.
81. Article 52. In principle Art. 52(1) is like the Tenth Amendment or Art. 30 of the Basic Law. It states, 'All powers not given expressly to the federal government alone or concurrently to the federal government and the states are reserved to the states.' Yet Art. 52(2) enumerates some powers of the states besides to the reserve power mentioned above.
82. Article 51 sub 2 and sub 3 (*Italics mine*).
83. Art. 52(2) c.
84. Art. 45.
85. Art. 53.
86. Art. 54.
87. Art. 50(3).
88. Arts. 72, 73 and 74.
89. Arts. 70 and 71.
90. This is unlike the federations in India and Nigeria where state constitution are embodied within the federal constitution.
91. See Art. 9.
92. Ronald Watts, *New Federations: Experiments in the Common Wealth*

(Oxford: Clarendon Press, 1966) at 233 here after called New federations; Carl Friedrich, *Trends of Federalism in Theory and Practice* (London: Pall Mall Press, 1968) at 32.

93. Ibid at 233.
94. Ibid.
95. See Indian Constitution Arts. 343, 345 and the eighth Schedule; also the Swiss Constitution that provided for three official languages.
96. See Article 125 of the Revised Constitution; Article 116 of the 1987 Peoples Democratic Republic of Ethiopia Constitution.
97. Art. 2 sub 5 of the 1987 Constitution.
98. Article 5 sub 2.
99. Article 5 sub 3.
100. See Art. 5 of the Harari state constitution.
101. Mohamed Habib, 'Federalism and its Implications for the Language Question in Ethiopia,' in *First National Conference on Federalism, Conflict and Peace Building* (Addis Ababa: United printers, 2003): 243-251.
102. Among the opposition political parties operating at home, some of the Oromo parties such as the Oromo Federalist Democratic Movement aim at promoting Oromiffa as a second official language at federal level.
103. Minase Haile, "The New Ethiopian Constitution: Its Impact upon Unity, Human Rights and Development," *Suffolk Transnational Law Review* 20:1 (1996), at 11.
104. Article 8.
105. Art. 46 (2).
106. Paul Brietzke, "Ethiopia's Leap in the Dark: Federalism and Self-Determination in the New Constitution," *Journal of African Law* 30: 1 (1995): 19-20; Fasil Nahum, *Constitution for Nation of Nations: The Ethiopian Prospect* (Lawrenceville, NJ: The Red Sea Press 1997: 51-52.
107. Art. 47 (1).
108. Article 47(2). The Constitution under Art. 47(3) provided strict procedures to be followed in such process. The required procedures among others include: the approval by two-thirds majority of the members of the council of the nations, nationality and people concerned, presumably at local government level and the approval by a majority vote of the nation/nationality or people in a referendum organized by the State Council. Interestingly enough, the constitution is silent about the role of the federal government in the whole process except one vaguely stipulated provision. According to Article 62(6): "The House of Federation shall strive to find solutions to disputes or misunderstandings that may arise between the states." The role of the state

- beyond organizing a referendum is also far from clear.
109. This seems to be the logic behind Articles 46 and 47.
  110. This is a rather fluid expression and is elaborated more in the Section dealing with the treatment of minorities.
  111. Addis Ababa is the capital city of the federal government and has the right to self-government but it is responsible to the federal government (Art. 49). It used to be one of the fourteen regional governments during the transition period (1991-1994) but not under the new Constitution.
  112. Dire Dawa is also administered directly by the federal government. There have been issues of disagreement over the town between the Oromia and Somali regional states and since 1995, it is under the supervision of the federal government. It has special geo-political significance particularly after the war between Ethiopia and Eritrea broke out in 1998. The only railway that connects Ethiopia with Djibouti passes through Dire Dawa.
  113. Will Kymlicka, *supra* note 19: pp. 54-55.
  114. Article 47 sub 4; federal practice suggests that the system of intergovernmental relations via the Ministry of Federal Affairs, fiscal competence of the states and court structure (in some states dual and in others delegated) some level of political asymmetry is inherent in the federal system. See Assefa, *supra* note 18 chapter seven for details.
  115. Kymlicka, *supra* note 19 at 14. By this he meant the nation-state with a dominant national ethos trying to impose its values on national minorities and the latter trying to resist such imposition and federalism being instituted to guarantee self-rule to such national minorities.
  116. Richard Simeon, "Managing Conflicts of Diversity" in *Unity in Diversity: Learning from Each Other Conference Reader of the 4<sup>th</sup> International Conference on Federalism* Nov. 2007, New Delhi p. 104.
  117. Many of the nationalist parties that claim to represent the Oromos, Somalis, Afars and principally EPRDF are clear examples.
  118. The point made by Maimire, "the constitution establishes regions on the basis of sociological diversity and out of which no political community can be driven," (*supra* note 25 at 71), seems to be partly true, but is indiscriminate. Nations/nationalities in the sense they are understood in the west are much more than ethnic groups with a possible candidacy for statehood and so many of them claim that right in Ethiopia. So not all of them could be dubbed as ethnic groups. Some of the constituent states under discussion include: Afar, Somali and Gambela. The two-tier nature of the federal system (those with relatively better experience in self-rule versus marginalized ones) has been

- made clear in a number of studies. See for instance John Young, "Along Ethiopia's Western Frontier: Gambella and Benishangul in Transition," *The Journal of Modern African Studies* 37:2 (1999): 321-346; Jon Abbink as well remarked that in the constituent states under discussion, there have been dismal failures. See his article "Ethnicity and Constitutionalism," *Journal of African Law* 41:2 (1997) at 173; also Dereje Feyissa, "The Experience of Gambella Regional State," in David Turton ed. *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective* (Oxford: James Currey, 2006): pp. 208-230.
119. See for example Abdi Ismail Samatar "Ethiopian Federalism: Autonomy versus Control in the Somali Region" *Third World Quarterly* 25: 6 (2004): 1131-1154.
  120. See, for instance, an interesting article about the crisis in Gambela by Dereje Feyissa, *supra* 118 at 61.
  121. Art. 47(4).
  122. Another area where diversity has been given political expression is the language policy.
  123. Akhtar Majeed, "Conflict Management in Federal Plural Societies: Some Lessons from India," in *First National Conference on Federalism, Conflict and Peace Building*, (Addis Ababa: United Printers Plc., 2003)Pp. 132-141.
  124. For a more detailed account of how a country's electoral system contributes to the stability or instability of a country see Maimire, *supra* note 71: 107-110.
  125. The HoF has as of 2007 endorsed a new formula.
  126. The Conference organized by GTZ and Ministry of Federal Affairs in 2003 in Addis Ababa; Seminar organized by Addis Ababa University and the British Council in 2004, Round Table held in March 2008 in Addis Ababa are some examples.
  127. See Kinfu Abraham, *Ethiopia from Empire to Federation* (London: EIIPP, 2001): 453-493; Fasil, *supra* note 106, at 107.
  128. Bekele for instance argues that unless something is done, the federal system will crumble once the ruling party is voted out of office. Bekele Haile-Selassie, Ethiopia: A Precarious Ethno-Federal Constitutional Order (Doctoral dissertation) University of Wisconsin Law School 2002 (Unpublished), p. 7.
  129. Minase, *supra* note 103.
  130. John Cohen, "Ethnic Federalism in Ethiopia" *Northeast African Studies* 2:2 (New series) (1995) at 168.
  131. Paul Brietzke, *supra* note 106 at 37.

132. Some have dubbed it as suicidal, Charles Ehrlich, "Ethnicity and Constitutional Reform: The Case of Ethiopia," *ILSAJ, Int'l. and Comp. L.* 6 (1999) at 62; others have called it "a recipe for disaster," Brietzek, *supra* note 106 at 35; Minase states by placing sovereignty on the nations/nationalities rather than on the people that the "constitution can be said to have juridically extinguished Ethiopia as a sovereign entity and created nine sovereign states in its place on the same territory," *supra* note 103: 21-22.
133. Border disputes between two or more regional states particularly between Oromia and SNNPRS; between Oromia and Somali Region; border and resource conflicts between Afar and Somali regional states; demands for new zones and Werdas in the SNNPRS have caused deaths to thousands of lives and destruction to property.
134. Kymlicka points out that these are existential problems in every multicultural federalism including the west. *Supra* note 19.
135. This is a reference made to Canada.
136. This is a reference made to Switzerland.
137. Maimire employs this notion in order to analyze the interethnic relations before and after the introduction of the federal system in Ethiopia. "Open ethnic identity" he claims recognizes the "other" as different but not alien and does not subject to double exclusion-identity and location, while "hard identity" makes identity and location inseparable leading from the "different" to double exclusion. This makes sense in the light of the present state crisis in Gambela, Oromia and Benishangul-Gumuz regional states where a significant number of people from different backgrounds are treated like "guest workers" for not being the "son of the soil." Dereje calls them "inconvenient minorities." Maimire, *supra* note 71 at 98; Dereje, *supra* note 118.
138. Some of them include the commitment to the federal principle, tolerance and the accommodation of difference, strengthening the institutions of democracy, economic development, the presence of a dominant/ majority nationality as well as the prevalence of rule of law and constitutionalism. For the complex network of relationships between a society, its constitutions and political institutions, See B. O'Leary, 'An Iron Law of Nationalism and Federation? A (neo-Diceyan) Theory of the Necessity of a Federal *Staatsvolk*, and of Consociational Rescue,' *Nations and Nationalism* 7:3 (2001): 273-96.
139. Maimire, *supra* note 71 at 94; Professor Mesfin has also devoted a small book to make this case. Mesfin Wold-Mariam, *The Horn of Africa Conflict and Poverty*, (Addis Ababa: Commercial Printing press, 1999).
140. Will Kymlicka, *supra*, note 65 at 6.

141. *Ibid.*: 110-111.
142. Thomas Fleiner, 'Recent Developments of Swiss Federalism,' *Publius: The Journal of Federal-ism* 32:2 (Spring 2002): 97- 124.
143. Edmond Keller and Thomas-Woolly, 'Majority Rule and Minority Rights: American Federal-ism and African Experience,' *Journal of Modern African Studies* 32:3 (1994) at 418.
144. See Basic Law of Germany Art. 28; Swiss Constitution Art. 50.
145. F. Capotorti, Study on the Rights of Persons Belonging to Ethnic, Racial and Linguistic Minorities, UNO 1977, UN-Doc. E/CN.4/Sub.2/384, Rev. 1, para. 58
146. Kjetil Tronvoll, *Ethiopia a New Start?* (Minority Rights Group, 2000): 22.
147. See Tesfaye Tafese, The Predicament of Amhara Migrant-settlers in East Wollega Zone, Ethiopia (unpublished paper presented at the Ethiopian Studies conference held in Norway 2006
148. State constitutions of Amhara and Tigray for example ensure minorities right not only to work and live but also to elect and to be elected. See the respective constitutions Art 33.
149. Article 41.
150. Laws establishing Human Rights Commission and Ombudsman were enacted a long time ago but it took more than four years to set up the institutions. The judiciary has not yet been able to deal with human rights issues satisfactorily.
151. Chaim Gans, *The Limits of Nationalism* (Cambridge: Cambridge University Press, 2003) at 10; James Kellas, *The Politics of Nationalism and Ethnicity* (London: Macmillan, 1991) at 51.
152. Chaim, *supra* note 151 at 28.
153. Indeed the Revised Constitution of the Region Arts. 74-82 stipulate about the Nationality Council but this Council simply strengthens the position of the indigenous nationalities rather than the disenfranchised/marginalized groups.
154. Ivo Duchacek, "Antagonistic Cooperation, Territorial and Ethnic Communities," *Publius: Journal of Federalism*. 7 (1977): 17-18.
155. Andre Hoekema, "Aspects of Legal Pluralism in the Federal Set up of the Ethiopian State," *Ethiopian Journal of Development Research* 24:2 (October 2002): 2-3.
156. The term nationalities has to be applied carefully here. It seems that in the case of the SNNPRS, Gambela and Benishangul-Gumuz states in practice they are not treated as nations/nationalities. The most multi-cultural states are treated with some level of skepticism from the center. If one has to interpret the federal practice the meaning appears

like this: for the moment you are not nations/nationalities but should you one day become so then you have the constitutional right to form your own states.

157. For more on the SNNPRS, see Jon Abbink, "New Configurations of Ethiopian Ethnicity: The Challenge of the South," *Northeast African Studies* 5:1 (New series) (1998): 59-81; Sarah Vaughan, *Response to Ethnic Federalism in Ethiopia's Southern Region*, in David Turton ed. *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective* (Oxford: James Currey, 2006): pp. 181-207.
158. What the transformation from a front to a movement implies is far from clear. However, some hint that SEPDF, which was a front of some twenty ethnic groups, was dependant on the fronts in decision-making. Important decisions were made by the twenty parties at zone level and then implemented by the SEPDF. This led to a weak regional state and strong zones. After the reform major decisions are made by the movement and not by the twenty parties. The role of the fronts accordingly is diminished. Interview, Speaker of the second chamber in the SNNPRS Ato Tekle Didu, Awasa, March 3, 2005.
159. Weredas are the second lowest level local governments.
160. Interview with Assefa Kessito, Lecturer and who is actively involved with political developments in the SNNPS, November 2002; see also *Zemen Magazine* Hidar 1995, *Ye Debub Ye Politika Tikusat* : 8-11; *Human Rights Watch World Report* (2003): Africa: Ethiopia <http://www.hrw.org/wr2k3.africa5.html> as visited on June 15, 2003.
161. For a detailed account of the conflicts see Assefa, *Supra*, 13, chapter five.
162. See Arts. 51, 55 and 54(3).
163. Ethiopian Constitution Art. 61(3) stipulates, 'Members of the House of the Federation shall be elected by the State Councils. The State Councils may themselves elect representatives to the House of Federation, or they may hold elections to have the representatives elected by the people directly.'
164. Daniel Elazar, *Exploring Federalism*, (Tuscalusa: University of Alabama Press, 1987) 12.
165. For more on the role of second chambers in federations and the role of the HoF in adjudication of disputes see Assefa Fiseha, "Federalism and the Adjudication of Constitutional Issues: The Ethiopian Experience," *Netherlands International Law Review* v. LII:1 (2005): 1-31.
166. Aberra Jembere, *An Introduction to the Legal History of Ethiopia 1434-1974* (Hamburg: LIT Verlag Munster, 2000) pp. 219, 227, 240.

167. Under the unitary systems, the judiciary was contained within the executive branch. The federal Supreme Court was separated from the Ministry of Justice in 1992. It suffers from a severe shortage of qualified legal and judicial personnel to operate its many layers of courts.
168. For a comprehensive review of the HoF's role see Assefa Fiseha, "Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation" *Mizan Law Review* 1: 1 (2007) Pp. 1-32.
169. Art. 93.
170. However, this position needs qualification. There must be some wisdom in granting the right to secede to nations/nationalities and not expressly to the constituent states. It appears that the constitution implicitly acknowledges its own limitations. Not all nationalities have their own states and granting the right to the constituent states would have meant only for a few nationalities.
171. Article 8.
172. Apart from the ruling party, some parties from Oromia and Somali put secession as a condition to participate in the political process, indicating that there were pragmatic reasons for its inclusion. They think that Art. 39 is their only guarantee against oppressive central government. See the newsletter issued by the Constitutional Commission issue No. 3, May 1994 E.C.; *Ye Ethiopia Hige Mengist Gubae Kale Gubae* (Minutes of the Constitutional Assembly) v. 3 *Hidar* 8-13/1987 E.C. (Addis Ababa, 1994), discussions on Article 39. For general reference see Cass Sunstein, 'Constitutionalism and secession,' *U. Chi. L. Rev.* 58, 633 (1991): 634, 643-644. For more on secession; also see Allen Buchanan, *supra* note 50 53-62; Will Kymlicka, 'Federalism and Secession: At Home and Abroad,' *Canadian Journal of Law and Jurisprudence* 13:2 (2000): 207-224.
173. Andreas *supra* note 18 at 168.
174. Barbara Thomas-Woolly and Edmond Keller, 'Majority Rule and Minority Rights: American Federalism and African Experience,' *The Journal of Modern African Studies*, 32:3 (1994) at 417.
175. See an interesting article by Allen Buchanan, *supra* note 50: 53-63.
176. See Merera Gudina, *Ethiopia: Competing Ethnic Nationalisms and the Quest for Democracy 1960-2002* (Shaker Publishing: 2003) at 119.
177. Lovise Aalen, *Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991-2000* (Bergen: Chr, Michelsea 2002) at 83; Joel Barkan, "Kenya After Moi," *Foreign Affairs* January/February 2004.
178. By now there is ample evidence pointing out that a centralized party system and federalism are inconsistent. See for example Alfred Stepan,

- 'Federalism and Democracy: Beyond the US Model,' *Journal of Democracy* 10:4 (October 1999): 22-23.
179. See Medhane Tadesse and John Young, "TPLF: Reform or Decline?," *Review of African Political Economy* 30: 97 (2003) at 394.
180. See Jon Abbink, "Discomfiture of Democracy? The 2005 Election Crisis in Ethiopia and its Aftermath," *African Affairs*, 105/419 (2006).
181. Marina Ottaway, "The Ethiopian Transition: Democratization or New Authoritarianism?" *Northeast African Studies* 2:3 (1995) pp.73; 81-83
182. Majority of the members of the CUD boycotted the new legislature's first sitting but 93 of them later joined the HoPR. Members of the United Ethiopian Democratic Forces (UEDF), the second largest opposition and other smaller opposition members, however, joined Parliament from the outset.
183. Some of the coalition members claim to be social democrats, others liberals democrats and some others nationalists.
184. The National Election Board stated that the ruling party and its allies secured 347 in a parliament with a total seat of 547 and declared it as a winner. The CUD secured 109 while the UEDF 52 seats. 11 seats went to an Oromo opposition while 1 for an independent candidate. See NEBE announces official results at <http://electionsethiopia.org/Whats%20new40.htm> as accessed on June 15, 2006.
185. In Addis Ababa the Opposition (CUD) won 137 (99.3%) in the 138 seats parliament. By some twist of history the April 2008 by elections resulted in 137(99.3%) seats to the ruling party, only one seat going to the opposition.
186. <https://www.cia.gov/library/publications/the-world-factbook/geos/su.html> as accessed on April 2008
187. Harvey Glickman, "Islamism in Sudan's Civil War," *Orbis* (Spring 2000) p.269
188. Political and economic marginalization of the region by central government led to the emergence of two rebel forces: the Sudan Liberation Army and the Justice and Equality Movement in Feb 2003. Resource competition existed for long between those who claim Black African descent and those who claim Arab descent though both groups are uniformly Muslim. With the signing of the CPA to their exclusion they attacked government forces and the latter in return started to arm Arab Militias- Janjaweed from the same region to check the insurgency and the crisis in Darfur took its present shape. See Scott Straus, "Darfur and the Genocide Debate," *Foreign Affairs*, January/February 2005.

189. Omer Awadalla Ali Gasmelseid, *Federalism as Conflict Management Device for Multiethnic and Multicultural Societies: The case of Sudan* (Bale: Helbing & Lichtenhahn 2006) pp.28-33. The political instability is further observed if one looks at Sudan's three transitional constitutions, "two permanent constitutions," countless decrees and Peace Agreements in 50 years life after independence.
190. Ronald Watts, *supra* note 2, p. 14
191. Ahmed T. el-Gaili, "Federalism and the Tyranny of Majorities: Challenges to Islamic Federalism in Sudan," *Harvard International Law Journal* 45:2 (2004) p. 504
192. Francis Deng, *Southern Sudan and the Cultural Change of Governance, Conference on the Current Peace and security Challenges in the Horn of Africa*, InterAfrica group (2007) p. 92.
193. The Southern policy was introduced by the British (1917-1945) that created a buffer zone between the North and the south with a view to merging the south with Kenya and/or Uganda. The policy among other things prohibited Islam and Arabic language in the South. It was abolished in 1947 Juba Conference in which representatives from the North and South agreed to end it and promised federalism to the South at Independence. See Omer Awadalla Ali *supra* note 189 pp. 22-23.
194. This movement forced the government to negotiate and sign the Addis Ababa Agreement and when the agreement was abolished in 1983 the Sudan People Liberation Army/Movement (SPLA/M) emerged.
195. It is already reported that some 300,000 people have lost their life since the conflict erupted in 2003 but such figures are often disputed by the GoS. See Darfur Deaths Could be 300,000 <http://news.bbc.co.uk/2/hi/africa/7361979.stm> as accessed on April 24, 2008.
196. Horowitz, Donald, *Ethnic Groups in Conflict*, University of California Press, Berkeley, 1985; Foulie Psalidas-Perlmutter, "The Interplay of Myths and Realities," *Orbis: A Quarterly Journal of World Affairs* Spring 2000 pp. 237-44; William Zartman, "Mediating Conflicts of Need, Greed and Creed," *Orbis: A Quarterly Journal of World Affairs* Spring 2000 pp. 255-66.
197. To be sure there were intense debates and negotiations between delegates of the North and the South during independence and even after. Typical of which is the 1965 Round Table conference that never materialized owing to the military Coup in 1969. See Steve Odero Ouma, *Federalism as Peace Making Device in Sudan's Interim National Constitution*, LLM Thesis 2005 unpublished p. 32-33.

198. The agreement provided that whatever adjustments to the accord would need approval from the South via a referendum.
199. See Daniel Elazar, *Exploring Federalism* (Tuscaloosa, AL: University of Alabama Press) 1987 pp.2-7.
200. Whatever section of the CPA not included in the Interim Constitution is considered as integral part of it. For analysis on the legal technicalities of the Interim Constitution see Hatem Elliesie, "The Contemporary Framework for a National Interim Constitution," *Recht in Africa* 2005: 63-81.
201. See Article 5 of the Interim Constitution.
202. Let alone from the perspective of rebel forces that did not participate in the CPA, seen from the opposition parties operating in the North some complain that the process was exclusive and not comprehensive as is suggested in the name. see for example Abdelwahab El-Affendi, *The View from the North: The CPA's Hopes and Multiple Disappointments, Conference on the Current Peace and security Challenges in the Horn of Africa*, InterAfrica Group (2007) pp. 82-89
203. John Young even warns that the CPA lays the basis for future conflict because it is exclusive, top bottom and externally induced. See John Young, *Sudan's Peace Process: Laying the Basis for Future Conflict, Conference on the Current Peace and security Challenges in the Horn of Africa, InterAfrica Group* (2007) pp. 108-126.
204. One classic challenge relates to the fact that the CPA provided that Sharia will serve as a source of law in all parts of Sudan except the Southern region and certainly there are many regions and groups in the North, West and East that resist such clause.
205. Contested because not all the rebel forces seem to be part of the DPA and the situation in Darfur has not shown significant improvement.
206. For the dilemmas involved with the use of asymmetric arrangement as solution to conflicts see Will Kymlicka, "Federalism, Nationalism, and Multiculturalism" in Dimitrios Karmis and Wayne Norman eds. *Theories of federalism* (Macmillan: Palgrave, 2005) pp. 277-282
207. The Interim Constitution of Sudan Article one declares Sudan as a multicultural state. It remains to be seen if such declaration is to be implemented in practice. Ethiopia has since the transition in 1991 officially embraced multiculturalism giving recognition to its "nations, nationalities and People" right to self-rule, shared rule at federal level and right to secede.
208. See Ronald Watts, *supra* note 2 P.XIV.

## **Thinking about Civic and Ethnic Nationalism: Issues for Ethiopia and the Horn**

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One caveat: this is an early draft of a work-in-progress, and is less a fully worked up academic review than the beginnings of a ‘think piece’ designed to stimulate discussion and debate. Some of the issues are controversial and difficult, but this discussion is offered in good faith as a constructive contribution to an urgent debate. I am sure this seminar will help in finding ways to take some of the issues and ideas forward.

### **1. Dualism of ethnic and civic nationalism**

As the concept paper prepared by the InterAfrica Group notes, civic and ethnic nationalism are often treated as though they were “mutually exclusive and contradictory” (2008:10). That this dichotomy has become established undoubtedly reflects the fact that “nationalism comes in manifold forms, some benign and reassuring and others terrifying” (Calhoun 1997:3). Because of this, social scientists and others have often been tempted to try to analyze ‘good’ nationalism (‘inclusive’ nationalism, patriotism, or what tends to be thought of as ‘civic nationalism’), and ‘bad’ nationalism, (‘exclusive’ or ‘chauvinist’ nationalism, often assumed to be synonymous with ‘ethnic’ nationalism), as though they were looking at “completely different social phenomena” (*ibid.*).

IAG’s concept paper gives a very useful review of the standard conceptions of ethnic and civic nationalism, and the way in which they have generally been understood to have played out in the development of African political systems of the late twentieth and early twenty-first centuries (2008:10-11). It’s worth citing the definitions offered:

For many, civic nationalism correlates with civil society. In this conceptualization of nationalism, nationalism is understood to be the political and socio-psychological underpinning of a population that believes that it constitutes a community and is governed by a state and a constitution. In this definition of (civic) nationalism, the sovereignty of the people is located in the individual (citizen), whose national identity is based on a sense of political community within a demarcated territory defining the social space that houses a culturally homogeneous group. To summarize, civic nationalism is congruent with a sense of cultural/national homogeneity, occupation of a common territory, and statehood. In other words, it is the form of nationalism that corresponds to modern statehood.

The conceptualization and evaluation of ethnic nationalism is very different. For some, ethnic nationalism is synonymous with sub-state nationalism. That is, the nationalism of those communities who have not achieved statehood. Ethnic nationalism is also often conceptualized as the form/type of nationalism based on descent.

This form/type of nationalism has often been viewed negatively for different reasons. For some, its reactionary/backward nature is explicable in terms of its sole reliance on racial/biological basis, making it narrow and exclusivist in character. Ethnic nationalism has also been viewed as an actual and potential threat to already existing states and civic nationalism.

It also has to be pointed out that many observers assume that the nature of nationalism that led to the emergence of statehood has an important

impact on the identity and criteria for belongingness (citizenship). To simplify, in states that emerged on the basis of civic nationalism, citizenship is based on/defined by formal adherence to the constitution and the procedures associated with the acquisition of citizenship. In states that emerged/rose on the basis of ethno-nationalism, citizenship is based/defined on descent/blood. (*op.cit.*:10)

The paper's useful review of the impact of this dualist conception on the politics of Africa<sup>2</sup> concludes that the various changes on the continent of recent years, in combination with shifts in academic perspectives, have "involved the interrogation of the previous assumptions regarding the contradictions between civic nationalism and ethnic nationalism" (*op.cit.*:11), and this is the point at which I want to begin.

The dualistic approach set out above is both challenged and underpinned in the influential work of Walker Connor, who goes so far as to argue that "all nationalism is ethnically predicated and those who employ the term nationalism to refer to a civic identity or civic loyalty are confusing patriotism with nationalism" (Conversi 2004):

*Nation* and *state* are commonly interutilized, and the term nation-state is regularly employed indiscriminately to refer both to uninational and multinational entities. As a result of this confusing interutilization of key terms, nationalism is used to connote two different concepts which are often in conflict with one another. At times it connotes identification with and loyalty to the nation in the sense of a human group which may or may not be essentially coterminous with a state (e.g. Croatian, Fleming, Scottish, or Ukrainian nationalism)<sup>3</sup>. More often it is used to connote identification with and loyalty to the 'nation' when the latter is used to indicate the state structure regardless of the national composition of the state's population

(e.g. American, Argentinian, Indian, or Filipino nationalism).<sup>4</sup>

In order to avoid the confusion surrounding two vitally different and often antagonistic loyalties, this writer has found it useful elsewhere to employ the term *patriotism* to refer to state loyalty, and *ethnoationalism* to refer to loyalty to the nation (Connor 1980:201)

There is some question as to whether Walker Connor's position should be considered part of the 'dualist' camp: his work has done much to undermine the concept of 'civic nationalism', by suggesting – I think probably rightly – that all nationalism is ethnically premised, but ultimately he retains the second category, simply renaming it 'patriotism', and this is still problematic. I tend to agree with Calhoun's conclusion that the insistence that ethnic and civic nationalism are different in kind simply makes "each hard to understand, and obscures their commonalities".<sup>5</sup> I suggest that it is preferable to stress the remarkable empirical diversity of 'nationalisms' (and patriotisms), and to trace patterns of similarity and difference in the processes which result in this range of phenomena, a range which shows differences of degree rather than of kind.

In order to interrogate the relationship between apparently different kinds of nationalism, we also need to think more fundamentally about what we mean by ethnicity and nationalism *per se*. Here we encounter a parallel problem, since theorists have tended to assume that these two concepts are and should be conceptually distinct, and much ink has been spilled, before and after Walker Connor, as to whether one can have nationalism without ethnicity.

Marcus Banks, for instance, suggests that "all nationalisms, once state control is achieved, actively seek both to enhance and reify the specifically ethnic identities of deviant others within the nation state, and at the same time to efface the idea of ethnic particularism within the national identity" (1995:158). This would seem to suggest

that nationalism of all kinds involves, at some level, at least a kernel of ethnic nationalism, even if not overtly presented as such. A cursory review of existing entities regarded as 'nations' does indeed tend to suggest that most are dominated – or at least strongly 'characterised' - by ethnic groups, or ethnic stereotypes; the dominant groups tend to deny their own ethnic identity, presenting themselves rather as "citizens or humans", whilst relegating or assimilating the identities of others. This is in line with Walker Connor's position on ethno-nationalism. Thomas Hylland Eriksen, meanwhile, suggests that whilst this may be a common pattern, nevertheless "there is no *necessary* link between national identity and ethnic identity" (2002:117). The problem with Eriksen's position lies perhaps in our next point, that there is so little agreement on what nationalism is, or indeed what ethnicity is. As a result, the force of his claim is limited in practice: almost all instances of apparent 'nationalism' *can* be analysed as having deployed or involved some kind of statuses or components at some point which *can* be described as 'ethnic'.

## 2. Nations as constructed, 'underdetermined' collectives

A nation is a group of people united by a common error about their ancestry and a common dislike of their neighbours. (Deutsch 1969:3)

In relation to nationalism, the lack of a widely accepted definition is almost a truism, and "reflects the deep embeddedness of the discourse of nationalism in the practical problems of modern politics":

The ideas of nation, nationality and the like are 'essentially contested' because any particular definition of them will privilege some collectivities, interests, and identities and damage the claims of others. [...] There is no objective way to determine which nations [or indeed ethnic groups] are 'real' on the basis of potential for political or economic autonomy. [...] Nationhood cannot be defined objectively, prior to political processes, on

either cultural or social structural grounds. This is so, crucially, because nations are in part made by nationalism. They exist only when their members understand themselves through the discursive framework of national identity, and they are commonly forged in the struggle carried out by some members of the nation-in-the-making to get others to recognize its genuine nation-ness and grant it autonomy or other rights. The crucial thing to grasp here is that nations exist only within the context of nationalism. 'Nation', is a particular way of thinking about what it means to be a people, and how the people thus defined might fit into a broader world system. The nationalist way of thinking and speaking helps to make nations. There is no objective way to determine 'what is a nation'. There are no indicators that are adequate independent of the claims made on behalf of putative nations, and the political processes by which they are made good, or fail to be made good." (Calhoun 1997:99-100)<sup>6</sup>

The same fundamental point has been made by many different authors, over several decades, from Ernest Gellner's comment that "it is states that create nations" (), and Eric Hobsbawm's observation that "nationalism comes before the nation" (), to Karl Deutsch's note that "nationalities turn into nations when they acquire the power to back up their aspirations" (Deutsch 1966:105). Whilst the view that there is nothing either natural, objective, or ancient about nations has become very widely accepted amongst academics, it is not one which is usually adopted by nationalist and ethno-nationalist political elites, precisely because it would do much to undermine the political projects to which they are committed. Whether it is possible and desirable to try to bridge this gulf, and how it might be done, are issues which this paper returns to, in relation to Africa and Ethiopia, and which this seminar could usefully discuss.

Nationalism is perhaps best thought about as having three dimensions:<sup>7</sup> as discourse ("the production of a cultural understanding and

rhetoric which leads people through the world to frame their aspirations in terms of the idea of nation and national identity [...]"); as project ("social movements and state policies by which people attempt to advance the interests of collectivities they understand as nations [...]"); or as evaluation ("political and cultural ideologies that claim superiority for a particular nation"). It is in this last sense that nationalism becomes something of an 'ethical imperative': this is the point, for instance, where it is often claimed that

"national boundaries *ought* to coincide with state boundaries, for example; members of a nation *ought* to conform to its moral values, etc. [This is where] nationalism comes to be associated with *excesses* of loyalty to one's nation – as in ethnic cleansing, ideologies of national purification, and hostility to foreigners" (Calhoun 1997:6)

It's worth noting that these risks of negative consequences seem to be inherent in this 'imperative' element of nationalism, and are therefore in principle relevant to all forms of nationalism, be they considered civic or ethnic. They inhere in the way in which the nationalist ideology in question evolves in practice, and I would argue cannot be automatically correlated with the extent to which 'ethnicity' may or may not be considered to have 'infected' the notion of 'nation'.

### **3. Nationalist individuals, and the national collectivity**

There is a particular kind of schizophrenia associated with nationalism, however, which does relate to the traditional distinction between ethnic and civic nationalism. This lies in the distinction between individual citizens and citizens as a collective national body - as a 'willed community' in the famous US parlance. It is useful to explore further the relationship between the emergence of nationalism in the nineteenth century,<sup>8</sup> and the kinds of essentialist, individualist, and categorical ideas about identities on which this thinking was - and is - premised. Essentialist thinking tends to reduce the

conceptualization of a particular population to a single defining criterion or characteristic – its essence, which is often seen not only as defining but also as inescapable or ‘in the natural order of things’. Thus nationality (along with gender, race, and sexuality) is often understood to classify people who are assumed naturally to “live in one world at a time, inhabit one way of life, speak one language, and [be], as individuals, singular integral beings. All these assumptions came clearly into focus by the nineteenth century, and all seem problematic” (Calhoun 1997:18). Clearly this problematic approach tallies with the assumptions that nations are somehow natural, and objectively identifiable, which as I have discussed above have now been abandoned by most social theorists. It also treats populations as ‘citizens of a nation’ first and foremost, stripping them of the relevance of their other social networks and obligations.

Essentialism chimes closely with equally ‘modernist’ trends towards individualism, which privileges an understanding of individuals ‘in and of themselves’. Again this approach removes citizens from analysis of the webs of relationships, interactions and hierarchies within which they are embedded on a daily basis, and which social theorists know are deeply implicated in the motivation of action. Many commentators have noted that this modern idea of the individual as the “locus of indissoluble identity – at least potentially self-sufficient, self-contained and self-moving” – is a powerful factor in nationalism.

Individualism is important not just metaphorically, but as the basis for the central notion that individuals are directly members of the nation, that it marks each of them as having an intrinsic identity, and that they commune with it immediately and as a whole. [...] The individual does not require the mediation of family community, region, or class to be a member of the nation. This way of thinking reinforces the idea of nationality as a sort of trump card in the game of identity. [The discourse of nationalism] promotes categorical identities over relational ones.” (Calhoun 1997:46)

This, as has been widely discussed, is where national identity starts to look different from family, lineage, kinship, or even some ethnic identities, and to require different kinds of ‘moral commitments’. National loyalty would, for instance, require individuals to inform on treasonous family members, whereas lineage or ethnic conceptions of ‘honourable behaviour’ could well be expected to place very different obligations. One could however say the same thing about all manner of different aspects of our social identities, which often produce conflicting loyalties, for instance between family, professional, political, and cultural sets of demands.

#### **4. Willed communities?**

Nationalism, of course, doesn’t just treat populations as individuals, however, and is also interested (at least in principle) in the nation, or ‘willed community’ arising out of a collective political commitment to the nation-state.

Part of the key is that the United States was conceptualized – at least in part – as a willed community, which meant that membership depended on commitment, not just ethnic or other categorization. This is one of the meanings of civic nationalism as distinct from ethnic. Over time however, a new categorical identity as Americans and US citizens began to supplant the idea of willed community and to issue in arguments about essential characteristics of American culture. (Calhoun 1997:48-9)

The fact that individual categorical identities have returned to dominate thinking even in the US, however, suggests another strand of problems with the concept of civic nationalism. This last quotation I think demonstrates much of what is specific about civic nationalism – still widely assumed to be ‘the good’. It is premised on individualized and essentialised categorical identity of ‘the citizen of nation x’. As such it is a very widespread view of an ideal, but it is seriously flawed in the way in which privileges one set of liberal rela-

tionships (individual citizen holding national government to account through periodic elections) over a range of other webs of social relations.

Let me make one more point regarding 'civic' nationalism to try to convince you that it is just as 'problematic' (or not) as ethnic nationalism, and probably not a separate phenomenon. Calhoun notes that nationalism can just as well be secessionist as well as integrative.

“Anti-colonial and anti-imperial nationalisms depend on the internal organizing capacity of the would-be independent nation. They cannot be understood as attempts simply to protect or restore traditional arrangements, even where that is their manifest ideological purpose, for they pursue a new, national form of mobilization as a more or less necessary concomitant of anti imperial struggle. [...] If one major source of nationalism is new levels of national integration, it is also true that secessionist nationalisms are often forged from failed projects of broader national integration. [...] Efforts to forge a more unified national state often inspire contrary efforts on the part of subordinate groups or neighbours. The formation of a larger unity is accompanied by rearrangements of national identities that create new lines of tension while overcoming some established ones. [...]

The discourse of nationalism can be employed equally in the service of unification or secession. Its focus is generally on the matching of a state to a putatively pre-existing nation; the scope of the national unit is not determined by the *form* of the nationalist discourse. It is a content given, in large part, by the relationship of national integration, cultural tradition and contraposition to other states within the world system. To emphasize any one of these to the exclusion of the others would be an error.” (Calhoun 1997:101-103)

It is worth noting that this description rather accurately describes the process by which Eritrean nationalists achieved independence. The Eritrean nationalist discourse very clearly stressed a claimed common political commitment to the project of Eritrea, forged in the period of Italian colonialism, and explicitly attempted to exclude notions of descent or ethnicity. Those who deplore ethnic nationalism in Ethiopia, perhaps need to think more closely about how they feel about Eritrean nationalism – apparently ‘civic nationalism’ *par excellence*.

I conclude this discussion of ‘civic’ nationalism with the comments of several authors whose empirical work, in these cases in Canada and central Europe, has led them to conclude that nationalism without ethnicity is a chimera.

The motherland discourse of interethnic or ‘civic’ national identity formation is in reality a rhetorical device for consumption by foreign audiences and ethnonational Other in order to help stabilize interethnic relations in the state and enhance state legitimacy within the sovereign state system. In practical daily life [multiethnic states] have favored more ethnically exclusionary fatherland reterritorialization policies that privilege member of titular national communities (Kaiser 2004:234)

Edwards’ discussion of political discourse in Canada also suggests that “despite the separatists’ claims, Quebec nationalism was, after all, essentially an ethnic phenomenon” (2004:139). His conclusion, however, is interesting:

If there *is* a civic nationalism, what is it, why has it become so popular a conception, in what way is it perceived to be a more attractive label than (say) patriotism, and so on? Is it, perhaps, that it seems to infuse a democratic adherence of social inclusion with a

more basic sense of belonging? Is it nationalism without tears? (Edwards 2004:145)

I think this set of questions may usefully prompt us to look at what happens at the levels of political systems and the citizenry. If we do conclude with Walker Connor that all nationalism is ethnonationalism, how is it that we can preserve commitments to democratic inclusion so that a political project – whether we label it nationalist or patriotic - extends this ‘basic sense of belonging to all of those affected by it, and living within its remit? I now turn to a consideration of several of the strategies which have been adopted or considered.

#### **5. Managing ‘multiple nationalisms’: options & limitations**

Joshua Forrest sets out four reasons for the recent rise in what he refers to as sub-nationalism in Africa:

“A history of state intervention and constructivist manipulation of regional affairs [...]; long-term economic inequities that reflect a materialist influence on movement formation [...]; individuals’ conscious or ascriptive adherence to ethnic or regional identity patterns [...]; and] the instrumentalist leadership of movement elites. When ascriptive and instrumentalist political behavior coincides with the evolution of constructivist and materialist factors, the conditions for subnationalist movement mobilization are especially favourable. (Forrest 2004:2)

Regardless of whether or not Forrest’s list of reasons is exhaustive, there is clearly widespread agreement that “ethnic pluralism is and will remain a fundamental characteristic of African modernity that must be recognized and incorporated within any project of democratic nation-building”. In an important introduction to their influential edited collection, Bruce Berman, Dickson Eyoh and Will Kym-

licka inventorise

“five (potentially overlapping) approaches that have been adopted by democratic states to reconcile ethnic diversity and common citizenship, and that have been adopted or recommended in the African context:

- a ‘neutral’ or ‘difference-blind’ state;
- Jacobin republicanism (nation-building from above)
- Civil society (nation-building from below)
- Federalism/decentralization
- Consociationalism” (2004:13-14)

In a fair but devastating critique, these authors then proceed to inventorise the very significant limitations, risks or shortcomings observed in practice in each of these approaches. It is worth summarizing their points (*op.cit.*:15-21).

The aim of establishing an ethnically *neutral or difference-blind state* tends to be favoured by those with a liberal perspective, who suggest that ethnicity could and should be dealt with ‘simply by ignoring it’, and who cite the alleged historical successes of this strategy in overcoming religious differences in Europe.<sup>9</sup> The two very significant limitations on this model presented by Berman *et al.*, however, need to be noted:

- firstly that it would require an unrealistic level of self-restraint on the part of dominant groups who control the state, and who have the power to adopt state policies supporting *their* culture; and
- secondly that, in actual practice, the state *cannot* avoid implicitly or explicitly supporting some cultures over others, since, for instance, it cannot but make decisions about the language of public administration, public health care,

schools, media, road signs, and so on: “any group which manages to get its language adopted as a state language in this way can gain enormous benefits, while other groups will face pressure to assimilate to this state-sponsored language group” (*ibid.*).

*Nation-building from above*, meanwhile, would accept that the state unavoidably promotes a particular language, but attempt to turn this into a virtue, by redefining the language and culture adopted as ‘universal’, or belonging to all citizens: to ‘de-ethnicize’ it rather than to ‘privatise’ it. As Berman *et al.* quickly conclude, however, “the international community would [not] tolerate the level of coercion needed to make it work”.<sup>10</sup> The failure of both of these strategies in post-independence African politics is well documented (see footnote 2 above. The recent re-emergence of discussions about ethnicity and nation in the context of small nation nationalism in Europe (Scotland, Catalunya, and so on) also tend to support the view that neither of these strategies is practicable.

Yet more demoralizing are the undoubtedly accurate conclusions Berman *et al.* reach regarding the potential for *nation-building from below* by means of civil society activity. Focusing on civil society, they suggest, merely “relocates the problem” given that “with distressing frequency, the rhizomes of ethnic factionalism and patron-client politics reproduce themselves within these parties and associations, rendering them, like so much of the apparatus of state, into ideological and institutional facades covering the reality of business as usual” (:19).<sup>11</sup>

The prospects in Africa for *consociationalism* – an option where ethnic groups are not territorially concentrated, and federalism is not possible – are even more summarily dismissed: “the most obvious attempt to implement it, in Rwanda and Burundi, failed completely, but it remains a topic of debate in other African countries” (:21).

Finally, the article discusses *multinational federalism*, and this is perhaps the area of greatest interest to students and politicians of the

Horn. The concerns voiced in this discussion offer a disturbingly resonant preface to a more detailed discussion of multinational federal arrangements in practice at the level of civil society and the citizenry.<sup>12</sup>

“Federalism often simply devolves power to levels where problems of patronage and political tribalism<sup>13</sup> are even greater. [...] federalism might exacerbate the problem of the exclusion of internal migrants. If a sub-unit is seen as ‘belonging’ to a particular group, then ‘sons of the soil’ preference will be given or will agitate for preference over mere ‘citizens’ from elsewhere in the state. In effect, the problem of ethnic hegemony is solved at the central level by creating a series of ethnic hegemonies at the sub-state level.” (*ibid.*:19)

## **6. How should we understand the risks in multinational federalism?**

Each of these risks is familiar to those who have been concerned with the success of the multinational or ethnic federal arrangement introduced in Ethiopia *de facto* from 1991 and *de iure* from 1995. It is true that after 17 years of federalism, evidence of both of these problems can be traced in the Ethiopian context. Few would deny that a range of instances can be identified in which ethnonational political elites, at least at local level, *do* seem motivated by “maximizing the power and resources available to their own group, whatever the consequences for other groups or for the functioning of the state as a whole” – what Berman *et al.* call “political tribalism”. Often this is reflected in an expansionist approach to ‘ethnic’ territory, and it is true that politicians have often contributed negatively to the disputes over boundaries between Ethiopia’s federated units which have proliferated over the period. Another arena of such ‘competitive’ ethnic behaviour, which disregards the interests of the functioning of the state as a whole, is certainly the power relations which persist between several of the political elites of the number of Ethiopia’s federated States which are explicitly multinational. Here the relative access to the ‘material resources of modernity’ won by contending elites has often been the subject of bitter

dispute, and occasional bloodshed.

Similarly, there are instances where the treatment of so-called 'indigenous' or 'autochthonous' citizens of particular National Regional States has differed from that of groups who have either migrated, settled or been resettled (often forcibly as under the *Dergue* regime) into these areas. The anxieties of such groups regarding their political rights and representation has, in a number of instances crystallized around the relationship between the FDRE and State constitutions, and electoral law, and whether the latter allows them to elect representatives who do not speak any one of the indigenous languages of the State, as apparently required by most constitutions. In those parts of the country where 'indigenous' groups have only limited numbers of educated people, the ethnic composition of a civil service necessarily drawing on the skills of 'outsiders' has become controversial. And of course the discrepancy between the formal political empowerment, yet ongoing economic marginalization, of some particularly peripheral groups under federalism is also of concern as a potential future source of friction.

Many of these undeniably emergent patterns of problems are cited by opponents of Ethiopia's multinational federalism as evidence of the flawed nature of this arrangement of the state *per se*. They see them as inherent in ethnic federalism, an arrangement which can only lead – and automatically will lead – to the increasing insularity of Ethiopia's 'nations, nationalities and peoples', fragmentation of its society, and eventual break up of the polity. Much additional anecdotal 'evidence' is adduced to support these claims, with little or no data on which to assess its validity. It is often asserted that cross-ethnic marriages have ceased, or are greatly reduced under federalism; that individuals have retreated back into enclaves of their own ethnic peers; that those who consider themselves to be of 'mixed inheritance' feel anxious and insecure. Inherent in many of the claims that these developments are 'true' is the assumption that it could not have been otherwise.

What all of these perceived risks and concerns about the undesirable outcomes of ethnic or multinational federalism have in common is that they view this form of political and administrative arrangement as closing off rather than opening up space, opportunities, and options for citizens. I think that this is closely connected with the way in which ethnicity is conceptualized as “drawing on a racial/biological basis, making it narrow and exclusivist” (IAG *op.cit.*). In positing a direct causal link between multinational federalism and both ‘ethnic insularity’ and ‘political tribalism’ one is assuming that politicized ethnicity has inescapable and negative consequences. But is this true? If we thought about ethnicity differently, could we envisage different outcomes? Sure, we can all agree on the risks which may be commonly observed and which Berman *et al.* have pointed out in common with many others. But are these trajectories inherent in ethnic federalism, or matters of contingent social development? Can multinational federalism have other, and more desirable outcomes? And if so, how could they be achieved? These, it seems to me, are urgent questions which face citizens and policy makers in the current period of consolidation of federalism in Ethiopia.

I would argue – contrary to those who are simply opposed to ethnic or multinational federalism *per se* – that the implications of this kind of ethnic or multinational federation are much more open ended than they suggest. The problem, I think, is not to try to eradicate ethnicity, and aspire to some putative ‘civic’ nationalist ideal which, as discussed above, probably does not exist. This would in any case now be impossible: ethnicity – whatever it is – is here to stay, and there is little point in trying to re-close Pandora’s Box, in the late Eshetu Chole’s resonant expression. Rather, a possible avenue might be to accept Walker Connor’s premise that *all* nationalism is ethnic, but to reconsider how we conceptualise ethnicity, and what we want it to deliver when we involve ethnicity in multi-level governance.

I have already discussed above the non-objective, constructed, and fluid nature of the nation, and the fact that most nationalist politi-

cians don't accept this conception because it might undermine the very nationalist project to which they are committed. There is a very similar problem with the conception of ethnicity, and this is particularly visible in the discourse of elite politicians and the public in Ethiopia as throughout the world. I think that the conception (widespread at the political level) of ethnicity and ethnic identity as ancient, fixed, immutable and objectively quantifiable is at the root of the problem. If one conceives of ethnicity as a dangerous atavistic force which dictates certain behaviour, then of course one won't support its use as a basis for state construction. But this kind of primordialist conception has long been discredited amongst social scientists, and perhaps its time to oust it from popular discourse. What should we put in its place?

### **7. Ethnicity as a fully constructed social status**

I have written extensively elsewhere about the need to apply a radical constructivist approach to get a better understanding of ethnicity.<sup>14</sup> If the nation is an 'imagined community', so I would argue is an ethnic group.

I have already discussed how nations cannot be identified by checking off a list of objective criteria, and this is equally true of ethnicity and ethnic groups. Much of the primordialist literature qualifies the idea that 'one is a member of an ethnic group if one is taken to be a member of an ethnic group' (i.e. ethnicity is a social status), with a rider along the lines of 'and also if one *is* a member of that ethnic group – or at least *looks* like one' (i.e. ethnicity is a 'real world' state). The idea is that ethnicity is deduced not only from 'what the collective thinks' but also from 'the facts of the matter' — *what* as well as *who* the members of the collective 'really are'. I think this is a mistaken approach.

Rather one should apply notions of social construction not only to 'social' matters but also to the 'real world', by tracing the entirely fundamental role of collective (social) conceptualization in episte-

mology overall, whether it is about ‘social’ knowledge or knowledge about the ‘real world’, which are equally ‘shared social institutions’.<sup>15</sup>

We tend to conflate the real world and socially constructed *referents* of the ethnic profile of an individual (the *constituents* of the *individual state* of being an ethnic x: language, culture, skin colour, hairstyle, descent or whatever they happen to be) with the fully constructed collective accomplishment which creates member of an ethnic group (conferring the *social status* of being an ethnic x, of which these referents are *markers*). It’s not the physical, cultural, or political characteristics of the ‘ethnic state’ which confer the ‘ethnic status’, or indeed influence action in any particular way, but the socially-produced conventions (conscious or otherwise) which create the social status ‘member of group x’.

What are the implications of this? I hope that it is becoming clear that we can’t and shouldn’t make any of the common assumptions about ethnic groups and how they will construct themselves, behave, or change: we have to stop thinking of ethnic groups as atavistic predecessors of modern nations, which, if things go well, will morph into the latter, disappearing in the process. Firstly, the level and extent of conventionality associated with ethnicity is much deeper than usually recognized. The issue of whether or not group members or group outsiders recognize someone as a member of an ethnic group (or nation) is a matter of convention, arising out of the ongoing interaction of the collective. The conventions according to which an ethnic group is identified and categorized from within, and from without, may well differ, since interaction patterns across the group are unlikely to produce uniform understandings of the conventional basis of the group.

Whether or not the distribution of this convention (the idea of the ethnic group or nation) coincides with the border of the ethnic group or nation identified by it (whether all those described as members by the conventional use of the category also actually consider themselves to be members) is just as much a contingent matter as is the coincidence of cultural, ethnic, and national boundaries. As

Fredrik Barth long-ago noted, an ethnic boundary may be characterized as well by interaction which crosses it as by an interruption in interaction between those on either side of it. Since consensus is local, each individual member of the interacting collective which 'shares awareness' of the conventional group status will have a slightly different perspective on precisely what the convention amounts. Similarly, any piece of new information relevant to the categorization and marking of groups will, in so far as it is disseminated, and locally 'known',<sup>16</sup> form part of the basis on which consensus about groups and group membership is locally constructed.

Here the emphasis is on the multiple webs of interactions which citizens are embedded in the course of their daily lives as members of multiple communities with multiple loyalties and identities; it is not on some normative individualised relationship they may or may not feel themselves to have as 'citizens of a nation' or 'citizens of a state'. Of course what the state 'says or does' is a part of this overall picture. If, as a result of widespread government propaganda and mobilization campaigns the categories 'nation, nationality, and people' become widely known and widely, if variously, incorporated into the basis for conventional attributions of group status, it can be expected that these attributions of status will shift in similar but not identical ways over this same broad canvas. Whether and how they do shift, however, will nevertheless remain contingent up on myriad processes of local consensus formation, based upon the specifics of interaction amongst group members, and also between group members and the sources of these new categorizations – cadres, government officers, and whatever news or political media may be in operation.

Also conventional will be the selection of 'markers' which label or identify the group membership in question, and the means, regularity and rigour with which members of the community recognize them as markers: they may have everything or nothing in common with what outsiders, including constitution makers, regard as ethnic markers. Again, since consensus is local, a 'single' ethnic identity or nationality status will be identified by means of innumerable slightly

different (even significantly different) processes. Questions about whether ethnic group - or national group - membership is to be regarded as natural, stable, durable, exclusive, or inescapable, are also all contingent matters of local collective convention. Answers to them need to be investigated rather than assumed in each case; they may well depend on the kinds of features which are considered to mark the status: If physical features are regarded as unchangeable, and have been selected to constitute an important marker, the status may *be regarded* as as 'inescapable' or 'natural' – more so, perhaps than if linguistic competence is a more important factor, and individuals are seen to acquire group members' status by learning that language. But this all depends on local beliefs and norms: none of the implications of a particular social status can be 'read off' from the facts; they can be traced rather by exploring communities' beliefs.

The means of investigating how ethnicity operates in any given situation, then, is to consider what people know about ethnicity – about salient group members: what they genuinely believe it to constitute. For if they believe it divides them from their neighbours, it will do so; if they do not, it will not. An assessment of multinational federalism, for instance, should enquire primarily into what people know about it. Whether or not Ethiopian or any other multinational federalism 'ethnifies' politics is a question of whether and how it has shifted patterns of belief, and modified popular conventions allocating and defining the social status of group membership. Ethnicity isn't something 'out there'; it's what we make it. We need to stop blaming 'it' for all our ills, and pay closer attention to the social and political processes by which we reproduce and influence it, for good or bad.

## **8. Implications for action and policy**

Lest all this seem far too theoretical, let me conclude by briefly exploring the implications of this for action by citizens, politicians, 'ethnic entrepreneurs'. First, we need to view ethnic, civic, and national identities as part of a single continuum of conventional social

statuses evolving out of the complex webs of social interaction amongst and within communities. Second, it matters very much what we think, say and do about these identities; how we conceptualise them, and what assumptions, conventions, and norms we apply to them - because this is how they are (re-)created and (re-)produced.

Every time we, as a collective, allow individuals or groups from amongst our number – be they politicians or anyone else – to spread ideas about ethnic, national, or civic categories which are divisive, discriminatory, or which marginalize the interests of others, we should expect that our collective conventions will shift accordingly. If we allow identities to develop which close off options of citizens, then this is what will happen. Likewise, the more as a collective – be it in Ethiopia, Scotland or anywhere else – we sanction such speech and behaviours, and encourage group identities which are inclusive, co-operative, collaborative and democratic, and which open up such space, the more this will happen. The problem is not ethnic, civic, or national identities *per se*, but the particular negative pre-conceptions of them which we harbour.

Of course to say that the evolution of either learned behaviour or structures of beliefs is contingent is not to say that it is easily changed. Essentialist thinking about ‘nations, nationalities, and peoples’ is well entrenched across the globe, and many people continue to think that ethnicity of its nature divides people into racial groups. Political tribalism, as Berman *et al.* have pointed out, pays dividends, and it is in so far as it continues to pay dividends that it will continue to be pursued. Changing behaviour in any given environment almost certainly means changing the incentive and rewards structures within which individuals perceive themselves to work. We know the risks common to multinational or ethnic systems of multi-level governance. If politicians and others are to be discouraged from going down the undesirable paths we are all aware of, they have to be systematically and collectively sanctioned when their actions fail to take a balanced view, or to protect the widest interest of the polity as a whole. But this is not a question of ethnic, civic, or

national loyalties *per se*: they will always be in competition, and this is something that will always need creative management. It's a question of enforcing the rule of law, and protecting the series of rights that the community in question, wherever it is in the world, is committed to.

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### Endnotes

<sup>1</sup> Dr Sarah Vaughan is a social scientist whose research interests include the politics of power, ethnicity and nationalism, decentralisation and the state in Ethiopia and the Horn. She is currently winding up a project of capacity building in conflict-related analysis, under which she has been seconded to the FDRE Ministry of Federal Affairs since 2004; she has recently been appointed to run a new International Development Centre at the University of Edinburgh, where she also holds an Honorary Fellowship. She has taught social theory and African politics in Addis Ababa and Scotland, and was most recently Associate Director for Academic Affairs at Addis Ababa University's Institute of Federal Studies. She is the author of 'The Culture of Power in Contemporary Ethiopian Political Life' (2004) and a range of articles and research reports.

<sup>2</sup> "In the African context, the above two conceptualizations and expressions of nationalism have been contentious issues. The context is particularly important in this regard. Most African societies are heterogeneous in terms of ethnicity, language, religion etc. Furthermore, the existing state system in Africa is "artificial" originating from the European scramble for Africa and the agreements between the different colonial powers. Coupled with the narrow social base of the struggles for independence (the 1st wave of independence), this led to the emergence of a system of statehood on a flimsy sense of nationhood.

African elites in the period after independence faced a dilemma. They recognized the weak or non-existent sense of nationalism and sense of nationhood in their societies. Moreover, they also viewed with alarm certain manifestations of the politicization of ethnicity such as the existence of ethnic based political parties and political participation and mobilization along ethnic lines.

They responded by outlawing formal, public expressions of the politicization of ethnicity such as ethnic based political parties, associational activity etc. Political elites in the decades after independence tried to forge a national identity and sense of nationalism that would transcend ethnic, religious and other primordial loyalties. In other words, they sought to replace the multiple ethnic nationalisms with a supra-civic nationalism. Ethnic identities and the formal or informal mobilization of ethnicity was derided as "tribalism" and viewed as a backward phenomenon. This vocabulary was not only used by political elites but was also true for social scientists working on the issue.

At the same time, the ethnically heterogeneous nature of African societies and the “potential” threat of ethnic nationalism served as a useful rationalization for the transition to authoritarianism. The “potential” threat of ethnic nationalism served as a useful scapegoat which enabled African elites to justify dictatorship and their tenure in power.

In retrospect, this attempt to forge a new sense of nationhood and nationalism out of heterogeneous societies was unsuccessful. Ethnic identities could never be completely transcended or submerged in the African state. Moreover, African elites in the post independence era often manipulated and exploited ethnic identities and loyalties to shore up their hold on power. The patronage system in post colonial Africa within the context of authoritarianism was based on ethnic, religious, regional or other primordial loyalties.

Another important and related development was the emergence of “ethnocratic” states, where a group from a particular ethnic, religious or regional group monopolized state power to the exclusion or marginalization of other groups. This process in the long run, according to many analysts contributed to the exacerbation of conflicts along ethnic lines. In “ethnocratic” political systems the attempt to forge a sense of civic nationalism often involved the imposition of the values and identity of the dominant group on the other groups coupled with suppressing their identities.

The developments mentioned above also applied to the Horn of Africa region. The political history and patterns of conflict in Ethiopia, Sudan and Somalia fully bear this out.

Beginning in the late 80s and continuing to the present, Africa has experienced a wave of democratization and political liberalization. Authoritarian political systems have either collapsed or are coming under so much pressure that they have been forced to make concessions.” (IAG 2008:10-11)

<sup>3</sup> One could add Afar, Berta or Oromo nationalism, for instance, to this list

<sup>4</sup> One could add Ethiopian nationalism to this list

<sup>5</sup> I conclude that Calhoun, and I, are here at variance with Walker Connor, who, as cited above, insists on the ‘vital difference’ of the two.

<sup>6</sup> Calhoun continues to make the important distinction with nationalist activists: “Of course this has not stopped many political actors and some social scientists from trying to come up with objective indicators of ‘full’ or ‘real’ or ‘historical’ nations. [...] Extensive debates have focused on the distinction between ‘nation’ and ‘nationality’. Stalin, among others, approached this as though it could be an objective question. [...] The distinction between nation and nationality is not of much help in social science, but it has had considerable appeal to ideologists involved in the processes

of nation building and sorting out the claims to various levels of self-determination brought forward by diverse people within former empires.”

<sup>7</sup> Here again, as in much of this discussion, I am indebted to Calhoun’s lucid account (1997).

<sup>8</sup> I trust that there is now enough of a consensus on the modern origins of nations and nationalism, even where their constructions draw on (perceptions of) historical material for me not to need to go over this well worked ground. Most social scientists now agree that nations and nationalism are modern phenomena, but this is another area where practitioners’ views commonly diverge.

<sup>9</sup> These processes in Europe of course involved centuries of bloodshed.

<sup>10</sup> It is interesting that the example which Berman *et al.* provide is of international concern and domestic resistance to the integrative policies of Haile Selassie I in privileging Amharic language and culture (*op.cit.* 2004:17, citing Laitin 1992:xi).

<sup>11</sup> I am conscious that this draft of the paper does not yet deal adequately with the issue and potential role of civil society: this is an area for further thought and elaboration. As a general point, however, I share the pessimism of the authors under discussion vis-à-vis the nation-building potential of civil society.

<sup>12</sup> Note that irrespective of this clear-eyed presentation of the risks associated with multinational federalism, much of the rest of this volume is devoted to a consideration of the advantages and great potential of such arrangements.

<sup>13</sup> Defined by the same authors as “the competitive confrontation of ‘ethnic contenders’ for the material resources of modernity through control of the state apparatus. Here success is defined as maximizing the power and resources available to one’s own group, whatever the consequences for other groups or for the functioning of the state as a whole” (*op.cit.*:5).

<sup>14</sup> Cf. Vaughan (2004) especially Chapter II.

<sup>15</sup> For those interested in this theoretical debate, it draws on the work of Barry Barnes, David Bloor, and Martin Kusch and others, loosely referred to as the Performative Theory of Social Institutions, and arising out of the study of SSK, the sociology of scientific knowledge. See Vaughan (2004) for references.

<sup>16</sup> Also a contingent process.

## *Annexes*

### Program

#### **2<sup>nd</sup> Conference on Constitutionalism and Human Security in the Horn of Africa**

Sheraton Addis, Addis Ababa, Ethiopia ,\  
August 7, 2008

### Morning Session

9:00 – 9:30	Registration
9:30 – 9:45	Opening Remarks Tamrat Kebede, Executive Director, IAG
09:45 – 10:20	<b>Paper presentation: Between constitu- tional design and constitutional prac- tice: The making and legitimacy of constitutions in Ethiopia- first thought</b>  <i>Ato Tsegaye Regassa</i>
10: 20 – 10: 40	Discussant <i>Ato Getachew Assefa</i>
10:40 – 11:00	Tea Break
11:00 – 11: 45	Plenary

11:45 – 12: 20	<b>Paper presentation: Federalism, diversity and the regulation of conflict in the Horn</b> <i>Dr. Assefa Fiseha</i>
12:20 – 12:40	Discussant <i>Dr. Aaron Tesfaye</i>
12: 40 – 01: 15	Plenary
01: 15 – 02: 30	Lunch Break

**Afternoon Session**

02:30 – 03:15	<b>Paper presentation: Civic and Ethnic Nationalism</b> <i>Dr. Sarah Vaughan</i>
03: 15 – 03:35	Discussant <i>Dr. Zeribun Mohammed</i>
03: 35 – 04:00	Plenary
04:00 -04:30	wrap up
4:30 – 5:00	Reception

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**InterAfrica Group (IAG)** is an independent, non-profit, non-governmental regional organization established in 1989 to promote peace, human rights, democratic culture, and development in the Horn of Africa. IAG's vision is a Horn of Africa where human rights are respected, democratic culture flourished and economic development achieved. IAG covers issues concerning the countries of the Horn, namely Ethiopia, Eritrea, Sudan, Somali, Kenya, Uganda and Djibouti, while also dealing with issues that have wider relevance to the continent.

IAG's programs combine networking, advocacy, dialogue and research on policy issues. We strive to achieve these goals through the following major activities in collaboration with governments, inter-governmental organizations and CSOs:

- Organizing conferences and forums for informative exchange of views and debate on social, political and economic issues concerning the Horn of Africa
- Undertaking research on critical socio-economic and political issues in the sub-region
- Publishing and disseminating information on vital socio-economic and political interests to policy makers and citizens at large

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