

# SUB-NATIONAL CONSTITUTIONS IN ETHIOPIA: TOWARDS ENTRENCHING CONSTITUTIONALISM AT STATE LEVEL\*

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## Introduction

Ethiopia's federalism is often studied from the perspective of the "centre".<sup>1</sup> The result of this focus on the centre to start off our inquiries has rendered the state constitutions<sup>2</sup> invisible both in academic and non-academic circles.<sup>3</sup> This article offers a fresh look at the Ethiopian federal experiment from the perspective of the states. In a sense, therefore, this study is an attempt at studying federalism "from below".<sup>4</sup> Thus this paper offers an overview of state constitutions in Ethiopia with a view to highlighting their significance in the public life of Ethiopians. It also provides an analysis of how we can deepen and entrench constitutionalism in the states of Ethiopia through the instrumentality of state constitutions. Given the fact that state constitutions

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<sup>1</sup> A number of studies have been made since the adoption of the federal constitu-

tion in 1995. Some of the recent studies include, Assefa Fiseha, *Federalism and Accommodation of Diversity in Ethiopia: A Comparative Study*. Nijmegen: Wolf Publishers, 2005/6. Solomon Negus, *Fiscal Federalism in the Ethiopian Ethnic-based Federal System*. Nijmegen: Wolf Publishers, 2006), David Turton (ed), *Ethnic Federalism: The Ethiopian Experience in a Comparative Perspective*. Addis Ababa/Oxford/Athens OH: AAU Press/James Currey/Ohio University Press, 2006. Fasil Nahum, *Constitution for a Nation of Nations: The Ethiopian Prospect*. Asmara: Red Sea Press, 1997. Merera Gudina, *Ethiopia: Competing Ethnic Nationalism and the Quest for Democracy*. Addis Ababa: Shaker Publishers (Netherlands), 2002. While these studies have examined the phenomenon of federalism in Ethiopia—and have enriched the scholarship in the field-- none of these studies make a sustained, direct inquiry into state constitutions. When they refer to state constitutions, it is often tangential and indirect.

are the primary tools with which to guide and regulate state behaviour in states, this article contends that it is important that state constitutions foster the efforts to keep government accountable and transparent at the local level. This in turn ensures the deepening of not only constitutionalism but also of the principles of good governance.<sup>2 3 \* 5</sup>

In this study, a quick survey of the constitutions of the nine states<sup>6</sup> of Ethiopia is made to provide an overview of what state constitutions look like.

- <sup>2</sup> Various terms are used to refer to state constitutions. Depending on the nomenclature used to refer to the constituent units of the federation (i.e., States. Provinces. Cantons. Communes. Regions, etc). they might be 'state constitutions', or 'provincial constitutions', or 'Statuti (as in Italy). or '*Estatutos de Autonomia*' (as in Spain). The term 'sub-national constitutions', a broader term to include the constitutions of all forms of sub-federal units. is used mainly to distinguish them from the 'national' constitution which is applicable country-wide. As such. it is a handy tool to be used in the discussion on sub-federal constitutions. In this piece. because the constituent units in Ethiopia are known as 'states' or 'regional states' or. more recently. 'national regional states'. 'state constitutions' and 'sub-national constitutions' are used interchangeably.
- <sup>3</sup> The only piece of writing on state constitutions so far is this author's "State Constitutions in Federal Ethiopia: A Preliminary Observation" [2004] (electronically published at: <http://www.camdenrutgers.edu/pdf>). There are a few Master's Theses written by LL.M students at Addis Ababa University. Getachew Kenfeshe's "*The Role of Council of Nationalities of the SNNPRS in the Accommodation of Diversity and Conflict Resolution: Challenges and Prospects*" (Unpublished LL.M Thesis: Faculty of Law, Addis Ababa University. 2008) and Lemmesa Berber's "*Division of Powers in the State Constitutions- The Case of Benishangul-Gumuz Regional State*" (Unpublished LL.M Thesis: Faculty of Law, Addis Ababa University. 2008) are two of the very few theses written on the subject recently. "State Constitutions and Local Government" is the only course offered in the study of Constitutional Law in Ethiopia. and even this only at a graduate level. In the world of constitutional practice. the first time the issue of state constitutions is publicly discussed is in a recent annual consultative meeting among states in June 21-22, 2008. One of the papers in this year's consultative meeting. held in Harar, was entitled. "Constitutionalism in the States: The Role and Status of State Constitutions in the Ethiopian Federal Experiment" (Amharic). presented by this author.
- <sup>4</sup> See Tsegaye Regassa (2007), "Imagining Federalism from Below: Sub-national Constitutions in the Ethiopian Federation" (an unpublished manuscript. available with the author; forthcoming in 2009.)
- <sup>5</sup> while it is helpful to note the distinction between *constitutionalism* and *constitutionism* (like Walter Murphy does in one of his lectures entitled "*Constitutional Interpretation as Constitutional Creation*" given at UC. Irvine on November 1. 2000) in order for us to distance ourselves from a mere legalistic adherence to texts of constitutions. in this study. owing to the focus of the study. the term constitutionalism is broadly used to refer to what is signified by *constitutionism*. too.

their purposes, functions, features, and operations, the institutions they constitute and regulate, the rights they guarantee, the limits they impose on state and local governments, and the manner of their making, interpretation and amendment. Having made an analysis of the texts of the constitutions of the states and of the federal constitution and other relevant sources of state constitutional law, and aided further by the theoretical and comparative literature in the field, an attempt is made to assess the state of sub-national constitutionalism<sup>6 7</sup> in contemporary federal Ethiopia. An attempt is thus made to identify some of the challenges and problems that attend state constitutional law both at the level of design and of implementation. Finally recommendations in favour of better entrenchment of sub-national constitutionalism are submitted.

some of the questions that this study wrestles with include the following: (1) what are the purposes, functions, features, and significance of state constitutions in a federal system such as Ethiopia's? (2) What are the principles, structures, and distinctive features of the state constitutions of Ethiopia? (3) What does the making, interpretation, and amendment of state constitutions look like? (4) What protections do the constitutions afford to fundamental rights and freedoms in the states? (5) What roles do the state constitutions play in institutionalizing self-rule and sub-national constitutionalism? (6) What are the problems and challenges encountered in the process of entrenching constitutionalism and deepening good governance at the sub-national level?<sup>8</sup>

<sup>6</sup> The nine states that constitute the Ethiopian federation are: Afar, Amhara, Benishangul-Gumuz, Gambella, Harari, Oromia, Southern Nations, Nationalities, and Peoples' Regional State (SNNPRS), Somali, and Tigray. All these states have their own state constitutions adopted in 1995 and revised in 2001 and since. The self-governing (autonomous) cities of Addis Ababa and Dire Dawa have their own charters in accordance with which they are administered. Both cities are accountable to the Federal Government, Addis Ababa because it is the federal capital and Dire Dawa because of the demographic heterogeneity of its residents which is not amenable to accountability to one regional state. This study is focused on the constitutions of the nine states, not the charters

of the two city administrations.

<sup>7</sup> The term 'sub-national constitutionalism' refers to constitutionalism at the state level. it is often used in preference to the term 'state constitutionalism' because it refers to the levels of constitutional practice at levels below the federal one (which includes the state, the zone, Woreda, Kebele, and the Municipality level) governments. While the term is broader in its scope than the 'State Constitutionalism', in this study, as indicated in *supra* note 2, we use the two terms interchangeably.

<sup>8</sup> It is important to note that these questions are ones often used in the study of sub-national constitutions, a field that can be viewed as internal comparative constitutional law or comparative constitutional law from within.

This article is presented in six sections. Following this introduction, section two gives an overview of state constitutions in federal polities. Section three describes state constitutions in Ethiopia. In section four, we analyze the extent to which state constitutions are utilized to regulate state behaviour at the sub-national (i.e., State and sub-state) levels in Ethiopia. In section five of this study, we try to identify some of the major challenges of constitutionalism at the state level. The study closes with some concluding remarks. The study, being a normative one, does not delve into the empirical study of the practice.<sup>9</sup> Consequently, the reference to the practice is merely tangential and is intended for purposes of exemplification.

## 1. Of State Constitutions in General

State constitutions are usual phenomena in federal polities. States in classic federations such as that of USA, Australia, Switzerland, had their own (state) constitutions from the beginning.<sup>10</sup> In some jurisdictions such as India,<sup>11</sup> South Africa,<sup>12</sup> and Canada,<sup>13</sup> however, the existence of state constitutions is an exception than a norm. Their existence in a federal system is quite an ac-

<sup>9</sup> While it is granted that it is vitally important to study the practice using tools of empirical data gathering, the focus of this study is limited to the analysis of the texts of the constitutions. One can envisage a disparity between the law and practice in this area (as in other areas of Ethiopian law). But the more comprehensive study of both the laws and the practice merits a bigger research than this.

<sup>10</sup> The original 13 colonies that established the first 13 states of the USA had their own constitutions. The states that came to join the USA subsequently also had their own constitutions the substance of which however was impacted by the federal constitution and the "conditions" set for them by the Federal Congress for their admission into the union. See K. B. Smith, A. Greenblatt, and J. Buntin, *Governing States and Localities*. Washington, DC: CQ Press, 2005. Pp. 60-92; G. A. Tarr, *Understanding State Constitutions*. Princeton and Oxford: Princeton University Press, 1998. PP.6-9; R. Williams and G. Alan Tarr, "Subnational Constitutional Space: A View from the

States, Provinces, Lander, and Cantons" in G.A. Tarr, R. Williams, and J. Marko (eds), *Federalism, Subnational Constitutions, and Minority Rights*. Westport, CN/London: Praeger, 2004. PP. 3-24. Austrian and German Landers, and Swiss Cantons, Australian States have their own state constitutions as do the states and provinces of Argentina, Brazil, Mexico, and Malaysia, from among others. See James A. Gardner, "In Search of Sub-national Constitutionalism," (Paper presented on the VIIth World Congress of the International Association of Constitutional Law, Athens, Greece, June 11-15, 2007, now available at <http://www.camden-rutgers.edu/pdf>), p.1.

<sup>11</sup> In India, state governments are regulated through the instrumentality of the Constitution of India. As a result, states are not allowed to have their own constitutions. Kashmir is the exception in this regard. See A. Khan, "Federalism and Non-territorial Minorities in India" in G.A. Tarr, R.F Williams, and J. Marko, *supra* note , at pp. 199-213

ceptable phenomenon.<sup>12 13 14</sup> In most of these systems, state constitutions *aim* at regulating the behaviour of states at the sub-national (i.e., at the state and sub-state) levels. In order to effectively do the regulation of state behaviour, they first establish the basic organs of state, namely the legislature, the executive, and the judiciary.<sup>15</sup> They also state the powers and responsibilities of each organ thereby laying down the rules that govern the relationship among these organs of state.<sup>16</sup> Thus they allocate authority among the three organs of state in the sub-national polities. In addition, state constitutions establish the rules governing the relationship between state governments on the one hand and local governments (e.g. Zone, or Woreda, or Kebele level governments in the case of Ethiopia) on the other. Further, they regulate the relationship between state governmental bodies and citizens by providing for a constitutional guarantee for fundamental rights and freedoms of state citizens.<sup>17</sup> By so doing, state constitutions aspire to limit the powers of state governmental authorities. In a federal polity, because there is dual constitutionalism<sup>18</sup> (often reinforced by the existence of at least two constitutional texts), the state constitutions are also used to reaffirm, explain, and elaborate on state powers that are “granted” or “left” to the states by the Federal constitution.<sup>19</sup> At a more symbolic level,<sup>20</sup> state constitutions serve as the embodiments of the goals and

<sup>12</sup> In South Africa--a decentralized unitary system with a federal character that has avoided the use of the term ‘Federal’--the provinces can have their own constitutions as long as the texts of the constitutions can be certified by the constitutional court for conformity to the 34 principles that guided the new South African constitutional dispensation. See K. Henrard, “Equality Considerations and Their relation to Minority protections, State Constitutional Law, and Federalism” in Tarr, Williams, and Marko, *supra* note 10, at pp. 25-41. Note also the fact that in South Africa, only one province has such a constitution. James A. Gardner, *supra* note 10.

<sup>13</sup> In Canada, only British Columbia has its own provincial constitution. See James Gardner, *Ibid*, p.7.

<sup>14</sup> State constitutions exist in Australia, Austria, Germany and the USA. In Spain, states have “Autonomy Statutes” and in Italy, they have their “Statuti”. Note

however that in Canada, states do not have constitutions—with the exception of British Columbia-- because there cannot be such constitutions “independent of the federal constitution” Tarr, Williams, and Marko, *supra* note 10, at pp. 4-5. In Russia, “republics” can have constitutions, but *oblasts* can only have a charter. (*Ibid*.)

<sup>15</sup> The distinction among the three organs of state, alias known as the *trias politica*, is of course merely conventional and “intellectual abstractions”. See W. Murphy, “Constitutional Interpretation as Constitutional Creation” (1999-2000 Eckstein Lecture presented at The Center for the Study of Democracy, UC, Irvine. Published electronically at <http://repositories.cdlib.org/csd/00-05> as visited in June 2008.

<sup>16</sup> In this, state constitutions imitate other (i.e., “National” or “Federal”) constitutions and to this extent, there is nothing unique or distinctive about them.

aspirations of the peoples of the states. They are also expressions of state sovereignty and the principle of self-rule that constitutes an aspect of federal governance.<sup>21</sup>

As has been hinted at above, the primary *task* of state constitutions is the creation (or constituting) of state governments and regulation of their day to day activities. They thus establish the primary organs of state and circumscribe the ambit of their powers so that they can be put within proper limits.<sup>22</sup> They determine the powers and responsibilities of major governmental insti-

<sup>17</sup> By far the most important justification for the existence of state constitutions is the protection of the rights and freedoms of state citizens from encroachment by the federal government while also granting the state governments the implicit power to interpose between the federal government and state citizens to block some intrusions from the federal government (by, for example, pre-empting the acts of the latter on areas of power overlap). See James A Gardner, *supra* note 13 at pp. 14-17; “The most important justification by far for subnational constitutionalism is the benefit it confers in the protection of human rights. Instead of a single regime of rights protection implemented at the national level, subnational constitutionalism allows for the creation of a second, and to some degree competing, regime of rights protection at the subnational level.” P. 26.

<sup>18</sup> See D. T. Beasely, “Federalism and the Protection of Individual Rights: The American State Constitutional Perspective” in E. Katz and G. A. Tarr (eds), *Federalism and Rights*. Lanham/London: Rowman & Littlefield Publishers inc., 1996, at pp. 104-105 and 117-118. See also, K.B. Smith, A. Greenblatt, and J. Buntin, *Governing States and Localities*, at 65.

<sup>19</sup> It is important to note that in federal systems such as Ethiopia’s, exclusively Federal and Concurrent powers are listed while exclusively state powers are “left”

to the states as “residual” or “reserved” powers. These powers are also known as “plenary” powers in federations that are created through aggregation or integration. See Arts 51 and 52 of the Federal Democratic Republic of Ethiopia (FDRE) constitution for a list of powers listed, respectively, as Federal and State powers.

<sup>20</sup> It is important to note the symbolic significance of constitutions as constitutional texts are also adopted, among other things, for the purpose of masking imperfections as much as of expressing aspirations and ideals. See W. Murphy, “Constitutions, Constitutionalism, and Democracy” in Douglas Greenberg et al (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World*. New York: Oxford University Press, 1993) at pp. 7-12.

<sup>21</sup> See T. Marks and J. Cooper, *State Constitutional Law in a Nutshell*. St Paul, Minn: West Publishing Co, 1988, at pp. 1-7 for a discussion of the functions of state constitutions. See also A. Heywood, *Politics* (2<sup>nd</sup> ed), New York: Palgrave, 2003 at pp. 297-300 on purposes of constitutions in general. He states that constitutions have the principal functions of empowering states, establishing values and goals, providing government stability, protecting freedom, and legitimizing regimes. *Mutatis mutandis*, these functions can also be viewed as functions of state constitutions.

tutions. Often, they also determine the manner of their organization and the rules of procedure for their operation. State constitutions also serve as devices through which constitutional (political) disputes are resolved without a resort to violence. Moreover, they guarantee protection to fundamental rights and freedoms of state citizens. In addition to serving as frameworks of government, often, state constitutions serve as “manuals of government” that carry details of government policies at the state level<sup>22 23</sup>

The *features* of state constitutional texts can be understood better when we compare and/or contrast them with the federal constitutions under the supreme authority of which they operate. When contrasted with federal constitutions, the texts of most state constitutions tend to be *lengthier, easier to amend and thus more flexible, less durable, and more varied*.<sup>24</sup> In their contents, they tend to be more detailed than federal constitutional texts. They also tend to prioritize direct democracy as opposed to representative democracy.<sup>25</sup> This is often because of the generally homogenous nature and smaller size of the states’ demographic make-up as a consequence of which most decisions are submitted to direct popular approval (or disapproval) such as through referendum. State constitutions are also said to have a penchant for a *majoritarian* democracy that goes without *minoritarian* checks.<sup>26</sup>

Although state constitutions provide for a list of *rights of citizens*, they tend to ignore or neglect the rights of minorities. In principle, states are expected to provide for a better protection of rights by adhering to and expanding the federal “minimum standard” for rights.<sup>27</sup> States are free to provide better protection. As such, they are not even bound by the interpretations of the federal institutions that offer a narrower constitutional space for rights as they demonstrate that they, within their respective jurisdictions, are doing

<sup>22</sup> Note that limiting governmental powers is one of the core ideas embodied in the principle of constitutionalism.

<sup>23</sup> K.B. Smith, A. Greenblatt, and J. Buntin, *Governing States and Localities*. Washington, DC: CQ Press, 2005 at p 67 where it is argued that in contrast to the Federal constitution, the American state constitutions “often set forth procedures and address policies.... While the federal constitution creates a framework for government, state constitutions often get into policy details.”

<sup>24</sup> *Ibid*, p. 68-69.

<sup>25</sup> *Ibid*

<sup>26</sup> More often than not, state legislatures are

unicameral and so there is hardly a way to countervail the majoritarian trend in the legislature. in systems such as that of the USA, the state supreme courts use their interpretive clout to check the excesses of majoritarian decision making in the legislatures. But in systems such as Ethiopia’s, where courts’ power vis-a-vis the legislatures is weak both in law and in practice, the potential for an unlimited form of majoritarianism to be unleashed is patent.

<sup>27</sup> See T. D’Alemberte, “Rights and Federalism: An Agenda to Advance the Vision of Justice Brennan” in Katz and Tarr, *supra* note 18, at pp 123-138.

better.<sup>28</sup> Nevertheless, there is a possibility that states turn “reactionary” with regard to rights of oppressed groups, minorities, and liberal individual rights in the guise of state rights and autonomy that is sanctified by federalism.<sup>29</sup>

The *making* of state constitutions vary not only from state to state but also from a federal system to another. In federations that are formed through *aggregation* (which are also known as *coming-together federations*),<sup>30</sup> state constitutions, often coming into effect way before the federal constitution was adopted, show a clear variation from the federal constitution. They also tend to be free not to emulate the federal constitutional text as their model. On the other hand, in federations formed through devolution (or those known as *putting-together* or *holding-together* federations),<sup>31</sup> state constitutions tend to be made following the federal model. In these latter cases, the federal constitutions seem to set the directions the state constitutions need to take. Sometimes, the federal constitutions tend to dictate the form and the content of the state constitutions.<sup>32</sup>

in the *constitution making process*, states may choose to have it adopted by a state legislature.<sup>33</sup> States may also have a constitutional assembly for the express purpose of adopting a constitution. Or alternatively, they might submit the draft constitutional text to popular referenda.<sup>34</sup> It is interesting, though, that in contrast to federal constitutions, state constitutions have an ‘easier’ procedure for their making.

Similar ‘ease’ is noted with regard to the *amendment* of state constitutions. Often, state constitutions can be amended through the legislatures, a

<sup>28</sup> There is a solid body of jurisprudence that advances this kind of argument as compiled in R.F Williams, *State Constitutional Law: Cases and Materials*. Washington, DC: US Advisory Commission on Intergovernmental Relations, 1990. There are also sceptics as to the power of states to elevate rights more than the federal government. Lawrence Tribe’s “Unravelling *National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*,” *Harvard Law Review*, 90 (April 1977): 1065, is only an example.

<sup>29</sup> This is the sentiment that is also reflected in Tribe’s scepticism. See Tribe, *supra* note 28, at p.1065.

<sup>30</sup> Alfred Stepan, “Federalism and Democracy: Beyond the US Model”, *Journal of*

*Democracy* (1999). Vol 10 No.4,

<sup>31</sup> *Ibid*

<sup>32</sup> See art. 52 (2) a-b of the FDRE constitution which stipulates that states are bound to “establish a state administration that best advances self-government, a democratic order based on the rule of law; to protect and defend the federal constitution;” and “to enact and execute the state constitution and other laws”. One can gather from these provisions that the state constitutions cannot hope to establish a system that has a deficit of self-government, democracy, or rule of law, or one that does not defer to the Federal constitution. These provisions set the outer limits of the freedom to adopt one’s own constitution at the state level.

<sup>33</sup> This is the case, for example, in Ethiopia.

constitutional revision commission, or a constitutional assembly. At times, amendments and/or revisions can be made to be ratified by popular referenda. This is perhaps because of the homogeneity of interests at the state level. The ease with which states effect a formal amendment, has rendered most state constitutions more flexible than the rather entrenched federal constitutions.<sup>34 35</sup> But on the other hand, this same ease and the consequent flexibility have made state constitutional texts less antiquated than the federal constitution which, often because of its relative “antiquity”, commands a degree of awe, reverence, and mythic status. Apart from the ‘easy’ formal amendment procedure, state constitutions can also be amended informally by various legal and political actors as they go about discharging their day-to-day activities such as law-making, or interpreting, or executing a government policy. They can also effect amendment by sheer neglect of some provisions which eventually will be ‘repealed’ by disuse.<sup>36</sup>

For their *interpretation*, state constitutions often depend on the state courts. This is the case, for instance, in the states of the USA.<sup>37</sup> But in systems where ordinary courts are not granted the power to interpret constitutions, such as in Ethiopia, a specific body such as the Constitutional Interpretation Commission, or as in the time preceding 2001 in Ethiopia, state legislatures interpret the state constitutions.

<sup>34</sup> Adoption through a constitutional assembly or referendum tends to create a unique ‘constitutional moment’ for the public and, to that extent, allows the constitution obtain a broader ‘original’ legitimacy. See Joseph H. Weiller, *The Constitution of Europe: “Do the New Clothes Have an Emperor?” and Other Essays on European Integration*. Cambridge: Cambridge University Press, 1999, pp.3-9 for an extended and splendidly lucid discussion on the meaning and implications of ‘constitutional moments’ and how they are helpful in galvanizing popular sentiment that goes into the legitimacy of the constitution. Herman Schwartz asserts the need for resolving the question as to which way of adopting a constitution is better, and suggests that “[a] special constitutional assembly representing as many elements in society as possible is preferable, even though it is more cumbersome and expensive.” H.

Schwartz, “Building Blocks for a Constitution” in *Issues of Democracy* Vol. 9, No.1 (2004), p.13. A more or less similar argument is presented in, Vivien Hart, “Democratic Constitution Making”. Washington, D.C.,: United States Institute of Peace (*Special Report* 107, July 2003) emphasizing the need for popular participation as an important component of modern constitution-making, available online at [www.usip.org](http://www.usip.org) (accessed in December 2008).

<sup>35</sup> See Tarr, *supra* note 10, at p. 6, generally on the intensity of constitutional change at the state level.

<sup>36</sup> See K. B. Smith, A. Greenblatt, and J. Buntin, *supra* note 24, at pp.62-65.

<sup>37</sup> See James A. Gardner, *Interpreting State Constitutions: A Jurisprudence of Functions in a Federal System*. Chicago: University of Chicago Press, 2005, for the predominant mode of constitutional interpretation, especially in the USA.

Implementation of state constitutions depend on various factors such as their legitimacy, a state's historical circumstances, political culture, the notions of governance that predominate a state. and the strength. independence. impartiality, neutrality, and effectiveness of state and constitutional institutions.<sup>38 39</sup> It is important to note at this juncture that all the features of state constitutions that we discussed here also recur as the features of state constitutions in federal Ethiopia.

## **2. Sub-national Constitutions in Ethiopia: Towards a Preliminary Survey**

In any federation. the federal and the state constitutions have an interlocked set of relations.<sup>40</sup> Often. one tends to be the extension of the other. One begins at the point where the other ends. or within the bounds of the other. As a result. discussions regarding sub-national constitutions will naturally begin with the discussion of the constitution that governs the federal polity. In the following sections. an attempt is made to first outline the nature of the constitution of the federal polity that encompasses the sub-national (constituent) units.

### **2.1- The Ethiopian Federation and its Constituent Units in General**

Ethiopia has become. and is. a federal polity since 1995. The move to federalism was only a culmination of earlier efforts at decentralization that started in 1991 on the aftermath of the collapse of the Derg regime.<sup>41</sup> Marking a complete break from a unitary and centralist past. Ethiopia dared to experiment with a multi-ethnic/ multi-national federation. The federation that was born out of the concern for ethno-nationalist groups' right to self-determination (which in turn was a result of an age-old quest for ethno-cultural justice)<sup>42</sup> manifested a number of unique features. (The recognition

<sup>38</sup> In most states of Ethiopia. a constitutional interpretation commission. assisted by the state constitutional inquiry council. interprets the constitution. In the SNNPRS. the Council of Nationalities (CON) interprets the constitution. In the years before 2001. the year at which most of the state constitutions (at least those of the four central highland constitutions. i.e.. of Amhara. Tigray. Oromo. and SNNPRS) underwent a massive revision. the state legislatures were the ones

that were in charge of constitutional interpretation at the state level. Political interpretation seems to take a swing. In this connection. it is also interesting to note that according to the constitution of the People's Democratic Republic of Ethiopia (PDRE) of 1987. a political body. i.e.. the State Council. was the ultimate interpreter of the constitution. (See Art 82(1) a-b).

<sup>39</sup> K.B. Smith. A. Greenblatt. and J. Buntin. *supra* note 36. at pp. 90-97.

of the right of secession,<sup>43</sup> the use of ethno-linguistic criteria as a basis of state formation,<sup>44</sup> the unconventional constitutional interpretation through the upper house of the federal legislature<sup>45</sup> the fact that states are not directly

<sup>40</sup> Depending on the origin of the federation, i.e., on whether it is a coming-together or holding-together type, one of the constitutions start off where the other stops. If it is of the former type, the federal constitution, often coming into existence after the state constitutions, starts where the latter stop—despite its supremacy all over the country. In contrast, if it is the latter type, the state constitutions start off at the juncture where the federal constitutions stop. Often the federal constitution prescribes the most fundamental and core values undergirding the state constitutions. On the other hand, depending on the nature of division of powers between the federal and state governments, the relationship between the two types of constitutions might present to us a similar but complex picture. Thus, if federal powers are enumerated and state powers are reserved or “residual”, then the state constitutions (mostly in coming-together federations) start off where the federal constitution stops. if, in contrast, state powers are enumerated and federal powers are reserved, then the state constitutions (mostly in holding-together federations), one of two things occur: either the state constitutions *begin and end*, at a time, within the boundaries set for them by the federal constitution, or they complete and perfect what has been started by the federal constitution; or they force the federal constitutions to, incrementally, start--and incrementally proceed from--where they stop, often to fill the gaps left unfilled by them or to pre-emptively preclude a potential free sphere of action. Hence, the interlocked relations.

<sup>41</sup> The ethno-nationalist liberation fronts that seized power in May 1991 hastened to negotiate a transitional charter that

made ethno-national groups’ right to self-determination sacrosanct. Subsequent legislation, Proclamation no. 7/1992, remade Ethiopia into a highly decentralized state where groups, as part of the package of their right to self-determination, had the right to administer themselves, use, promote, and develop their languages; enjoy, promote, and develop their cultures; write, preserve, and develop their history, and assert their particular identities.

<sup>42</sup> It is to be noted that the two most important questions that dominated the Ethiopian political terrain since early 1960s, and indeed the predominant preoccupation of the student movements of the age, were the question of land (typified by the slogan, “Land to the Tiller”) and the “Question of Nationalities”. There is a huge body of literature on this. Balsvik’s *Haile Selassie’s Students: The Intellectual and Social Background to Revolution, 1952-1977*. East Lansing: African Studies Center, Michigan State University, 1985; Kiflu Tadesses’s, *The Generation: The History of Ethiopian People’s Revolutionary Party Parts 1 and 2*. Trenton: Red Sea Press, 1993 and Lanham: University Press of America, 1998; Edmond Keller’s “Ethiopia: Revolution, Class and the National Question” 80 *African Affairs* No 321, 1981; Merera Gudina’s *Ethiopia: Competing Ethnic Nationalisms and the Quest for Democracy, 1960-2002*. (PhD Thesis). The Hague: Institute of Social Studies, 2002; Assefa Jalata’s *Oromia and Ethiopia: State Formation and Ethno-National Conflict*. Boulder, CO/and London: Lynne Rienner Publisher, 1993; Andargatchew Tiruneh’s *The Ethiopian Revolution, 1974-1987: A Transformation from an Aristocratic to a Totalitarian*

represented in the upper house,\*<sup>43 44 45 46</sup> the fact that the upper house has little, if any, legislative role,<sup>47</sup> etc, can be mentioned as evidence of its unique features).

The Ethiopian federation is composed of nine constituent units carved on the basis of “settlement patterns, language, identity, and consent of the people

*Autocracy*. Cambridge: Cambridge University Press, 1993, are only a few notables among a morass of books and articles on the historic questions of class and ethnicity in Ethiopia. The “question of nationalities” was subordinated to the question of class in the course of the making of the 1974 revolution and its unfolding in the subsequent years, but since 1991 it seems that, on the wake of the collapse of the *Derg*, the former has triumphed as the preeminent question that, if repressed, hardly dies out.

<sup>43</sup> Art 39(1) recognizes the “unconditional right to self-determination, including the right to secession” of every nation, nationality and people.

<sup>44</sup> See art 46(2) which holds that states are formed “on the basis of settlement patterns, language, identity and consent of the people concerned”.

<sup>45</sup> The House of Federation poses formally as the upper house of the federal legislature. See art 53 which says that “There shall be two Federal Houses: the House of Peoples’ Representatives and the House of the Federation.” This obviates the fact that Ethiopia’s legislature is bicameral in form although it is unicameral in actual operation. That aside, Art 62 cum 82-84 indicate that the House of the Federation (with the support of the Council of Constitutional Inquiry) is the ultimate interpreter of the constitution. Subsequent federal legislations, namely Proclamations No. 250/2001 and 251/2001 and confirm and elaborate on the interpretive powers of the House of the Federation and of the Council of Constitutional Inquiry. This makes Ethiopia’s system unique compared to other

contemporaneous constitutions of its time (such as that of South Africa, Namibia, etc).

<sup>46</sup> The House of the Federation, the upper house of the Ethiopian parliament, is “composed of representatives of Nations, Nationalities, and Peoples” (art 61(1)). The House is thus a representative of the ethno-cultural groups rather than the states. But the states may have their interests aired through the ethnic groups that come out of them. Besides, the fact that the representatives are—in practice so far—selected by the state legislatures (often from within the state legislatures), rather than by direct popular vote, has created the impression that they represent the states. The state legislatures are of course allowed to elect the representatives themselves or to “hold elections to have the representatives elected by the people directly” (Art 61(3)).

<sup>47</sup> In deed the House of Federation has little legislative role. This is evidenced by the fact the list of powers and mandates under article 62 refers only to two matters, among a total of 11, as the ones relating to legislation. These matters are: a) determination of “the division of *revenues* derived from joint Federal and State tax sources and the *subsidies* that the Federal Government may provide to the States” (art 62(7)); and b) determination of “civil matters which require the enactment of laws by the House of Peoples’ Representatives.” (art 62(8)). One can quickly note that even these are not legislative matters *in stricto sensu*; they are rather directions on what to legislate upon, sort of a license for the HPR to legislate on the matters indicated.

concerned.”<sup>48</sup> These nine states, officially called variously as “National Regional States”, “Regional States,” “Regions”, or simply “States,”<sup>49</sup> are: Afar, Amhara, Benishangul-Gumuz, Gambella, Harari, Oromiya, Southern Nations, Nationalities, and Peoples (SNNPRS), Somalia, and Tigray.<sup>50</sup> Most of these states are ethnically heterogeneous although in most of them there are dominant ethnic groups after whom the states are often named.<sup>51</sup>

The power of the states is provided for in Article 52 of the FDRE constitution as the “reserved” or ‘residual’ power that is “not given expressly to the Federal Government alone, or concurrently to the Federal Government and the States”.<sup>52</sup> While the constitution reserves the “plenary” powers to the states, it also makes it clear that states, among other things, have the power to set up their own administration “that best advances self-government, a democratic order based on the rule of law; to protect and defend the federal constitution”, to “enact and execute” their own state constitutions, and other laws, to administer land within the framework legislations of the federal gov-

<sup>48</sup> Art 46(2) of the FDRE Constitution

<sup>49</sup> Throughout this paper, the term used will be “states” at times interchangeably with sub-national entities. This is done only for reasons of convenience.

<sup>50</sup> Art 47 (1) of the FDRE Constitution.

<sup>51</sup> Hence, we have the states of Amhara, Oromia, Somali, Afar, and Tigray, in all of whom we have diverse peoples other than the Amhara in Amhara state (such as the Agaw, the Argoba, the Oromo, etc), other than the Tigrayans in Tigray (such as the Erob and the Kunama), other than the Oromos in Oromia (such as the Zay, and pockets of other peoples living mostly in urban centers all over the state), other than the Afar in Afar State (the urban dwellers who have migrated into the region over the years), the Somalis in the Somalia State (urban dwellers in the cities and towns). The SNNPRS is demographically intensely diverse, and is obviously an exception in this regard, i.e., in the sense that there is not one predominant group that can be associated with the identity of the State. Harari state is composed predominantly of the Oromos, the Harari, and many other people

groups who live in the city of Harar. Given the fact that the Harari are numerically small in the state, Harari, too, is an exception in having a political predominance that lets the state be identified with it while it is the smallest in terms of numbers. Harari is also unique in its adoption of a mode of democracy that is more consociational than any of the states or even the federal government can afford. Gambella is composed of the Anywaa, the Nuer, the Mezenger, the Mao, and the Opo peoples but ‘Gambella’ does not signify a people group. Likewise, Benishangul-Gumuz is composed of the Berta, the Gumuz, the Shinasha, the Mao and Como peoples and the name hardly refers to anyone group in the state. Interestingly, in these latter states of the Western periphery of Ethiopia, there is a distinction made even in the constitutions between ‘indigenous nations, nationalities’ [of , for example, Berta, Gumuz, Shinasha, Mao and Como in Benishangul-Gumuz State] and ‘other peoples residing in the region’. (See for instance Preamble, Parag. 3 and Article 2 of the constitution.)

<sup>52</sup> Art 52(1) of the FDRE Constitution.

ement, to levy and collect state taxes on their own revenue sources, to establish and administer their own police force, etc.<sup>53</sup> Obviously one can have a fuller picture of the ‘residual’ powers only after considering the list of federal powers in the preceding provision<sup>54</sup> which includes those powers traditionally known as federal powers (such as foreign affairs, defence, interstate commerce, interstate relations, currency, foreign trade, national security, transportation, postal services, and telecommunication, some natural resources including land, etc). Because the list of federal powers seems to be long, people often reasonably doubt if the residual powers reserved to the states in Ethiopia are really significant. Nevertheless, it is important to note at this juncture that state constitutions play an immense role in articulating these ‘plenary’ powers so that they can be better exercised by the states in consonance with the principle of self-rule that constitutes an aspect of federalism.

It is interesting to observe that some of the state powers “enumerated” (by way of example) in art 52(2) (a-b) tend to impose an obligation on states. Thus, to an extent, they seem to be determining the key elements of the state constitutions. That is to say, a state constitution that does not recognize the pre-eminence of the principles of self-government, democracy, and rule of law, and is not poised toward protecting and defending the federal constitution cannot be accepted as valid, it stands to reason, then, that all state constitutions, minimally, need to abide by these principles.

In the Ethiopian federation, symmetry is the norm.<sup>55</sup> Thus, states have “equal rights and powers.”<sup>56</sup> State legislatures command the supreme political power and are accountable to the people(s) of the states.<sup>57</sup> States are obliged to establish local governments at various administrative levels so that there are possibilities for local people “to participate directly in the administration” of these levels of governments.<sup>58</sup>

The state legislatures’ powers “to draft, enact, and amend” the state constitutions is also recognized in the federal constitution.<sup>59</sup> Its supreme legislative power is similarly recognized in the same provision. The states’ executive and judicial powers—and by extension all the powers that mark sovereignty at the local level—are also recognized in the constitution.<sup>60</sup> Although

<sup>53</sup> See art 52(2) a-g of the FDRE Constitution.

<sup>54</sup> Art 51 of the FDRE Constitution

<sup>55</sup> I readily concede the point that in multinational polities, asymmetry is almost inevitable. See, for instance, Rainer Baubock, *Multinational Federations: Territorial or Cultural Autonomy?*, Malmo: Malmo University (Willy Brandt

Series of Working Papers in International Migration and Ethnic Relations 2/01), 2001. Baubock says that “Asymmetry is endemic to multinational federations....” (p.11).

<sup>56</sup> Art 47(4) of the FDRE Constitution.

<sup>57</sup> Art 50(3) of the FDRE Constitution.

<sup>58</sup> Art 50(4) of the FDRE Constitution.

<sup>59</sup> Art 50(5) of the FDRE Constitution

the constitution does not explicitly stipulate the existence of the *principle of federal supremacy*<sup>60 61</sup> in the Ethiopian federation, it holds, in consonance with the *principle of federal comity*, that “The states shall respect the powers of the Federal Government and the Federal Government shall likewise respect the powers of the States.”<sup>62</sup> This provision is indicative, at least in theory, of the dual nature of the Ethiopian federation.

The perusal of this provision in conjunction with the provisions that indirectly (through nations, nationalities, and peoples) grant the right to self-determination<sup>63</sup> to the states, give the impression that the Ethiopian federal system guarantees state sovereignty. As a result, it is incumbent upon the state constitutions to articulate, elaborate, and give institutional expression to this state sovereignty that seems to be regnant in the constitution.

But before delving into the discussion on the state constitutions of federal Ethiopia, it stands to reason if we pinpoint some significant features of the federal constitution under the umbrella of which the state constitutions and, indeed the federation in its entirety, operate. The Federal Constitution is a compact document made up of a total of 106 articles divided into 11 chapters. (As a legal document, it is a well organized document with an enviable degree of simplicity and clarity.) It is the legal document that *constituted* the federation. From its preamble, we note that it is a compact agreed upon among the “nations, nationalities, and peoples” of Ethiopia. It is thus a solemn contract, treaty, even a vow, among these groups who reconstituted Ethiopia into a federation of disparate ethno-linguistic groups that aspire to build “one economic community” based on a “common destiny” born out of a shared past.<sup>64</sup>

From the preambles, one can glean such principles with far reaching consequences as the principle of the salience of self-determination, the sanctity of human rights, the sacredness of the principle of inter-personal and inter-group equality, and the primacy of the need to build a democratic order based on the principle of the rule of law for the sake of a sustainable peace. Apart from these, the constitution postulates five basic principles as ‘fundamental’ pillars of the constitutional order. These principles are that of sovereignty of ‘nations, nationalities, and peoples’, constitutional supremacy and constitutionalism, sanctity of human rights, secularism, and of transparency and accountability of government.<sup>65</sup>

<sup>60</sup> Art 50(6-7) of the FDRE Constitution.

<sup>62</sup> Art 50 (8) of the FDRE Constitution.

<sup>61</sup> The principle of ‘federal supremacy’ or ‘federal paramountcy’ maintains that the federal government, its laws, and institutions are supreme, i.e., superior to, and override, the state laws and institutions.

<sup>63</sup> Art 39 of the FDRE Constitution.

<sup>64</sup> Paragraphs 3-5 of the preamble of the FDRE Constitution.

<sup>65</sup> See arts 8-12 for these principles.

In its chapter three,<sup>66</sup> the Constitution provides for a catalogue of fundamental rights and freedoms. About 31 “kinds” of rights are recognized and granted a constitutional guarantee. The provisions of this chapter are *entrenched*, i.e., they are protected from easy (and often unilateral) encroachment through making the amendment procedure rather rigid.<sup>67</sup> Nevertheless, the absence of an *application* clause (that indicates whether they have *direct*<sup>68</sup> or *indirect*<sup>69</sup> application), *interpretation*<sup>70</sup> clause (that clearly indicates the principles, methods, and steps to be used in the construction of human rights clauses), *limitation*<sup>71</sup> clause (that regulates the manner in which limitations are imposed when necessary), and the ambiguity with regard to the role of

<sup>66</sup> Chapter three, the chapter that can be taken as Ethiopia’s Bill of Rights chapter, extends from art 13 to 44 in which all the traditional civil and political rights, economic, social and cultural rights, as well as the rights to peace, development, and environment are enshrined.

<sup>67</sup> According to art 105(1) of the FDRE constitution, chapter three can be amended only through the consent of all the nine state legislatures and the 2/3<sup>rd</sup> majority vote of the Federal Houses (i.e., the House of peoples’ Representatives and of the House of the Federation).

<sup>68</sup> *Direct application* relates to the situation whereby the provisions of chapter three are invoked in the process of litigation to assert a particular claim hoping to obtain a specific remedy emanating from the self-executing nature of the human rights chapter. It is so invoked when the chapter is viewed as a special law directly applied in the course of litigation to assure the plaintiff a special regime of remedy.

<sup>69</sup> *Indirect application* is said to exist when the human rights chapter, by permeating the system from behind, prompts all public decisions (be it in court or otherwise) to be respectful of the rights and freedoms recognized therein. In these circumstances, the human rights chapter serves more as a framework of understanding, a tool of interpretation of other laws, than as a special regime of law applicable directly in its own right. In

indirect application, the human rights chapter of the constitution “loses” itself into the other (ordinary) laws and disciplines them thereof. For an elaborate discussion on direct/indirect application, see generally Johan De Waal, Iain Currie, and Gerhard Erasmus, *The Bill of Rights Hand Book* (4<sup>th</sup> ed). Lansdowne: Juta & Co. Ltd, 2001.

<sup>70</sup> An interpretation clause would clarify to us as to what modes, principles, and techniques ought to be adopted in the course of constructing the provisions of chapter three. In particular, it would clarify issues of procedure (jurisdiction, standing, and justiciability), content (the scope and limitations of a particular right), and remedies (as to the consequences of the decisions of the tribunal that is engaged in the work of ‘making sense’ of the chapter). It would also hint at the steps and principles (e.g. textual/literal, historical, purposive, etc) to be used in the actual task of interpretation. The reason all these are not self-evident in the ‘normal’ judicial process in Ethiopia is because, at least since 1991, the courts have had no experience in the hermeneutics of human rights; it is also the result of the fact that the courts’ position vis-a-vis the constitution is ambiguous. See Section 38 of the constitution of South Africa for how constitutions deal with interpretation of human rights provisions.

courts to enforce constitutional human rights—owing to the bifurcated division of the interpretive power between courts and the House of the Federation—have played a role in the diminished implementation of human rights in Ethiopia.<sup>71 72</sup>

The constitution establishes a parliamentary system of government with a formally (weak) bicameral legislature at the federal level.<sup>73</sup> The lower house is the supreme legislator and the supreme political organ.<sup>74</sup> The upper house has little legislative role; instead it has interpretive and adjudicatory powers.<sup>75</sup> It is a house in which nations, nationalities and peoples (and, indirectly, states) are represented in proportion to their numbers.<sup>76</sup> The Constitution also establishes an executive made of the Prime Minister, the Council of Ministers and the Ministries.<sup>77</sup> It also provides for a ceremonial executive headed by a President who serves as the non-partisan, non-political Head of State.<sup>78</sup> Furthermore, it provides for a three-tiered, parallel, court system of federal and state judiciary.<sup>79</sup>

A Constitutional Inquiry Council with an advisory power (to send recommendations on constitutional interpretation) that assists the House of the Federation is also provided for.<sup>80</sup> Moreover, the Constitution lists down the policy objectives and directive principles that guide government policies, decisions, and activities in its chapter 10. Thus the directives that guide the foreign affairs, defence, political, social, cultural, and environmental policies of the country are specified therein<sup>81</sup> With these points regarding the federal constitution in the background, we now turn to the discussion of the state constitutions of federal Ethiopia.

<sup>71</sup> The constitution does not set aside a separate provision dealing with limitations to be imposed on the exercise of human rights. But built into specific provisions are some limitative phrases. But absent a general limitation clause, we hardly know how to rule on the (im)propriety of a limitative legislation, decision, or any other measure.

<sup>72</sup> Art 13 is only partially about application and interpretation. Art 13(1) states that the state—at all levels-- is the duty bearer of obligation emanating from chapter three. Art 13(2) states that interpretation of chapter three must conform to international human rights instruments, but says

no more. Art 13(1) is thus about the *reach* of the Human Rights Chapter.

<sup>73</sup> Art 53 of the FDRE.

<sup>74</sup> Arts 54-55 of the FDRE Constitution.

<sup>75</sup> Art 62 of the FDRE Constitution

<sup>76</sup> All nations, nationalities, and peoples are represented by one member having one more additional member for every additional one million. See art 61 of the FDRE Constitution.

<sup>77</sup> Art 72 of the FDRE Constitution

<sup>78</sup> Art 69-71 of the FDRE Constitution

<sup>79</sup> Arts 78-79 of the FDRE Constitution.

<sup>80</sup> Arts 82-84 of the FDRE Constitution.

<sup>81</sup> See arts 85-92 for these policies.

## 2.2- The State Constitutions: A Closer Look

Since 1995, immediately upon the coming into force of the federal constitution, states have come to adopt their own constitutions and to utilize them to manage state politics in accordance with them.<sup>82</sup> For their making, all of them depended on the state legislatures. The fact that they were made by the state legislatures in an ordinary session made the constitutions look like any other law “enacted and adopted” by the legislatures. It also precluded the opportunity for people to relish in the deliberation and festive mood that comes along the “constitutional moment” that often comes with the adoption of a constitution. Nevertheless, the constitutions were made and put in place by the states. One might wonder as to how the constitution that constitutes the state governments and their organs can be made by the same legislatures that the constitution brought into existence. The answer is to point to arts 46-47, 50 (2-3), 52(2), etc of the Federal Constitution which provide for the power of the state legislatures to adopt a constitution. Partly, one can safely say, the mandate to make the constitution is rooted in the provisions of the federal constitution that antedate the state constitutions.

One might also wonder as to how the constitutions can assert a significance that is stronger than the one that is asserted by other (ordinary) laws of the states. The formal response to that query is that the constitutions, in their supremacy clauses, invariably claim to be the “supreme law”s in the states.<sup>83</sup> But the more substantive and important answer would be that their superior significance can be progressively exerted as, through time and effective implementation,<sup>84</sup> they gain broader popular legitimacy and the awe and reverence that comes along.

<sup>82</sup> Oromia had its own state constitution since 1993. But in its 1995 constitution, there is—rather strangely—no reference to the old constitution. Tigray’s constitution of 1995 came into effect slightly earlier than the coming into effect of the federal constitution. See Tsegaye Regassa, “The Constitution of Oromia: A Brief Account” in : Tsegaye Regassa, *State Constitutions and Local Government: A Reader* (Vol II: Texts, Cases, and Thoughts).(Unpublished teaching material prepared for LL.M students at ECSC, Addis Ababa).

<sup>83</sup> See arts 9 of the Afar, Harari, SNNPRS, Oromiya, Amhara, and Tigray constitutions and art 10 of the Benishangul-Gumuz and Somali state constitutions for

their supremacy clauses. These clauses assert that under the authority of the Federal constitution, state constitutions serve as the supreme law of the states.

<sup>84</sup> Elsewhere I argued that this kind of *earned legitimacy* that endows the constitutions with a late-coming wider popular legitimacy is a *derivative legitimacy* (*derivative* as opposed to *original*) that can further be strengthened by a ‘redemptive constitutional practice’. See, Tsegaye Regassa, “Between Constitutional Design and Constitutional Practice: The Making and Legitimacy of the Ethiopian Constitution” (An unpublished paper presented at a Conference on Constitutionalism and Human Security in the Horn, Addis Ababa, August 7, 2008)

The major *material or substantive source* of the norms of the state constitutions is apparently the federal constitution. A cursory glance at the provisions of the state constitutions confirms this observation. There is a striking similarity in the area of fundamental principles (chapter two of both the federal and all the nine state constitutions), human rights chapter (chapter three) [although there are some interesting differences as well], and in the statement of policy objectives and directive principles (assigned to chapter 10 of the federal constitution and to various chapters of the state constitutions).<sup>85</sup> The parliamentary model of government that they entrenched up to the Kebele level (especially since 2001),<sup>86</sup> the non-judicial constitutional interpretation method they opted for, the salience of the principle of the right to self-determination as accorded to all nations, nationalities, and peoples, etc are only some of the norms that are substantively drawn from the federal constitution.

In addition to the Federal constitution, the texts of the state constitutions seem to have drawn some provisions from the Transitional Charter (e.g. on the conditions attached to the exercise of the right to secession),<sup>87</sup> Proclama-

<sup>85</sup> Most of the states share the economic, political, social, cultural, and environmental policy objectives but drop the defence and foreign policy objectives as these are unnecessary at the state level. see, for example, chs 10 of the Afar, Benishangul-Gumuz, Somali, and Tigray constitutions, or chs 11 of the oromia, SNNPRS, and Amhara constitutions. The Harari constitution differs from all the others in that, in its article 77, it stipulates that the implementation of all laws (including the federal and Harari constitution) and policies shall be guided by the policy objectives and directive principles of the FDRE Constitution that are enshrined in its chapter 10 (arts 85-92).

<sup>86</sup> This, is because the state legislatures, in the traditions of typical parliamentary system, are made the supreme political organs in the states. Moreover, in all of the states, the executive is drawn from, dependent on, and accountable to the legislatures. one quickly notes, however, that the Chief Administrators are both the heads of Governments and of State, at a time, in the states. However, as will be

argued later, this and the fact that they are also called ‘presidents’ (especially before 2001, in law, and after 2001, only in practice) should not give the impression that the states have presidential forms of government.

<sup>87</sup> The state constitutions (re)introduced conditions since 2001. The conditions in the texts of the state constitutions are not exactly the same with those in the charter. But the thrust and the orientations are the same. The charter says that secession is exercised when a group is denied self rule, democracy is on the wane, and there is a violation of human and democratic rights—and these problems cannot be solved within the Ethiopian union. The constitutions say that secession is exercised if a group is “convinced that the rights under art 39(1-3) have been violated, suspended, or encroached upon and when such cannot be remedied under the auspices of a union with other peoples.” (This is from art 39(4) of the Revised Oromia Constitution, and is referred to here only an example of a general pattern in all the states.)

tion No 7/1992 (on the organization of the sub-state units within them), traditions of the ethnic groups that live in the States (e.g. the recognition of customary and religious laws through their courts; the recognition of the role of advisory elders in Afar,<sup>88</sup> Somalia,<sup>89</sup> and other states), and religion (manifested often in the clauses that extend recognition to religious laws).

Apart from the state legislatures that are formally declared to be their makers, the *formal sources* of the state constitutions are unclear. The question as to who drafted them, and based on what preeminent principles, and who deliberated upon them before they were presented to the legislatures are not clearly known. In some states, it is the House Standing Committees that drafted the constitution. In others, it is a committee whose members are appointed by the chief executives that are responsible for the drafting of the texts. What is clear is that not many people, not many stakeholders (be it political parties or otherwise), are made part of the *drafting, deliberation and adoption* process. This indicates that most of them might have probably been drafted and adopted under the supervision of one dominant political party of the States.<sup>90</sup>

Like in all other federal polities, (and perhaps like all other constitutions), the purposes of state constitutions are to govern state behaviour in the states by regulating the relationship between the various organs and “levels” of state government, guaranteeing human rights of citizens, and determining the powers and responsibilities of the state organs. In Ethiopia, the state constitutions can also be viewed to have been made in order to consolidate and solidify the victories of the nations, nationalities, and peoples of the states; ensure self-rule; embody and express the collective goals and aspirations of state citizens;<sup>91</sup> reaffirm the sovereignty of nations, nationalities, and peoples residing in states; reaffirm the state powers that are stipulated as “reserved” for states in the federal constitutions; establish sub-state level of governance and

<sup>88</sup> Art 63 of the Afar Constitution allows the state legislature to “establish Councils of Elders at various hierarchies as may be necessary.”

<sup>89</sup> Art 56 of the Somali constitution mandates the state legislature to establish “Elders’ and Clan Leaders’ Council”.

<sup>90</sup> For the distinction between ‘formal’ and ‘material’ sources of laws, see George white-Cross Paton, *A Text book of Jurisprudence* (3<sup>rd</sup> ed), Clarendon: Oxford University Press, 1970(?).

<sup>91</sup> The Ethiopian state constitutions, like all other constitutions, aspire to embody the

aspirations of the state citizens thereby hoping to portray a projected identity of the states. The ‘we, the People of ...’ phrase always tries to depict more a project than a reality. (See R. Rorty’s “Moral Universalism and the Economic Triage” [November 2003] at <http://www.unesco.org/phiweb/uk/2rpu/rort/rort.html> as accessed in December 2006.) But this is acutely pronounced in the case of the SNNPRS, which lacks any ‘anthropological’ personality even more than the other states.

regulate the relations between these levels of government and the state governments; and to reaffirm constitutional guarantees granted to fundamental rights and freedoms of state citizens. In 2001, when the state constitutions were revised, some of the reasons that prompted the revision were the need to ensure a better form of governance through a constitutional separation of powers among organs of state (especially between the legislature and the Executive). The concern for entrenching good governance and efficient and effective governance that helps promote sustainable development in the states also forms part of the *raison detre* of the revision.<sup>92</sup>

In terms of length, until 2001, rather uniquely, Ethiopia's state constitutions were shorter than the federal constitutions. on average, most of the state constitutions had 98-102 articles, Harari, having a strikingly shorter text.<sup>93</sup> Since the revision in 2001, most of the state constitutions have become lengthier than the federal constitution. Thus, by far the longest, the SNNPRS Constitution came to have 128 articles. Tigray and Somali stopped at 110 while Afar, Oromia, Amhara, and Benishangul-Gumuz stopped at 111, 113, 120, and 121 respectively. Even the Harari constitution has grown in length from 63 to 80. The growth in size is perhaps attributable to the degree of details that began to go into the texts in order to determine the powers of all the three organs of the sub-state level governments, the newly created institutions such as the Council of Nationalities of the SNNPRS, the Constitutional Interpretation Commissions of the other States, and the Nationality Administration Council (executive and judiciary) of the Amhara state. While *prima facie*, the growing length of the texts might be taken to suggest that they are progressively becoming manuals of government (as opposed to framework of government) at the local level, in actual fact, because the length is primarily attributable to the creation of new structures, it is yet premature for us to say that they have become manuals of government, thick with policy details. But it is interesting that the states have begun to take a fuller account of their specific (demographic, geographic, socio-economic and cultural) contexts as they go about revising their constitutional texts.

The *principles* based on which the state constitutional texts sought to anchor the state constitutional orders are similar to those of the federal constitution. Thus, as we can gather from their chapter twos, the principles of sovereignty of nations, nationalities, and peoples, constitutional supremacy and constitutionalism, sanctity of human rights, secularism, and of transparency and accountability of government constitute the jural postulates of the sys-

<sup>92</sup> See the preambles of any of the revised state constitutions for these preoccupations with separation of powers, good governance, and sustainable development.

<sup>93</sup> The 1995 Constitution of Harari had only 63 articles.

tems at the state level. From their *preambles*, we can gather principles such as that of *self-determination, equality, rule of law, democracy*, the importance of strengthening one's *identity, language, and culture, separation of powers*, etc.<sup>94</sup>

Human rights are gratuitously granted a constitutional guarantee in the state constitutions. In almost<sup>95</sup> all of the constitutional texts, the provisions of chapter three of the federal constitution are “restated” at times even *ad verbatim*. Thus all rights—individual as well as of groups—are recognized. Deference to the federal constitution is patent in all the state texts. In the revised constitutions, some rights are granted better protection. The right to be recognized as a human person is, for example, a right which had not had recognition in the federal constitution but which found such recognition in the state constitutions of Amhara, Benishangul-Gumuz, Harari, Oromia, Tigray, etc). In most of these states, the list of non-derogable rights in times of emergency has grown longer<sup>96</sup> In this regard, it can be said, states have begun to demonstrate they can extend the horizon of rights protection to frontiers that the federal constitution hasn't taken them yet.

But on the other hand, the states tended to limit the collective right to self-determination when they introduced a condition<sup>97</sup> to be fulfilled for a group to exercise the right to secession. Thus the constitutions of Tigray (art 39/4), Oromia (39/4), Benishangul-Gumuz (39/4), Harari (39/4), Amhara (39/4), Afar (37/4), etc declare as follows: [the peoples of... shall have the right to:

Exercise its rights of self-determination, including the right to secession in accordance with [art 39] the constitution of the FDRE where it believes that the rights specified in sub-articles 1 to 3 are suspended, denied and not fully implemented and such violations could not have been rectified within [sic] unity.<sup>98</sup>

This shows that the state constitutions are attaching conditions to the right to secession, a right that is unconditional as per the words of the federal consti-

<sup>94</sup> These principles are stated in the preambles almost invariably.

<sup>95</sup> The 1995 Harari Constitution had only a reference to the federal constitution for some rights. But in the revised constitution of 2005, this has been changed to directly enshrine the rights in the text.

<sup>96</sup> The federal list recognizes only arts 18, 25, and 39(1-2). The state list goes to include (in addition to the ones rendered federally non-derogable) the right to life, physical integrity (or bodily security), rights of detained and convicted persons

in places of detention and prisons, the right to be recognized as a human person, and freedom of thought, conscience, and belief.

<sup>97</sup> It is better to say that they re-introduced the conditions for the exercise of the right to secession by bringing in the provisions of the Transitional Charter which said that secession can be exercised only if massive violation or denial of the rights to language, culture, history, autonomy, self-rule, and democracy and this cannot be corrected within the union.

tution. To this extent, then, one can say that the state constitutions, by providing less protection to the right of secession, have made an inroad on the collective right to secession. Of course, to the extent that this clause contradicts the federal constitution, it is of no effect (as per art 9(2) of the FDRE Constitution). It is interesting to note that state constitutional texts should not even talk about secession from Ethiopia (unless they want merely to reaffirm their rights guaranteed to them by the federal constitution); rather, they would be entitled to talk about the right to form one's own separate state by seceding from the states.<sup>98 99</sup> In short, what one can say is that the state texts tell a mixed story of both better and less protection when it comes to rights: better for individual rights and less for collective rights.<sup>100</sup>

Up until 2001, the states had a semi-presidential, semi-parliamentary system of government with a unitary structure of government. Thus the Presidents of the states were chief executives, heads of the regional states, chairs of the state legislatures, etc. On the surface, the pre-eminence of the Presidents gave the impression that the states had a presidential form of government. But when one observes that the state legislatures were the supreme political organs who determine the state budget, elect the president, control and oversee the performance of the executive, etc, one realizes that the system has also traits of a parliamentary system. There was a fusion of powers. The legislatures were unicameral. The legislatures were the interpreters of the constitutions. Since 2001,<sup>101</sup> however, primarily owing to the revisions, in some of the states, parliamentarism became very clearly established. Separation of the powers of the legislature and the executive became more visible. The presidents (alias Chief Administrators) are elected by the legislatures.

<sup>98</sup> The additions in the braces are from the Amharic version of the text—which is the authoritative version.

<sup>99</sup> Even this is taken care of by article 47 of the constitution anyway.

<sup>100</sup> Note the fact that traditionally states are said to be strong on collective rights while the federal government is strong on individual rights. Ironically, in Ethiopia, at least theoretically, the situation is otherwise.

<sup>101</sup> In some circles, it is said that the constitutions had to be revised in order to reduce the powers of the state presidents to dictate the states. Apparently, this makes the states more difficult to be mobilized in favour of one or another politician in office at the Federal level. This happened

because a real possibility that a dissident group who wants to gain the support of the states can easily do so by merely speaking to the president (without the need to seek approval from the state legislatures) when the splinter group that left the TPLF sought the support of the state leaders in 2001 on the aftermath of the crisis in the TPLF. This information has been granted to me by an official who sought to remain anonymous and our discussion strictly confidential. Given the fact that this needs further corroboration, what *actually* necessitated the revision of state constitutions remains dubious until future inquiries help us find out the background causes of the revision.

The legislatures are now chaired by their own Speakers and Deputy Speakers who themselves are elected by the legislatures. Some states (e.g. the SNNPRS and Harari) moved towards bicameralism, although this is more of an appearance than of substance. There is a striking omission in the state constitutions — save in the Constitution of SNNPRS<sup>102 103 104</sup> — regarding the dissolution of the state legislatures. Consequently, there is hardly any guide as to what happens when the legislatures are so divided into party lines that a coalition government cannot be established or a reigning coalition government collapses owing to various reasons.

Moreover, save in the SNNPRS, constitutional interpretations began to be envisaged as tasks of an independent Constitutional interpretation Commissions. Division of powers between the state and sub-state levels of government became more expansive. Separation of powers among the organs of the sub-state governments (i.e., Zones/or Nationality Administrations, Special Woredas, Woredas, Kebeles, and even Municipalities) was taken more seriously (than they used to be in the pre-2001 times). Although none of the states could concoct a “federation within a federation”,<sup>105</sup> intra-state decentralization seemed to be intensified.<sup>106</sup>

<sup>102</sup> The upper houses have little, if any, legislative competence. At best, (as in the case of the SNNPRS), they serve as representative institutions with the power to interpret the constitution and resolve inter-group disputes at the state level.

<sup>103</sup> There is a similar omission regarding *emergency powers* in, for example, the Benishangul-Gumuz constitution. In the Harari State Constitution, there is a mere reference to the provisions of the federal constitution on *policy objectives* by specifically mentioning arts 85-92 of chapter 10.

<sup>104</sup> The SNNPRS Constitution provides for dissolution of the Council in its art 57 more or less in a manner similar to its federal equivalent. But because the chief executive is also the Head of State, it makes it difficult to imagine a scenario, for example, where, given the collapse of government in the legislative council, the Chief executive will invite the “previous ruling party or parties” to continue to

serve as a caretaker government. Isn't the Chief Executive himself part of the “previous” government? If so, what is the point of the whole exercise of dissolution of the legislature except to give the old governing executive to dominate the legislative council?

<sup>105</sup> The SNNPRS seems to pose as a “federation within a federation” because of the accent on ethnic self-determination and the consequent local self-rule. But even there, substantive decision making (including law-making) power seems to be the power of the state not of the self-governing Zonal or Special Woreda or Woreda entities.

<sup>106</sup> It is probably because students of decentralization in Ethiopia say 2001 marks the beginning of phase II of decentralization in Ethiopia. See for example the papers in Taye Assefa and Tegegn Gebe-Egziabher (eds), *Decentralization in Ethiopia*. Addis Ababa: Forum for Social Studies, 2007.

Although elaborate provisions are included in the revised constitutions regarding constitutional interpretations, the general thrust that was put in place in 1995 remains the same. Thus state constitutions are still interpreted by a non-judicial body. In all, save the SNNPRS, state constitutions are interpreted by Commissions set up for this purpose. These commissions are composed of representatives of Woredas of the states in more homogeneous states such as Somalia, Afar, Oromia, Amhara, Tigray, etc. In others (Benishangul-Gumuz, Gambella, etc), the diverse ethnic groups are represented in these commissions.<sup>107</sup>

In all these states, a Constitutional Inquiry Council that assists the commissions (or the Council of Nationalities in the case of the SNNPRS) was envisaged to be set up. In some states <sup>108</sup> (e.g. Oromia <sup>109</sup> and the SNNPRS),<sup>110</sup> such Councils have also been legally established. In most, however, it is not yet established. Where it is established, it has not become operational. It is also not an unwarranted pessimism to expect that where it begins to be operational, it will be beset by constraints such as lack of skilled manpower (especially constitutional law experts), lack of clear procedure (for accepting complaints and/or petitions, investigating disputes, conducting hearings, gathering evidence or hearing witnesses, writing judgement-looking recommendations [which could be taken as arbitral awards], sending out orders, etc), lack of financial and infrastructural resources, etc <sup>111</sup>. The sad consequence of this is that states will be lacking in strong constitutional institutions that: a) manage sub-national constitutional disputes (of which we have no lack); and b) serve as reliable custodians of the constitutions and the constitutionalism that emerges therefrom.

<sup>107</sup> See article 71 of the Benishangul-Gumuz constitution, for example, which holds that the commission is composed of 20 members drawn from all four “indigenous” nationalities (five from each).

<sup>108</sup> The councils have not been operational so far, although there are efforts towards that in most states.

<sup>109</sup> In Oromia draft law on the modes of operation of the State, CCI was prepared and discussed among officials but it was never adopted and promulgated by the *Caffee*. To date, the members of the CCI

are not appointed. Consequently, the state CCI is not yet operational.

<sup>110</sup> A similar effort was undertaken in the SNNPRS (in 2004/2005) where the Speaker of the Council of Nationalities (CON), with the help of the then President of the State Supreme Court, had started to draft a specific law on the mode of operation of the SNNPRS CCI. (Discussion with Tekle Didu, the Speaker of the CON, December 2008).

<sup>111</sup> The federal Constitutional Inquiry Council has had its time of these problems for a long time and it doesn’t seem to have fully come out of it yet.

While diversity is taken seriously in all the states, no state dares to expressly deal with *minority rights* in its constitution. Following the tack of the federal constitution, all the states view ethno-national groups sovereign.<sup>112</sup> They also readily grant that these entities are entitled to the right to self-determination.<sup>113</sup> But what they tend to ignore is the (new) minorities that emerged in the (new) ethnic sovereignties that arrived on the scene immediately after the adoption of federalism as an organizing principle that re-made up Ethiopia. These minorities are of four types: (a) groups that are children of northern settlers (the ruling elite) who were dispersed in the far-flung territories of the wider south of Ethiopia;<sup>114</sup> (b) groups that, owing to the (re) settlement and villagization programs of the government of the 1980s, were forced to migrate and settle in the South Western states;<sup>115</sup> (c) groups living

<sup>112</sup> Indeed the equivalent of the principle of ethnic sovereignty in art 8 of the FDRE Constitution is enshrined in all the state constitutions, often in their arts 8 or 9.

<sup>113</sup> The equivalent of art 39 of the FDRE Constitution is enshrined in all the constitutions albeit in most cases with a condition attached to the exercise of the right to secession.

<sup>114</sup> These folks are mostly people of Amhara, Tigryan, or other northern descent who moved into the “south” as state functionaries of the past and have made a home out of their places of residence. Cut-off from their northern kins, they are left to their own devices. Because they cannot qualify as “nations, nationalities, and peoples” under the definition of “nations, nationalities and peoples” under article 39 (5)—mainly because they do not have a contiguous territory—they cannot claim sovereignty rights (art 8) or rights of self-determination (art 39). As groups, they tend to be ignored, and often even discriminated against.

<sup>115</sup> Such is the case of those who, under the spell of famine and fragile ecology affected by drought, had to be (re)settled mainly in what are now the states of Gambella and Benishangul-Gumuz. These people have preserved their distinct cultural, religious, and linguistic

identities although they have also, to a varying degree, adapted themselves to the local cultures and languages of the host societies. Nevertheless, they still associate themselves with their kins in their place of origin and often emphatically distinguish themselves from the local population. The local population also consider them as “settlers” who came from other places and view them as “other” than the original inhabitants of the States. Because they are made to (re) settle in a contiguous territory, they seek a veritable recognition as a distinct nation, nationality, and people. The local folks invariably resent this. Because they are numerous, they have swayed the demographic configuration of these states, especially that of Benishangul-Gumuz. As a result, the “settlers” as a group seem to be the single most important category of people that constitute a relative majority in the states. There is a consequent tension (albeit mostly latent so far) in these states between the local inhabitants and the “settlers”. Diffusion of these tensions and channelling them towards broader recognition, accommodation, tolerance, and peace requires a stronger system of minority rights protection and a vibrant sub-national democratic practice.

dispersed all over the country by virtue of the exercise of their freedom of movement;<sup>116</sup> and (c) caste groups<sup>117</sup> that live oppressed under the predominance of an ethnic group.<sup>118</sup> It is important to stress that the states need to take account of these groups in their constitutional texts in the years to come—unless they want to develop in to “islands of illiberalism”.<sup>119</sup>

Moreover, while states are relatively serious about local self-rule by distinct ethnic groups (and thus they grant self-rule, autonomy, etc, to these kinds of sub-state entities)—often in spite of the profuse rhetoric in favour of

<sup>116</sup> See art 32 of the FDRE Constitution on freedom of movement and residence of “every Ethiopian national”. See also the equivalent provisions of all the nine state constitutions on this.

<sup>117</sup> Groups such as the Menja (SNNPRS), the Donga (SNNPRS), the Fuga (SNNPRS), the Negede Woito (Amhara), and nowadays to a lesser extent the Hadicho exemplify the plight of caste groups who, as minorities within new sovereignties, suffer from discrimination, marginalization, and exclusion. It is interesting to observe that since the “restoration” of sovereignty to ethnic groups in 1991, the old traditional social stratification in various groups has been resuscitated. Studies on the Dawro of SNNPRS suggests that the differentiation among the Mana (alias Dawro), the artisans, and the Manja, etc which was abolished during the time of the military regime has come back to matter ironically in the times of ethno-cultural justice. See Data Dea, *Rural Livelihoods and Social Stratification among the Dawro, Southwestern Ethiopia*. Addis Ababa: Social Anthropology Dissertation Series of AAU, 2006). See generally also, Lovise Aalen, *Institutionalizing the Politics of Ethnicity: Actors, Power, and Mobilization in Southern Ethiopia under Ethnic Federalism*. Oslo: university of oslo, 2008 on the most recent dynamics of inter-ethnic and intra-ethnic relations in the SNNPRS.

<sup>118</sup> One can add “indigenous” groups to this list as a yet other category of minorities

but the use of the term in Ethiopia evokes a bad memory of the Italian rule which divided the people into “Romans” and the “indigino”. Also, it is often argued that beyond the traditional colonial boundaries, the term cannot be used palatably. The sensitivity aside, there is a reason for considering these groups as a separate category which could not benefit from the new federal and ethnic sovereignty dispensation. In a way, the fact that this dispensation could not help substantively equalize or ‘emancipate’ the many ‘indigenous’ peoples of the South, especially those in the South Western flank, and others in other states is either a paradox, or at least a manifestation of the practical limits of this (modernist) dispensation which could not penetrate into societies languishing under pre-modern situations.

<sup>119</sup> This is a term used by Will Kymlicka to refer to groups that tend to be internally oppressive while arguing for a wider collective right to freedom, autonomy, and accommodation in the encompassing polity. See his *Multicultural Citizenship: A Liberal Theory of Minority Rights*. Oxford: Oxford University Press, 1995.

<sup>120</sup> The autonomy we are referring to at this juncture is of course implementational autonomy (obviously along with autonomy to issue directives or produce a negotiated/deliberated set of decisions) for executive to act upon.

decentralization of power and resources--they tend to grant only executive autonomy<sup>120</sup> to Woreda and Kebele levels of government. This is because such entities are not granted with the substantive power to make (legislative and policy) decisions. At best, they can only develop regulations or directives (forms of subsidiary laws) to implement the laws and policies made and formulated by the state level government.

As has been indicated in earlier sections, state constitutions are flexible, i.e., amenable to change with procedures that allow easy *amendment*. That was also generally true in the case of Ethiopia's state constitutions until 2001. Since 2001, the state constitutions became relatively more entrenched. This is particularly the case with regard to the chapters on the fundamental principles and human rights of the constitutions (namely chapters two and three of the

<sup>121</sup> The state constitutions often refer to art 105(1) of the Federal constitution as the provision that guides the amendment of chs 2 and 3 of the state constitutions. To wit: Art 110 (1) of the Afar Constitution reads: "The provisions of Chapter Two and Three of this constitution may be amended in accordance with art 105 of the Federal onstitution." Art 112(1) of the Oromia Constitution hold that "Provisions of chapters two and three of this constitution *cannot be amended outside the conditions specified under art 105 of the Federal Constitution.*" Art 107(1) of the Tigray Constitution says that "Provisions of chapters two and three this constitution shall be amended in accordance with art 105 of the Federal Constitution." (Translation mine.) Art 79 (1) of the Harari Constitution says that (the provisions of chapter three of this constitution shall not be amended in a manner other than that which is provided for under art 105 of the Federal Constitution"(Translation mine.) *Note that the Harari constitution, appropriately, does not subject its principles' chapter to a similar procedure of amendment .A slightly different wording of amendment provisions are those of Gambella, Benishangul-Gumuz, Somali and the SNNPRS. Art 122 of the Gambella Constitution says that "The provisions of chapters two and three of this constitution shall be amended only when chapters two and three of the federal constitutions are amended."*(translation mine.) *Note that, in effect, Gambella cannot change these chapters of the constitution before, or apart from, a change in the equivalent chapters of the federal constitution. The dynamics is frozen to that extent.* Art 119 (1) of the Benishangul-Gumuz Constitution holds that "the provisions of Chapter Two and Three of this Constitution may be amended if the provisions of chapters Two and Three of the Constitution of the [FDRE] are amended." in a similar vein, Art 109 of the Somali Constitution says: "The Provisions of Chapter Two and Three of this Constitution may not be amended except in accordance with the provisions of Article 105 of the Federal Constitution". Art 125(2) of the SNNPRS constitution, on its part, says: "Provisions of chapter Two and Three of this constitution are amended only if provisions of Chapter Two and Three of the Federal Constitution are amended." Evidently, thus, even a casual reading of these provisions shows that all of the state constitutions tend to be even more rigid than the federal constitution. This stands in stark contrast to the usually more flexible feature of state constitutions in other federal

texts). Accordingly, the provisions of these chapters were made to be amended in accordance with Article 105(1) of the Federal constitution<sup>121</sup> which requires that: all the state legislatures approve the proposed amendment with a majority vote; and that both federal houses (HpR and HoF) support the proposed amendment with a 2/3<sup>rd</sup> majority vote. In addition to converting the state texts into frigid constitutions, this arrangement seemed to imply that state sovereignty/autonomy is undermined by being exposed to the scrutiny of neighbouring states and of the federal government.<sup>122</sup>

### 3. Regulating State Behaviour at the Local Level

In addition to serving as frameworks of government at the sub-national level, state constitutions are also expected to serve as tools of regulating local government behaviour. In Ethiopia, the state constitutions have, especially since 2001, tried to establish sub-state level governments and determine the scope and limits of their powers. The powers and responsibilities of the Zone (or Nationality Administration in Amhara State), Special Woreda, Woreda, and Kebele level legislative, executive, and judicial institutions are clearly established in the state constitutions. Thus Zone/Nationality Administration Council,<sup>123</sup> the Zone Executive, or Administrative Council, the Zone High Courts are all constitutionally recognized. The Woreda Council, the Woreda Executive/Administrative Council, and the Woreda Courts are granted constitutional recognition.<sup>124</sup> Likewise, the Kebele administration council, the Kebele

polities. For a more directed and detailed discussion of the issues of state constitutional amendment, see my “Between Dynamism and Entrenchment: Amendment of State Constitutions in Ethiopia—An Exploration” (Unpublished paper prepared for the 7<sup>th</sup> International Congress of the International Association of Constitutional Law, Athens, Greece, June 2007.)

<sup>122</sup> it is important to note, in fairness, the advantage this has in terms of entrenching the text, especially the provisions pertaining to human rights, in the states. But it is also important to note that adding a new protective provision is also made difficult now. Also, it is interesting to note that the Woredas are now granted more opportunity to involve in constitutional amendment (as they are in constitutional interpretation). it is important to

further note that, in practice, no amendment is effected by following this procedure so far.

<sup>123</sup> ‘Nationality Administration Council’ is a term used in the Amhara Constitution. The Agaw (of Awi and Himra) and the Oromo in the Region have their own National Administration, equivalent to Zones in the SNNPRS where the term ‘Zone’ is used to refer to a similar category of sub-state entities. A variant of the same term “Administration of Nationalities” is used in the Constitutions of Benishangul-Gumuz and Gambella to refer to similar entities.

<sup>124</sup> See the chapters of the state constitutions on the Woredas, e.g. chapter eight of the Afar and Somali, chapter nine of the Benishangul-Gumuz, and chapter 10 of the Gambella constitutions.

Executive (“Leadership”) Council, and the Kebele Social Courts are recognized.<sup>125</sup> Their powers are enumerated, their accountability chains are specified, and their financial sources are indicated. To this extent, the distinct identity and powers of local government institutions are rendered indestructible by virtue of recognition in the state constitutions.

However, it is still unclear as to what states will do when there arises an inter-organ (horizontal) or inter-level (vertical) dispute in the states. It is not clear, for example, as to what to do when the State Chief Executive (or Administrator), alias President, appoints a woreda Administrator who is rejected by the Woreda Council.<sup>126</sup> What happens when there is a friction be-

<sup>125</sup> See the chapters of the Constitutions on the Kebeles. e.g. chapter 10 of the Benishangul-Gumuz, 11 of the Gambella, 8 of the Harari, 9 of the Tigray, Somali and Afar Constitutions. Note also that in Tigray, the term used to refer to the kebele is the word ‘Tabia’. Note further that the Harari Constitution devotes only one article to the matter and relegates the details to a law envisaged to be enacted by the state. (See art 75 (3)). Striking about the Harari constitution is that it does not have a chapter dealing with Woredas at all. In Harari state, there are only two tiers of government: state and kebele, although establishment of another tier of government is envisaged as may be appropriate and necessary (art 45). Harari’s experiment is quite a material that excites a comparativist of state constitutions because it presents a number of unique ways of doing things.

<sup>126</sup> A case that happened in Benishangul-Gumuz elucidates this. In one such case, a person by the name *Andualem Negash Bemgaku* was appointed to work as an Appointee [*shum* in Amharic] of the Provisional Municipality Administration of the town of *Manbuk*, the capital of the *Dangur Woreda Administration* in the *Metekel Zone* of *Benishangul-Gumuz State*. Apparently, he was so appointed by the State level Executive (perhaps by the Chief Administrator himself). After working in the position for some years, the Woreda Administration (alias, the

*Dangur District Chariman* named *Terenta Mara Encha*) banned him from work and wrote a letter (dated May 28, 1999 EC) to the State Executive to appoint them another Appointee in his place. The reasons for banning him included inefficiency at work, embezzlement of public money, abuse of power, lack of transparency, accountability, and efficiency on the part of his administration, lack of ethical integrity (chewing *chat* at home in regular working hours, etc), and others. In deed, his case was also referred to the District/Woreda Police and was under investigation (letter to the police dated, 2 April 1999 EC). In response to the request of the Woreda District Chairman, the Chief Administrator of the State (in a letter dated 28 June 1999 EC) rejected the ban, hinted at the fact that such an Appointee can be removed only by the authority that appointed him in the first place, alleged that the allegations of the Woreda/district chair is not yet proved to be correct, and suggested that he be reinstated to his position. From this one can easily notice that there is a possibility of an inter-level tension within a state. I am indebted to Lemmessa Berber for the information (the letters and exchanges) regarding this case. See his “*Division of Powers in the State Constitutions—The Case of the Benishangul-Gumuz State*” (Unpublished LL.M Thesis: Faculty of Law, Addis Ababa University, 2008).

tween state level government and a Zone that has sought separate statehood as a result of which the relationships have grown sour and coarse is not very clear.<sup>127</sup> A similar omission seems to attend to the tension that emerges after a Woreda begins to seek a separate Zone Status.<sup>128</sup> If a group seeks a Special Woreda status and the dominant group in the Woreda resents it, frictions are naturally bound to arise.<sup>129</sup> What to do in such circumstances is not clear. Apparently, the constitutions did not envisage the possibility of such conflicts. Also, it is not clear as to what we can do when the Woreda Council seeks to oversee the work of the Woreda judiciary who it thinks is accountable to it (especially given the fact that the former allocates budget to the Woreda judicial organ).<sup>130</sup> Consequently, it looks like that while the state constitutions

<sup>127</sup> The situation that came about after the Sidama Zone sought statehood separate from the SNNPRS and after the Gamo's request for the same bears this out. The Sidama have since withdrawn their demand for statehood and apparently the friction has given way to peace and mutual understanding and cooperation between the Zone and the State level governments. But before this "pacific" settlement of the friction, the request for separate statehood has been presented to the Legislative Council of the SNNPRS (letter dated 08/11/1997 EC also copied to the SNNPRS Executive and the CON). The request was preceded by a unanimous decision of the Zonal Council (on its 9<sup>th</sup> Regular meeting on 06/11/97 EC). At a technical level the request was for a popular referendum to decide on statehood. The legislative Council sent the case to the CON (in a letter dated 02/01/98 EC). The CON, on its part, resisted to make a decision on this by arguing that decision on the request for statehood is to be made by the Legislative Council, and that this doesn't fall under art 59 of the Constitution which enumerates the powers and functions of the CON. So, it rejected to decide on the case on procedural grounds (i.e. absence of jurisdiction).

Gamo's request is similar. But the request was addressed to a diverse array

of political and legal institutions: Central Committee of EPRDF, office of the FDRE President, Office of the Prime Minister, Ministry of Federal Affairs, Office of the Southern wing of the Coalition of the parties forming the EPRDF, the SNNPRS legislative Council, the CON, the Gamo Branch of the SNNPRS wing of EPRDF, Gamo Zone Legislative Council, and the office of the Gamo Zone Administration (i.e. the Executive). (See letter dated 10/10/97 EC.) I have not come across any evidence of the legal response to their request so far.

<sup>128</sup> The situation that came about after the Gofa sought a separate zone status is an example that bears this problem out. The Gofa, peoples who currently enjoy a Woreda status (Gofa Zuria Woreda) in the Gamo-Gofa Zone, presented their request for a separate Zone status (separate from the Gamo-Gofa Zone) in a letter dated 02/07/98 EC (ref no. 2/623/2/98) and addressed to the FDRE Prime Minister, House of Federation, Office of the EPRDF, the SNNPRS Legislative Council, the Chief Administrator of SNNPRS, CON, and the SNNPRS wing of EPRDF. It is interesting to note (from the addressees of the request) that importance is given to the political institutions, perhaps even more than the legal institutions (in this case the legislative Council and/or the CON).

have effectively laid down the ‘framework of government’ at the state level, they have yet a long way to go to serve as effective tools of regulating state behaviour at the sub-national level. To this extent then, constitutionalism at the sub-national level is not yet fully ensconced. We now turn to the discussion of some of the challenges posed to constitutionalism<sup>129 130 131</sup> in the states.

#### 4. Challenges to State Constitutionalism in Ethiopia

it has been stressed throughout that state constitutions play a stupendous role in entrenching constitutionalism at the sub-national level. It has also been noted that, in Ethiopia, state constitutions have been adopted and have be-

<sup>129</sup> The case of the Tambaro versus the Kambata is an example of such a conflict. The Tambaro form part of the Kambata Zone. They seek a special Woreda status (equivalent to a zone in its effect) (See letter dated 04/06/98 EC). Apparently, their woreda is known as “Omo Sheleko”. They also seek that it be called “Tambaro (Special) Woreda”. They seek this Special Woreda status because they think their identity is watered down (because of the neglect of their identity markers and the promotion of the Kambata identity alone often at their expense) they are oppressed administratively by the dominant group in the Zone, development is wanting, equality is denied to them, and their constitutional rights are denied or neglected, etc. The request was addressed to the SNNPRS Legislative Council, the Chief Administrator, and the CON. So far, I know of no evidence to the effect that their request is dealt with either legally or politically.

<sup>130</sup> The conflict between the Oromia State Supreme Court and the Woreda administrators in Oromia show these kind of conflicts. The Supreme Courts says only the Judicial Administration Commission can look into the work and character of all (including Woreda) judges, not the Woreda administration. But the latter hold the contrary view.

<sup>131</sup> it is obvious that constitutionalism is a broad concept that relates to the con-

straint imposed on the exercise of state power by, among other things, guaranteeing fundamental rights and freedoms, empowering the people so that they can make officials responsive and responsible, and putting a limit to what government can (procedurally and substantively) do even in a democracy. There is a veritable literature on constitutionalism. See for example, Andras Sajó, *Limiting Government: An Introduction to Constitutionalism*, Budapest: Central European University, 1999; Carlo Fusaro, “Constitutionalism in Africa and Constitutional Trends: Brief Notes from a European Perspective”, available at [www.carlofusaro.it](http://www.carlofusaro.it); A. E. Dick Howard, “Toward Constitutional Democracy Around the World: An American Perspective” *Issues of Democracy*, Vol. 9 No.1, (March 2004), Pp.18- 24; Louis Henkin et al (eds), *Constitutionalism and Rights: The Influence of the United States Constitution Abroad*, New York: Columbia, 1990; Daniel N. Hoffman, *Our Elusive Constitution: Silences, paradoxes, Priorities*, Albany: State University of New York, 1997; Cass R. Sunstein, *Designing Democracy: What Constitutions Do*, New York: Oxford University Press, 2001; etc. In this piece, the term constitutionalism is used in the sense of constraining governmental exercise of power by regulating the behaviour of state and sub-state level governments.

come operational since 1995. In their 14 years of existence, these state constitutional texts have been amended substantively only once.<sup>132</sup> That could go for stability in the constitution. But it also could go for lack of challenges that test the constitutions as such. The question is: how far have the state constitutions in Ethiopia become tools of regulating state behaviour at the sub-national level? How far have they fostered states' efforts to become "laboratories of democracy"<sup>133</sup> and arenas of experimentation and innovation? What are the challenges that they encounter as they try to regulate state behaviour and entrench the ideals of constitutionalism at the sub-national level? We now turn (briefly) to addressing these questions.

As has been suggested at various junctures throughout this paper, while states set up the framework of government at the state levels, they hardly have become robust tools of regulating state behaviour. While states have tried to demonstrate some willingness to offer a more expansive space for individual rights and freedoms (and to that extent they have shown a degree of innovation), they haven't yet become "laboratories of democracy". This might be attributed to various factors such as lack of political party pluralism, states' strong dependence on the federal government, lack of skilled manpower and developed infrastructure at the state level.<sup>134</sup>

Apart from these, it is incontrovertible that--perhaps more than it is the case in other federal polities--the state constitutions in Ethiopia suffer from invisibility.<sup>135</sup> The consequence of this invisibility is that they failed to con-

<sup>132</sup> The Oromia constitution has been amended a couple more times when it was deciding on the (political) capital of the state Government, once in 2003 and again in 2005. The 2003 amendment moved the capital from Addis Ababa (alias Finfinne) to Adama, and the 2005 amendment moved it back to Addis Ababa again. There are some minor amendments to other constitutions often regarding the nomenclature of the states (to make them all "National Regional States"). The 2001 amendment is so massive that it can be understood more as a revision than an amendment.

<sup>133</sup> Justice Louis Brandies of the US Supreme Court used this term first in the 1930s and it has become a famous phrase since.

<sup>134</sup> Lovise Aalen alerts us to the first two factors in her "*Ethnic Federalism in a*

*Dominant Party State: The Ethiopian Experience 1991-2000*". Bergen: Christian Michelson Institute, 2002. Added to that is the poverty that looms large in the background of all the problems in the states and the problem of instability that recurs in some of the states (such as Gambella and Somalia).

<sup>135</sup> Granted, not all the constitutions suffer from a similar magnitude of invisibility. Obviously, the SNNPRS and the Benishangul-Gumuz constitutions—owing to their being tested through relatively difficult cases--have experienced a degree of attention and visibility among state political actors and even some portions of the electorate. But on the whole, there is no gainsaying that all the state constitutions suffer from a relative invisibility, especially when compared to the federal constitution.

stitute part of the “civil religion” of the states so that they can be instruments with which to discipline power and assert one’s rights. What then are the challenges faced as states try to entrench constitutionalism? A number of factors may be mentioned.<sup>136</sup> The following is only a suggestive list:

- a) The fact that most of the constitutions are not known among state citizens. which might have to do with the lack of a constitutional moment that engaged the state electorate as participants in the making process
- b) The fact that there is a limited popular legitimacy that accompanies the texts of the state constitutions;
- c) The fact that. as has been hinted at earlier on. the institutions that are envisaged to interpret and enforce the constitutions are not legally established (e.g. the Constitutional Interpretation Commissions and the state CCIs). and where they are established. the fact that they have not become operational; and the fact that they lack effectiveness in their operation is also part of the challenge.
- d) The patent lack of principles of constitutional interpretation. the weakness of interpretive authorities to render neutral. impartial. and independent interpretative decisions;<sup>137</sup>
- e) The challenge of giving a prompt and effective constitutional solution to constitutional disputes that emerge in the states;<sup>138</sup> and
- f) The challenge of guaranteeing effective protection to minorities in the sub-national and sub-state entities.

## Conclusions

Throughout this article. an attempt is made to explore the state constitutions with a view to circumscribing their significance in regulating state behaviour at the sub-national level. It has been noted that although state constitutions suffer from the problem of invisibility. they can be important tools via which we not only govern sub-national state behaviour but also entrench constitu-

<sup>136</sup> One quickly notes that these set of challenges are at times shared by the state of constitutionalism at the federal level. too.

<sup>137</sup> The problem the Council of Nationalities has faced in this regard can be evidence of this challenge.

<sup>138</sup> This challenge has been faced when there was a conflict between the Anywaa and the Nuer in Gambella in 2003/2004;

when the electoral dispute that raged between the “Highlanders” and the locals in 2001 and since; when the quest for statehood (Sidama. Gamo). zone status (Gofa). Special Woreda status (Tambaro). for reassigned into another Zone (the 8 villages of Dale Woreda into Sidama. Menja into Kulo Konta). etc in the SNNPRS have not been effectively responded to.

tionalism by protecting human rights and limiting the power of sub-national governments. We have also noted that Ethiopia is one of the federal polities in which states are free to adopt their own state constitutions. We noted that these constitutions have been promulgated and rendered operational since 1995. All of them were amended (or, better, revised) in 2001 and since.

These constitutions, we noted, were made by the state legislatures. The result is that not many people had the opportunity to seize the “constitutional moments” during which they would be part of the process of constitutional deliberation. Nevertheless, they established states, formed organs of government, guaranteed fundamental rights and freedoms, set up sub-state level governments, and circumscribed the scope of their powers. These constitutions also provided for institutions of constitutional interpretation and procedures for formal constitutional amendments. However, throughout this article, we noted that the constitutions suffer from some omissions that pose a challenge to the work of entrenching constitutionalism in the states. We also noted that a more robust implementation is lacking thereby making constitutional practice weak and, to that extent, undermining the possibility for states to become “laboratories of democracy”, or centres of experimentation and innovation in the Ethiopian federation. A number of challenges are identified. In order to suggest effective responses to the challenges thus identified, it is incumbent on us to suggest the following set of recommendations.

First, it is important for state governments to engage in “norm communication”, a task that calls for duplication and dissemination of the constitutional texts in sufficient copies, translation of the texts into local vernaculars,<sup>139</sup> \* teaching (formally and informally) of the contents of these texts, and thereby “massifying” knowledge of the constitutions. This is so because (of the assumption that) the more people know about the state constitutions, the more readily they will utilize them both to put power in check and to assert their rights. This also helps curb the problem of invisibility that state constitutional texts perennially suffer from. Secondly, state governments need to engage in “norm implementation”. This relates to putting the principles, rules, and standards set by the constitutions into practice. Effecting the values embodied in constitutional texts requires that political actors make way to the

<sup>139</sup> Often, they are published in the working language of the states, in Amharic (if the working language is other than Amharic), and English. The only exception is the Harari state constitution which is published in Amharic alone although the working languages of the state are Harari and Oromiffa (Art. 6). Strangely, when

there is a conflict between the Harari and Oromiffa versions of the Constitution (which are not published yet), the Amharic version is taken as authoritative (because it is a tie breaker).

<sup>0</sup> H.L.A. Hart, *The Concept of Law*. Oxford: Clarendon Press, 1961.

demands of the constitution even when so doing might lead to temporary political losses. When officials obey the rules of constitutions (as Hart says regarding the secondary rules of recognition),<sup>140</sup> then a constitutional system continues to gain strength and vibrancy.

Apart from these, it is important that state institutions, especially those that are designed to serve as custodians of the constitutions, are strengthened, empowered, and allowed to operate competently, impartially, and independently. (For this, constitutional re-engineering may be necessary in order for them to curb some flaws of design.) More specifically, it is essential that the state constitutional texts specify the human rights chapter add a clear set of clauses on their application, interpretation, limitation, and remedies (when and if they are violated). It is essential that the texts extend explicit guarantee for the protection of minority rights within the states. (This would have the additional effect of redeeming the deficiencies of the Federal constitution in this regard.) The states also need to demonstrate valour in coming up with a stronger and more effective system of constitutional interpretation by rethinking the political interpretation of the constitutions in favour, for example, of their judicial interpretation. States also need to rethink the amendment procedure for injecting change into their chapter twos and threes; thus they need to resort to a scheme of formal amendment that : (a) disallows the involvement of the federal and other (neighbouring) state governments in the formal amendment processes; and (b) makes the constitution more flexible than the federal constitution. The need for flexibility resonates well with the need to be spots of experimentation in democracy and constitutionalism and with the (legal) fact that the states in Ethiopia are not indestructible entities as a result of which they invite frequent changes.

in the academia, it stands to reason that law schools and students of federalism teach, research, and study state constitutions more forcefully than they are so far doing.<sup>141</sup> This shift of academic focus to state constitutions (which should be done without losing our focus on the federal constitution and its institutions) would not only help to curb the problem of invisibility state con-

<sup>141</sup> Only the Graduate (LL.M) program of the Addis Ababa University Law Faculty offers a course on State Constitutions since 2005, and, even there, it is only one course offered in 3 credit hours per semester. The course is entitled, "State Constitutions and Local Government". In an interesting recent development, the LL.M Program at the ECSC is also beginning to offer a similar course. There is

also a course entitled "State Constitutions and Good Governance" in the catalogue of courses to be offered to LL.M students of the Institute of Federalism and Legal Studies at the ECSC. It is remarkable that a number of students, both at the Graduate and undergraduate level, are annually encouraged to conduct (and are in fact conducting) researches on state constitutions in recent years.

stitutions are languishing under, it also makes our study of constitutional law and federalism more complete. Through studying state constitutions, we can have view of federalism from the perspective of states.<sup>142</sup> In this way, we can start to imagine federalism from below. -----■

<sup>142</sup> I am indebted to Daniel Elazar for this phrase and much else. See Daniel Elazar, *American Federalism: A View from the States*. New York: Crowell, 1966, for this notion.



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