

# The System of Intergovernmental Relations (IGR) in Ethiopia: In Search of Institutions and Guidelines

Assefa Fiseha\*

## 1. Introduction

“What if a certain Regional State is not interested in being part of the System of IGR?”<sup>1</sup>This was a question posed by a key regional state official in a seminar on IGR held in 2007. It should be noted that this question came from a notable regional state figure and reflects the fear (real or imagined) emanating from the system of IGR in Ethiopia as perceived by at least some of the regional states. More importantly the question also hints that IGR is little understood, if not a misunderstood concept in the Ethiopian federal system. Regional states need to realize that IGR is a forum for bargaining with the federal government on matters of common interest and if conducted based on some sense of partnership between the two governments then in the long run it is meant to be a forum for the attainment of *common goals* through co-operation. IGR after all is aimed at enhancing shared rule without undermining self rule. It is only if used inappropriately that it would be an instrument of centralization and by then one could say IGR has lost its objective. Hence we start by outlining what IGR is in a federal context.

The system of intergovernmental relations (IGR) has vertical as well as horizontal dimensions.<sup>2</sup> Federations divide political power between the federal government and the states and this gives rise to a complex set of relationships among several actors. Vertically, IGR deals with relations between the federal government and the states on issues of common interest. Depending on the substantive basis for interaction, it may involve some or all of the constituent units with the federal government. Some federations like the US (at least during the 19<sup>th</sup> c. and early 20<sup>th</sup> c.) have given emphasis to competitive relations between the federal government and the states.<sup>3</sup>

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\* LL.B., LL.M., PhD, Associate Professor, Institute of Federalism and Legal Studies, Ethiopian Civil Service College. The author would like to acknowledge the invaluable comments made by the reviewers. All errors and opinions remain that of the author.

<sup>1</sup> This was a question posed by a key figure of a Regional State in a seminar on IGR held in 2007. The author would like to acknowledge to all participants of the series of seminars on IGR held in Nazreth/Adama and Addis Ababa.

<sup>2</sup> For more on the system of intergovernmental relations see Deil Wright, *Understanding Intergovernmental Relations*, 3<sup>rd</sup> edn. (Pacific Grove, CA: Brooks/Cole, 1988); also David Nice, Patricia Fredericksen, *The Politics of Intergovernmental Relations*, 2<sup>nd</sup> edn. (Chicago: Nelson-Hall Publishers, 1995) pp. 122-144; David Cameron, ‘The Structure of Intergovernmental Relations,’ *International Social Science Journal*, 53:167 (2001) pp. 121-127; Brian R. Opeskin, ‘Mechanisms for Intergovernmental Relations in Federations,’ *International Social Science Journal*, 253:167 (2001) pp. 129-137.

<sup>3</sup> While the notion of dual federalism may be an appropriate description of the 19<sup>th</sup> century federal system of the United States, matters have changed a lot in the 20<sup>th</sup> century in favor of what some call co-operative or ‘marble cake federalism,’ signifying a complex intermixing of powers and responsibilities between the federal government and the states with shared rather than layered powers. The author who

This changed significantly in the 1960s with the emergence of co-operative IGR. Others (for the most part European federations) emphasize the interdependence between the two levels of governments.<sup>4</sup> In some cases intergovernmental relations in the vertical sense is extended to cover federal-local as well as state-local relations.<sup>5</sup> Horizontally, it deals with interstate,<sup>6</sup> inter-local relations and depending on their constitutional status municipal intergovernmental forums could also be included. However, our primary interest in this piece is the federal – state and to some extent interstate relations.

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popularized the marble cake concept was Morton Grodzins and he defines it as ‘an inseparable mingling of differently colored ingredients, the colors appearing in vertical and diagonal strands and unexpected whirls. As colors are mixed in the marble cake, so functions are mixed in the American federal system...functions are not neatly parceled out among the many governments...it is difficult to find any governmental activity which does not involve all three of the so-called levels of the federal system.’ He argued that in the most local of all functions, law enforcement and education, as well as in what *a priori* may be considered as purely federal, there is significant sharing of power directly or indirectly. See Morton Grodzins, ‘The Federal System,’ in Laurence O’Toole, Jr. ed., *American Intergovernmental Relations* (Washington, D.C.: CQ Press, 1985)pp. 43-44; also See Michael Laslovich, ‘The American Tradition: Federalism in the United States,’ in Michael Burgess and Alain-G. Gagnon eds., *Comparative Federalism and Federation, Competing Traditions and Future Directions* (New York: Harvester, 1993) pp. 187-188; equally Rufus Davis states that although the early 19<sup>th</sup> century federalism is presented as ‘dual worlds where two political streams flowed in parallel and splendid isolation from each other, the implications of interdependence were not wholly ignored.’ ‘By the mid 20<sup>th</sup> century the *two conditions* which characterized the political setting of the 19<sup>th</sup> century, the insulated remoteness of agricultural communities and the minimalization of government intervention in the affairs of the community completely changed.’ More emphasis was placed on co-operation than on dual polity. Thus making the point that neither was 19<sup>th</sup> century American federalism solely dual nor is the present federal system exclusively co-operative. Rufus Davis, *The Federal Principle: A Journey Through time in Quest of Meaning* (Berkeley: University of California Press, 1978) at 147.

<sup>4</sup> German Basic Law Articles 74 and 75 and the Swiss Constitution provide for a comprehensive list of shared powers. The Indian Constitution schedule VII and Art 246 as well provided for a comprehensive concurrent list.

<sup>5</sup> There is an emerging tendency to constitutionalize the position of local governments in India, Germany, South Africa and Nigeria and partly in Ethiopia (post 2001 development), which has traditionally been considered as the exclusive domain of the constituent units and in the former three countries there is an effort to include local governments and municipalities into the IGR.

<sup>6</sup> This is often not given enough emphasis but it covers crucial issues that may affect the whole federal system. Among other things, a federal system should clearly regulate interstate mobility, that is whether each constituent state is allowed to discriminate between those who come from other constituent states and its own residents and under what conditions; issues of guaranteeing the enforcement of decisions from courts of one state in another constituent state; the status of legal documents (like marriage and divorce certificates) before the courts of another constituent state court; extradition of fugitives from one jurisdiction to the other; interstate compacts among the states that may cover conservation of the environment, law enforcement, health, education and issues of guaranteeing uniformity of laws, when there exists significant variation of laws among the states. If history is any guide, one needs only to be reminded of the evils of the Articles of Confederation of the United States. Discriminatory policies, protectionism, burdensome and artificial barriers among the states contributed to the failure of the system, thus giving birth to the new federal system in 1789. See David Nice, Patricia Fredericksen, *supra* note 2: 122-144.

As already hinted intergovernmental relations is a very broad notion referring principally to the relations (formal or informal) between the federal government and the constituent states as well as among the constituent units, concerning the coordination of policies on shared programs. This often is linked to the bulk of frameworks and concurrent powers. In the areas where the constitution assigns exclusive powers to either level of government IGR is of little relevance. But when both levels of governments exercise power jointly the appropriate institutions and mechanisms need to be put in place for the purpose of coordinating their joint efforts. IGR is one such mechanism that serves as a forum for the frequent interaction of the two levels of governments.

IGR is one of the defining features of federations.<sup>7</sup> In a nut shell, federal polities are defined as systems where two or more orders of government each with constitutionally defined powers (legislative, executive, judicial and financial powers) exercise genuine autonomy and act directly on the citizen. Supreme and written constitution not unilaterally amendable by one order of government but rather requiring the participation of the federal and the units ensuring not only the division of power but also the continued interest of the actors in the federal process is also the essence of federations. Besides an umpire that rules on the interpretation of cases involving the division of powers and on the rule of constitutionality is crucial as disputes are bound to arise. Entrenched regional representation in the federal policy making as well remains a vital aspect strengthening the shared rule aspect of federations. Very relevant to this piece, processes and institutions to facilitate intergovernmental collaboration in those areas where governmental responsibilities are shared or overlap is the final defining feature of federations.<sup>8</sup> While earlier on it was thought that watertight division of powers (represented by a “layer cake federalism”<sup>9</sup>) between the federal and state governments was the essence of federations, later it became clear, both in the older and newer federations, that overlapping and interdependence between the two levels of governments is simply part of federal constitutions. Even the United States federal system where the constitution emphasized dual structure at least during the early phase of the federation somehow fits into this development. Indeed, several authors have written that even 19<sup>th</sup> century American federalism had some features of power sharing.<sup>10</sup> Zimmerman

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<sup>7</sup> Ronald Watts, *Comparing Federal Systems*, 2<sup>nd</sup> edn., (Montreal and Kingston: Queen’s University, 1999) p.7

<sup>8</sup> As to the relevance of the defining features of federations and their practical application to Ethiopia see Assefa Fiseha , *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study* (Nijmegen: Wolf Legal Publishers, 2005) Chapters 2 and 6.

<sup>9</sup> This model assumes clear-cut policy demarcations between the two levels of government and fails to consider the bulk of shared/concurrent jurisdictions. This is the essence of K. C. Wheare’s book. K.C. Wheare, *Federal Government* 4<sup>th</sup> edn. (Oxford: Oxford University Press, 1963).

<sup>10</sup> Daniel Elazar, *American Federalism a View from the States* (New York) Thomas Crowell Co., 1966)pp. 53-76.

has recently confirmed the view that the United States federation had some seeds of co-operative federalism from the outset.<sup>11</sup>

Certainly, American federalism has undergone some changes during the 20<sup>th</sup> century. After 1937, the federal practice did not reserve much exclusive jurisdiction to the state governments to legislate free from federal interference.<sup>12</sup> After the New Deal, federal-state relationships shifted radically from its traditional dual form to a level in which the states became recipients of federal grants-in-aid. States administered dozens of important federal programs (that contain general nationwide standards), including unemployment insurance, poverty assistance, environmental protection, workers health and safety, public housing, community development, maintenance and construction of interstate highways. With the grants, Congress was able to induce states as well as condition states' continued ability to regulate in a given area on that states' assistance in the implementation of federal regulatory policies. Thus, Congress can secure state co-operation first by making a credible threat to pre-empt state law by creating a federal agency to regulate a field in place of the state unless the state regulates according to federal standards. Secondly, Congress may also condition the state's receipt of federal funds on that state's regulating according to federal standards and will secure state assistance as long as state politicians depend on federal funds. One can add the widening role of commerce power over the most part of the 20<sup>th</sup> century that brought about the regime of intra-state trade to the realm of interstate commerce. Duality then became more a myth than a reality.

The interdependence model as opposed to the 'layer cake' model gives emphasis to the existence of shared powers and responsibilities among the different levels of government. In a nutshell, it states that many areas of policy require federal, state and local involvement to carry out common programs. The federal and state governments do not operate in isolation but they rather interact frequently and this interaction forms the basis for the study of intergovernmental relations. The interdependence model is often known by various names but the most common one is co-operative federalism, also called 'marble cake' federalism.<sup>13</sup> Indeed, it is in the area of joint powers that an effective IGR is required for coordinating federal and state policies. As one author noted IGR "profoundly shapes the way in which a particular federation functions. IGR

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<sup>11</sup> Joseph Zimmerman, 'National-State Relations: Co-operative Federalism in the Twentieth Century,' *Publius: The Journal of Federalism* 31:2 (Spring 2001) pp. 17-18.

<sup>12</sup> With the Depression, the New Deal and with the famous decision in *United States v. Darby* in 1941 in which the Supreme Court pronounced that the Tenth Amendment does not serve as a barrier to national government, dual federalism was almost declared irrelevant, if not dead. It is currently getting refreshed as in the *Lopez* and *Printz* decisions. Just in 2000 Chief Justice Rehnquist opined in *United States v. Morrison* 120 S. Ct. 1740, (2000), 1754, emphasizing that there is a need to distinguish between what is truly national and what is truly local. See Arthur Gunlicks, 'Principles of American Federalism' in Paul Kirchhof and D. Kommers eds., *Germany and its Basic Law* v.14 (Baden-Baden, Series Drager Foundation, 1993) pp. 91-101.

<sup>13</sup> See Morton Grodzins, *supra* note 3.

is the workhorse of any federal system ...it is the privileged instrument by which the job – whatever the job – gets done.”<sup>14</sup>

## 2. A NOTE ON THE NATURE OF SHARED POWERS

Given the continued debate and ambiguity<sup>15</sup> on the nature of shared powers in the Ethiopian federation, it is appropriate to start the discussion by explaining its nature and relevance to IGR particularly in reference to the Ethiopian federation. We must state at the outset though that the Ethiopian Constitution is silent when it comes to the principles that guide the system of IGR and the necessary institutions that make it work. Hence the constitutional basis for IGR is very much limited to the provisions of the Constitution that deal with the division of powers and that are of some relevance to IGR. Although the constitutional division of powers between the federal government and the states is the central point in federations, we find, however, that the dividing line between the two powers is never clear. There are deliberate and some unintentional overlaps in the division of powers. Shared (joint) powers represent the meeting point of the two levels of governments, otherwise considered to be exercising exclusive federal and state powers.

Shared powers refer to that category of powers of which both the federation and the states at some point, exercise at least, a part. Experience has shown that there are certain matters which cannot be allocated exclusively either to the federal government or the states. It may be desirable that the states should legislate on some matters but it is also necessary that the federal government should also legislate to enable it in some cases to secure uniformity across the nation.<sup>16</sup> The federal government may also need to guide and encourage state efforts and more importantly some measures taken by the states may have spill-over effects and for this reason the federal government may need to intervene.<sup>17</sup> Shared powers as well avoid the necessity of enumerating complicated minute subdivisions of individual functions to be assigned exclusively to one area of government or the other, thus serving as a flexible channel for adjustment to new circumstances.<sup>18</sup> They are introduced in recognition of the inevitability of overlaps of jurisdiction between the federal government and the states.<sup>19</sup>

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<sup>14</sup> David Cameron, *supra* note 2, 2001 p. 121.

<sup>15</sup> For instance one author stated the Ethiopian constitution has no concurrent powers except in the area of taxes. See Lovise Aalen, *Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991-2000* (Bergen: Chr. Michelse Institut 2002) p. 56; see Article 98 on the concurrent power of taxation. It is true that only in the field of taxation, under Art. 98 distinct from Arts. 51 and 52, the constitution expressly incorporates concurrent powers. Yet others have carefully elaborated that shared powers are inherent to the Ethiopian Constitution as well. See Assefa, *supra* note 8, chapter six; Solomon Nigussie, *Fiscal Federalism in Ethiopia's Ethnic Based Federalism*, (Nijmegen: Wolf Legal Publishers, 2006) chapter 3.

<sup>16</sup> Asok Chanda, *Federalism in India: A study of Union- State Relations* (London: George Allen & Unwin Ltd., 1965) pp. 68-69.

<sup>17</sup> *Ibid.*, pp. 68-69.

<sup>18</sup> Ronald Watts, *New Federations: Experiments in the Common Wealth* (Oxford: Clarendon Press, 1966) p. 38.

<sup>19</sup> *Ibid.*

Traditionally, it has been argued that the existence of a separate list of powers other than exclusive and residual ones is liable to raise considerable problems. For instance, Wheare argued that shared powers add another series of disputes about jurisdiction to the already formidable list of possible conflicts, which are inevitable in even the simplest federal systems as it adds new and complicated list.<sup>20</sup>

However, Wheare's view of federalism is based on the co-ordinate theory implying dual polity, in which each government acts directly towards the citizen and assumes a clearly 'layered division' of power that is far from real.<sup>21</sup> Challenging this position Duchacek states that the existence of shared powers is simply another reflection of the fundamental impossibility and also the undesirability of dividing political powers neatly and permanently.<sup>22</sup> Besides, executive federalism (also called functional federalism), that is, a constitutionally mandated and entrenched provision for splitting legislative –mainly to the federal government and administrative jurisdiction – principally to the states,<sup>23</sup> as practised in Germany and Switzerland indicates that the classic approach of duality has been taken over by the regime of co-operative federalism.

In terms of the field of coverage it can be stated broadly that, for the most part, the social and economic spheres fall into the shared power category. Economic affairs (that include regulation of trade and commerce, industries and labor and economic planning) raise issues because both levels of governments have a lot of vested interest in these spheres of activities. It is, for instance, rarely possible to draw a line between trade and commerce which is interstate and that which is intra-state.<sup>24</sup> On the one hand, there are bound to be conflicts of economic interests between states specializing in different products and on the other hand fear that measures taken by the federal government integrating the national economy might undermine the cultural distinctiveness of the diverse societies. Besides, in the economic sphere states are often concerned with ensuring the economic welfare of their citizens and developing policies related to their own particular economic interests.<sup>25</sup> These concerns call for

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<sup>20</sup> K.C. Wheare, *supra* note 9, 79.

<sup>21</sup> *Ibid.* at 14.

<sup>22</sup> Ivo Duchacek, *Comparative Federalism: The Territorial Dimensions of Politics*, 2<sup>nd</sup> edn. (Lanham: University Press of America, 1987) p. 272.

<sup>23</sup> Watts, *Comparing Federal Systems*, *supra* note 7, at 40.

<sup>24</sup> See for example US Supreme Court decisions *United States v. Darby*, 312, US 100 (1941) in which the Court held that an activity that took place wholly intra-state could be subjected to Congressional regulation because of the activities impact in other states. The Court stated intra-state transaction might be so intermingled with interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled; *Wickard v. Filburn* 317 US 111, 129, (1942) in which the Court stated Congress could control household production of goods because the cumulative effect of household production of goods might affect the supply and demand on the interstate commodity market; *United States v. Lopez*: 514 US 549 (1995); Jesse Choper, 'Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?', *Arkansas Law Review* 55:4 (2002-2003) at 735, 793.

<sup>25</sup> Watts, *Comparing Federal Systems*, *supra* note 7 at 40.

state control of these spheres. On the other hand, there is the need for guaranteeing free trade and economic development, and in developing countries there is the urge for rapid economic growth through active federal participation. These provide the reasons for the involvement of the federal government in these fields.<sup>26</sup>

Social services cover education, health care and welfare of citizens, insurance, and assistance for old age, unemployment, accident, and workers' compensation. There are a number of arguments in favor of the involvement of the state governments in these services. Regional governments often have the primary constitutional responsibility. The personal nature of the services, the need to adapt them to local circumstances and their close relation to other aspects of local government urge for state power. However, extensive federal financial assistance has often been necessary because of program costs and the pressure for federal wide standards of service to the citizen.<sup>27</sup> Besides, greater scale of research and specialization is possible at federal level. As a result, these two fields (economic policy and social affairs) show extensive activity, interaction and co-ordination by both levels of government. Experience so far indicates that one can distinguish at least two types of shared powers: concurrent and framework powers.<sup>28</sup>

## 2.1 Framework Powers

When framework legislation has been prescribed for the exercise of power, a special type of shared power exists that in principle grants the federal government the competence to issue general legislation in a specific policy field. This federal legislation is subject to strict conditions because it has to leave substantial room for the states to issue their own legislation within the limits set by the federation.<sup>29</sup>

The federal government may use framework legislation to regulate federation-wide standards while leaving the states room to legislate the details and to deliver the services in a manner that is suitable to local situations. The states, under this category of powers, are allowed to *fill in the gaps* with more detailed laws. Unlike the concurrent powers in which the federal government has the potential competence to absorb, federal framework legislation indicates an interesting compromise that requires significant decentralization of policy-making authority without sacrificing uniformity, where it is needed.<sup>30</sup> Especially in the social services the federal government may legislate to secure a basic national uniformity and to guide regional

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<sup>26</sup> Watts, *New Federations*, *supra* note 18 at 182.

<sup>27</sup> Watts, *Comparing Federal Systems*, *supra* note 7 at 40.

<sup>28</sup> Flora Goudappel, *Powers and Control Mechanisms in European Federal Systems* (Gouda Quint: Sanders Institute, 1997) p. 41.

<sup>29</sup> *Ibid.*, at 41.

<sup>30</sup> Watts, *Comparing Federal Systems*, *supra* note 7 at 38.

legislation while leaving the states with the initiative for details and for adaptation to local circumstances.<sup>31</sup>

There is less guidance as to how far framework legislation enacted by the federal government could possibly go into details. In Germany where framework legislation is very common, the Constitutional Court held that a federal framework law cannot stand on its own but must be designed to be filled in by state legislation. It must leave the states an area, which is of substance.<sup>32</sup> This way it tried to protect the states' legislative power. Because the federal government had extensively used this power of legislation in a manner that affected the autonomy of the states, the Basic Law provision dealing with framework legislation (Article 75) was one that was amended as part of the Constitutional reform in 1994. The new provision sets at least two minimum conditions to be fulfilled before a federal framework law could be enacted.<sup>33</sup> It appears, therefore, that as far as the law is concerned, for the federal government, the framework powers are more restrictive than concurrent ones as it is obliged to leave room for the states to issue their own legislation.<sup>34</sup> Framework powers not only preserve the right of the states to legislate but also positively presuppose future state legislation. Thus, the federal government may not in principle legislate exhaustively on the subject.<sup>35</sup>

Although it has been argued that the Ethiopian Constitution has no shared powers except in the area of taxation, a careful study of the provisions hints that it indeed provides for such category of powers. By virtue of Article 55(6) the House of Peoples' Representatives (HoPR) is empowered to enact *civil laws*, which the House of Federation (HoF) deems 'necessary to establish and sustain one economic community'.<sup>36</sup> In principle by virtue of Article 52, civil law<sup>37</sup> is a matter reserved for the

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<sup>31</sup> Philip Blair, *Federalism and Judicial Review in West Germany* (Oxford: Clarendon Press, 1981) at 85; Watts, *New Federations*, *supra* note 18 at 174; also Art. 75 of the German Basic Law. The article enumerates areas falling within this category: general principles on higher education, hunting, nature conservation, land distribution, regional planning, general legal relations of the press, film industry, land reform, water resource management, registration of residence, identity cards, legal status of state and public servants. This article was amended on 14 November 1994.

<sup>32</sup> 4 BverfGE, 115 (1954); for more on the German Basic Law see Blair, *supra* note 31; David Currie, *The Constitution of the Federal Republic of Germany* (Chicago: The University of Chicago Press, 1994).

<sup>33</sup> Art. 75 cross refers to Art. 72 to extend the conditions attached to concurrent powers to framework laws and these are: the necessity to establish equal living conditions or the maintenance of legal or economic unity. Apart from this Art. 75 also stipulates under sub 2 that only in exceptional cases could framework law be detailed or directly applicable.

<sup>34</sup> Goudappel, *supra* note 28: 56-57.

<sup>35</sup> Blair, *supra* note 31 at 87; see also Currie, *supra* note 32 at 51.

<sup>36</sup> This notion is not defined in the constitution but interestingly a policy document issued by the federal government that underscores the point that there can be one economic community if there is a network of infra-structure that connects people together and a uniform economic, fiscal and monetary policy as well as free movement of labor and capital throughout the country. If this is so then the power of the federal government is very wide in scope. But note that it seems to be limited to civil law. See *Be Ethiopia Ye Democrasiyawi Ser'at Ginbata Gudayoch* (Ministry of Information, Addis Ababa, Ginbot 1994 E.C.): 201-217.



states. However, as a matter of exception the federal government may enact civil laws when the HoF states that it is necessary to enact such laws to establish and sustain one economic community. This is a clear departure from the general clause under Article 52 sub 1. The last clause states that whatever is not expressly given to the federal government alone or concurrently with states remains with the states. But here the approach is that whatever is not expressly given from the civil law to the federal government is not necessarily with the states. It points out that federal government may legislate even in areas of civil law. It appears that like its German counterpart, if the federal government through the HoF decides that uniformity in some fields of civil law should be achieved in light of the potential and actual variation among states in terms of culture, religion and tradition, which may have a bearing on the rights of children, women or even inheritance, then the HoPR may be compelled to enact such laws. According to the Basic Law in Germany the conditions for enacting concurrent and framework powers are 'to establish equal living conditions throughout the federal territory or the maintenance of legal or economic unity.'<sup>38</sup> There is no doubt that a comparison of the two Constitutions hints at the Basic Law provision granting wider powers to the federal government. The responsibility of establishing equal living conditions or the maintenance of legal unity taken in light of the fact that under Article 74 of the Basic Law most part of civil law, criminal law and the procedures is concurrent, leaves wide powers to the federal government.

On the other hand, in Ethiopia where civil law is the residual power of the states and given the ethno-linguistic and religious diversity within which the federation operates, the need for some level of uniformity remain compelling. However, this attempt has to be considered in light of the sensitivity necessary to accommodate the diverse nationalities in Ethiopia. Yet this clause is potentially a key provision for guaranteeing uniformity in some fields of civil law.

Another area of great significance falling under the framework legislation appears to be Article 51(2) and sub (3) versus 52(2) c. The Constitution empowers the federal government to '*formulate and implement the country's policies, strategies and plans in respect of overall economic, social and development matters...; ...establish and implement national standards and basic policy criteria for public health, education, science and technology...*'<sup>39</sup> One may state that this perhaps goes further than the 'necessary and proper' clause in the US Constitution for it grants the federal government wide powers in economic, social, health and education spheres. It seems to place the primary responsibility of determining major policy directions and standards on the federal government. This expressly covers all economic and social issues that were federalized during the 1930's in the United States. There is no doubt

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<sup>37</sup> The constitution does not define what the content of civil law is but traditionally it is understood to include all matters covered by the existing civil code, which in principle is within the jurisdiction of the states unless the constitution itself federalizes it as in the case of land.

<sup>38</sup> Basic Law of Germany Arts. 72 and 75.

<sup>39</sup> Article 51 sub 2 and sub 3 (Italics mine).

that these powers cover the bulk of concurrent power on a vast field of social and economic affairs as stated in other federations. However, it is also possible to argue with equal force that if one follows the terms closely, the powers of the federal government even in these vital areas do not seem exhaustive. The same Constitution also empowers the states, among other things ‘to formulate and execute economic, social and development policies, strategies and plans for the state.’<sup>40</sup> Thus, there is obviously a lot of overlap between the powers of the federal government and the states concerning economic, social and development plans as well as health and education. But the extent of the powers of the respective governments is not clearly stipulated. To what extent could the federal government outline the national standards and policy criteria or the breadth and depth of the nationwide policies? It is consequently also not clear what is left for the states. But it seems clear from the provisions that the federal government cannot exhaustively legislate on all these matters. The wording of Article 52(2) seems to suggest that the states are endowed *not merely with administrative power* but with the power to formulate and execute economic, social and development policies. No doubt that this power is the basis for shared/framework power covering the bulk of social and economic spheres.

The provision that empowers the states to legislate on matters concerning state civil servants is also far from entrusting the state exclusively with these matters.<sup>41</sup> At first sight, it appears there are two entirely separate laws: a federal law governing the federal employees and state law regulating state civil servants.<sup>42</sup> Yet, the federal Constitution does not leave it there. In the implementation of state laws concerning the state civil service, the state is required to approximate national/federal standards. Besides, if one looks at the policies issued by the federal government, they blur the formal distinction and duality of authority stipulated in the Constitution. In the document there are standards that the federal government clearly spelt out as applicable to civil servants nationwide.<sup>43</sup> In the last decade or so indeed there is an emerging horizontal IGR regarding the civil service where regional state civil service bureau heads meet at least once a year and discuss some strategic issues concerning the human resource development but often without the center. One could keep on listing other examples but the point is simply that framework powers call for series of interaction between the two levels of governments and seem to be part of the Ethiopian Constitution.

## 2.2 Concurrent Powers

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<sup>40</sup> Art. 52(2) c.

<sup>41</sup> Art. 52(2) f.

<sup>42</sup> See Proclamation No. 262 of 2002, Federal Civil Servants Proclamation, *Federal Negarit Gazeta*, 8<sup>th</sup> Year No. 8 (January 2002) that exclusively regulates civil servants at federal level and states have accordingly regulated their respective civil servants.

<sup>43</sup> *Ye Ethiopia Federalawi Democrasiawi Republic Mengist Yemasfesem Akim Ginbata Strategy Ena Programoch* (Addis Ababa: Ministry of Information, Yekatit 94 E.C.): 193-257.

As one category of shared powers, concurrent powers refer to powers attributed to both entities. However, one of the entities, often the states, are allowed to exercise this power until the federal government steps in to legislate on such powers. The states continue to regulate in some fields until the former occupies the field and the part of the concurrent power which has not yet been occupied by the federal government, may still remain with the states.<sup>44</sup> Concurrent powers provide an element of flexibility in the distribution of power enabling the federal government to postpone the exercise of potential authority in a particular field until it becomes a matter of federal importance. They enable both governments to exercise their respective powers depending on whether the matter remains of regional or of national importance.<sup>45</sup> Examples of such instance in Ethiopia include the provision on enactment of penal code. It is stated, 'it [HoPR] shall enact a penal code.'<sup>46</sup> The states may, however, enact penal laws too on matters that are not specifically covered by the federal penal legislation. It appears that this is more of a concurrent than parallel or framework one because the states may enact such laws only if the federal penal law does not exhaust the list of offences. Potentially the federal parliament may by virtue of Article 55(5) exhaust the field leaving no room for the states. But states do often include specific offences not covered by the federal penal code in every piece of legislation and as a result it is not a power merely written on paper.

If we agree that IGR principally derives from the nature of shared constitutional powers and if such powers are inherent to the Ethiopian Constitution, the question is what is required for IGR to be effective in Ethiopia particularly in terms of principles, institutions and policies? Are there any emerging tendencies from the practice of nearly a decade and half federal experiment relevant to IGR? What lessons can we draw from the system of IGR as evolved from other federations? In the Ethiopian context surely this is an area where little has been researched and policies and guidelines on IGR are yet to be designed. Besides most of the IGR activities, to the extent that they exist, are undertaken behind closed doors and through party machineries at the two levels of governments and one is not able to find comprehensive reports that disclose the practice. Therefore, this essay is a modest attempt to fill the gap in law/policies, institutions and research on IGR and to shed some light on the system of IGR in Ethiopia based on the experience of other federations.

To this end, the essay is divided into four parts. Part one and part two as already seen provide a short introduction to IGR. They principally aim at defining what IGR is and the constitutional basis for it. It is vital to hint that federal systems divide power between the two levels of governments and it is because powers are divided that the need for coordination arises. Part three attempts to shed some light on the institutions and principles of IGR as evolved in other, relatively older federations. This is indeed

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<sup>44</sup> Goudappel, *supra* note 28 at 41; Watts, *Comparing Federal Systems*, *supra* note 7 at 38.

<sup>45</sup> Watts, *New Federations*, *supra* note 18 at 174.

<sup>46</sup> Art. 55(5).

the section that hints on the level of IGR in Ethiopia, that is, the institutional and policy gaps we have. Part four dwells on the practice (to the extent that it exists) of IGR in Ethiopia and the final section draws some conclusions. A final remark as to the scope of this paper. IGR as has developed in other federations is not limited to the interaction between the two levels of governments at executive and legislative level. Federal constitutions and legislations issued by both levels of governments often provide for a complicated level of interaction to exist among the judicial organs at federal and state level. Mechanisms for settling IGR disputes is also another component while dealing with IGR policies. Fiscal issues as well take center stage in any IGR structure and process in any federation. For the sake of limiting the size of the paper, these three aspects of IGR are not dealt with in this essay.<sup>47</sup>

### **3. Institutions/Instruments for Intergovernmental Relations**

A central issue that often emerges in relation to the organization of IGR is whether or not the institutions, processes and guidelines for IGR should be stipulated in the constitution, in a proclamation or whether it should be left to evolve on its own. Indeed, there is a wide range of variation among federations in this respect. Older federations like the United States rarely attempted to regulate this sphere and for the most part left IGR to evolve on its own. Younger federations like Germany and South Africa on the other hand have attempted to take lessons from older federations and stipulated broad principles in their constitutions and in the case of South Africa even enacted a detailed proclamation on IGR. Nonetheless, it is important to realize that even in the older federations, there are general patterns and trends that evolved from practice indicating the institutions and processes of IGR. Besides there is enough evidence indicating the fact that IGR by its nature is dynamic and hence, however regulated it may be, there is a need to leave some room for flexibility and for it to evolve. Such dynamism and flexibility enables IGR to adapt to changing social, economic and political realities. Thus, while formalizing IGR will surely lay down the framework and the principles by which it is guided, it should not aim at regulating the entire sphere of the activity of IGR. The maximum that can be done to facilitate the smooth functioning of IGR is to state in broad terms the policies designed to support IGR and induce some incentives for co-operation, political culture of co-operation and mutual respect between the two levels of governments.

In the Ethiopian context, however, there are at least two compelling reasons calling for some level of institutionalizing IGR. Firstly, so far there are no formal federal-state, interstate mechanisms of intergovernmental relations except through what was *de facto* known as the Office of Regional Affairs (*kilil Guday Zerf*) within the Prime Minister's Office, later formally replaced by the Ministry of Federal Affairs (MoFA). As will be illustrated later, it is hardly possible to argue that MoFA has fully replaced

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<sup>47</sup> The fiscal aspect has been dealt with by Solomon Negussie, *supra* note 15; and the judiciary by Assefa, *supra* note 8 chapter 8.

the informal party based IGR that is prevalent in Ethiopia. Indeed, if seen critically the name MoFA appears to be a misnomer as its performance so far has little to do with IGR proper. The federal government heavily relies on party lines rather than on formal institutions of intergovernmental cooperation. Intergovernmental relations are important in installing the culture of negotiation between the federal government and the states, checking the trend of centralization and thereby enhancing the bargaining power of the states. Institutionalizing intergovernmental relations could further facilitate resolving potential center-state conflicts. While the process is calm at the moment owing to the congruency of the party system at federal and state levels, it is not impossible to imagine states run by a party whose political program is different from the center or *vice versa*. Indeed this was about to happen following the May 2005 election when the Coalition for Unity and Democracy (CUD) won by a landslide all the seats to the Addis Ababa City Council. In such cases, conflicts could be serious and channels of negotiation should be set up to accommodate interests. The March 2001 TPLF split and its subsequent impact on other states regarding federal-state relations is also a clear evidence supporting the argument that there is indeed the need for separating party and government institutions including those dealing with IGR.<sup>48</sup>

Secondly, Ethiopia has no law-making second chamber. The HoF does play a modest role in the area of fiscal transfers, one field of intergovernmental relations between the federal government and the states, but this in itself is in the process of evolution. The states do not have control over the laws enacted by the federal government. The institutionalization of the regime of intergovernmental relations may then be one option for enhancing the participation of states on matters shared between the federal and state governments. Indeed in federations where the second chamber is weak or has no law making function a special kind of legislative IGR is recommended for the effective interaction of the legislative organs of both levels of governments.

Before embarking on the technical institutional aspect, there is another issue that is recurring within the emerging IGR system in Ethiopia that needs serious consideration. That is, whatever the details and technicalities of IGR may be, which organ of state, for example, the Prime Minister's Office, the HoF, MoFA or even as it appears today a department on IGR within MoFA should coordinate the entire system of IGR? This is central to the institutional aspect of IGR and will have an impact on the system of IGR in general and on its effectiveness in particular. Certainly, whichever institution is entrusted with the mandate of coordinating IGR nationwide, every level of government, line ministries and equivalent regional state offices will continue conducting some form of IGR relevant to their specific portfolios. This is what some prefer to call "picket fence federalism"<sup>49</sup> where every office in a less

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<sup>48</sup> For more on the nature of the crisis see note 100 *infra*.

<sup>49</sup> See David Nice, Patricia Fredericksen, *supra* note 2: 11-14. 'Picket fence' federalism underscores the importance of the co-ordination of functions by functional bureaucrats in relation to their respective functions without the need for having a focal institution.

structured manner undertakes some aspect of IGR via the experts of both levels and where it is not easy to map out the forest of IGR as it remains scattered throughout. As such it is difficult to comprehend what is happening at national level and whether it is guided by some principles or is simply an instrument of manipulation by one level of government over the other. Hence, there is a need for a central/focal institution that designs policies on IGR and coordinates and guides the entire IGR system. Seen along this line, a department within a ministry as is presently the case in the MoFA is very likely to be ineffective for lack of resources, experts and more importantly for lack of the stature, leadership quality and influence to bring the actors into the structure and process. Current practice as well indicates that it can run the risk of being overshadowed by other priorities of the Ministry.<sup>50</sup> If so then the ideal candidate for the IGR to be effective may be the Prime Minister's Office or a Ministry appended to it. Experience elsewhere indicates that a higher level political commitment is crucial for its success.<sup>51</sup> One concern in this regard is perhaps that such office may lose focus given the overwhelming size of work related to coordinating and running the Council of Ministers.

Next in the list are the HoF that by virtue of Article 48 and 62 is mandated at least to conduct some aspect of IGR and arguably some even think that it is mandated to coordinate the entire IGR system in the country and the MoFA that until recently has been involved with some aspects of IGR as well. There is thus some overlap and even emerging tension between the two federal institutions. Constitutionally speaking the HoF's position appears to be more legitimate but the HoF suffers from institutional weakness. As a House it meets only two to three times a year and has a few experts who understand the complexities of the federal system in general and IGR in particular. MoFA as an executive body is in theory in a much better position in terms of institutional structure but as its 2005-2008 term indicates, it lacks political leadership to coordinate nation wide IGR activities. Besides IGR has in this term been a much sidelined activity. By and large, the IGR activity conducted by the two institutions is undertaken on an *ad hoc* basis. There is, thus, a need for designing an IGR policy and perhaps a framework law on IGR that defines the respective role of the institutions, sets the guidelines and principles and that outlines the various actors and their role if IGR is to have meaningful effect in the Ethiopian federal system.

Well regulated or not, the experience of other federations like Germany and Switzerland indicates that unless backed by relevant institutions facilitating the interaction between the two levels of governments IGR is unlikely to be effective in attaining its objectives. As Ronald Watts has rightly indicated, for the consultation, cooperation and coordination of joint activities to be effective, the establishment of structures and processes within each government is a prerequisite so as to coordinate

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<sup>50</sup> This fact has clearly emerged on a number of seminars on IGR held in 2007 organized by MoFA, HoF and external donors. Most of the sources on the state of IGR on Ethiopia have been drawn from such series of seminars and interviews with key experts of MoFA.

<sup>51</sup> This is indeed the lesson one draws from the German and South African experience.

and participate effectively in its interaction with the other level. In Germany, South Africa and Switzerland,<sup>52</sup> for example, there are institutions already established for conducting and coordinating IGR at various levels. Comparative studies of these federations indicate that there are intra jurisdictional, federal-state and interstate institutions for IGR.

First we have Intra-jurisdictional IGR institutions that bring regional states into the federal level. In other words, in these institutions both the federal and state governments are represented at federal level and these include the second chamber which is often designed to be a federal institution but significantly influenced by the regional governments and hence having impact on the policy making process at the center. While the role and effectiveness of the second chamber in representing regional interests at federal level vary depending on the powers, composition and manner of appointment/election of the members, in some federations like Germany the second chamber is a key player in the IGR.<sup>53</sup> The HoF as well decides the formula for the allocation of federal subsidies to the regional states and in this limited sense and to the extent that such decision is influenced by the regional states could be treated in this part. Secondly, we have federal-state IGR institutions and in this broad part we have several actors. At the top we have the top regular conferences between the Federal Chancellor/Prime Minister and the heads of government of the states held, for example, in Germany in a more or less regular sequence of roughly every two months since 1969 and covering topics on which either the federation is dependent on the states or in which the competences of both sides are so closely connected with one another that separate action would compromise the effectiveness of any of the parts of the system. In South Africa this is called the President's Coordinating Council mainly composed of the President, his deputy, some key ministers and heads of the provinces; one step below this level is the interaction between a federal minister in a particular sector and the regional state counter parts. In all these processes IGR provides opportunities both for the federal institution to discuss national policy with regional state politicians who will implement it and for the latter to ensure that regional state concerns are adequately addressed in the design of such laws and policies.

#### *Executive Dominated IGR*

In theory the system of co-ordinating policies and shared programs between the federal government and the regional states involve both the elected and appointed

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<sup>52</sup> See South African Constitution Section 41; Franz Lehner, 'The political Economy of Interlocked Federalism: A Comparative View of Germany and Switzerland,' in Lloyd Brown-John ed., *Centralizing and Decentralizing in Federal States* (Lanham: University Press of America, 1988).

<sup>53</sup> See Articles 50 and 84 of the Basic Law; Uwe Leonardy, 'The Working Relationship Between Bund and Lander in the Federal Republic of Germany' in Charlie Jeffery and Peter Savigear eds., *German Federalism Today* (New York: saint Martin's Press, 1991) pp. 40-59; Daniel Halberstam and Roderick Hills, Jr. 'State Autonomy in Germany and the United States,' 574 *Annals* 173 (2001) 173-178; Tony Burkett, 'The Ambivalent Role of the Bundesrat in the West German Federation,' in Michael Burgess ed., *Federalism and Federation in Western Europe* (Croom Helm: Harvester 1986) p. 210

officials (hence we talk about IGR at the executive and legislative level of both governments). But in parliamentary federations, because of the fusion of power between the legislature and the executive and the subsequent dominance of the executive, IGR is often dominated by the executive of both governments hence the name executive federalism. Executive mechanisms of IGR include formal cooperation, binding agreements - sometimes called treaties or compact agreements and informal interactions through telephone, fax, email, seminars, *ad hoc* meetings etc among the executive organs of both levels of governments from the top down to the lowest level.<sup>54</sup> In parliamentary systems, parliament is in principle supreme, 'makes and breaks the government' and the executive's continuity in power depends on the continued support it gets in parliament.<sup>55</sup> But political practice in many parliamentary federations seems to indicate that the executive has become dominant over the legislature. This is often visible as the executive dominates the beginning of the legislative process as it has key role in initiating policies and legislations. The executive is further responsible to apply such laws which it mostly initiated and that grant it wide discretionary powers. Observing this development one noted 'in fact the triangle of the *trias politica* where the legislature used to be at the top has been turned upside down with the executive becoming at the top.'<sup>56</sup> Ethiopia's emerging parliamentary federation is not immune to this phenomenon. There is already enough evidence indicating the executive's dominance over the legislature. Nearly more than 95 percent or so of the laws and policies of the federal government are initiated by the executive.<sup>57</sup> Given this reality, it is no surprise that the system of IGR in parliamentary federations is often dominated by the executive organs of both levels of governments and this is not without consequences. First, it reinforces the dominance of particular interests<sup>58</sup> in policy-making. Second, the process enhances an uncontrolled growth of government activity and hence severely reduces political (legislative) control of intergovernmental policy-making. This is because intergovernmental bargaining is by

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<sup>54</sup> Opeskin, *supra* note 2, pp. 130-131.

<sup>55</sup> See for example Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes*, 2<sup>nd</sup> edn., (New York: New York University Press, 1997) pp. 101-114.

<sup>56</sup> Leonard F. M. Besselink, *The Role of National Parliaments – The Dutch Experience in Comparative Perspective*, Speech Delivered at the 2<sup>nd</sup> Annual Congress – Irish Center for European Law; available at <http://www.icel.ie/Besselink%202.doc> as accessed on November 04/2008.

<sup>57</sup> Interview with expert in the HoPR March 2008.

<sup>58</sup> In Germany for instance, according to Lehner, four different dimensions of conflict can be observed. One distribution of powers and responsibilities between the center and the states and related influences on policy making as both usually attempt to gain as much influence as possible on the decision-making process and the programs. Second, divergent fiscal interests of the poorer versus richer states that is between those that need federal financial intervention and those that do not. Third, socio-economic disparities among the states result in divergent interests. Fourth, party competition-different party composition among the federal and state. The same holds true in Switzerland except the last factor is replaced by cultural and linguistic diversity playing some role. As a result, intergovernmental bargaining in both countries usually takes place within specialized interaction between federal and sub-national bureaucracies rather than through comprehensive co-ordination programs. See Lehner, *supra* note 52 at 215.



and large an executive matter and federal and state legislative parliaments have little or no share in the bargaining process.<sup>59</sup> Most parliaments lack access to the details of intergovernmental agreements concluded behind closed doors. This creates a difficult situation for political control of executive activity. Thus, critics contend, the process limits the transparency of the federal- state relations, there is a problem of democratic deficit and accountability and tends to undermine the autonomy and responsibility of the state legislatures. This becomes more serious with federations in which the law-making functions of the states are reduced compared to those where the law-making is divided between the federal government and the states.<sup>60</sup> To compensate for the problem of democratic deficit and transparency, IGR policies and framework laws need to stipulate that any such intergovernmental agreements concluded between the executive organs of both levels of governments need to be reported to the respective legislative bodies in due time and approved.

### *Legislative IGR*

Although as noted already the system of IGR is predominantly an executive task, elected bodies of both levels of governments as well exercise some form of IGR that facilitate their respective roles in the law making process in areas of shared jurisdiction. This is an important forum for the legislative organs of both governments to consult, communicate and interact on framework and concurrent laws before the promulgation of such laws. If not, both legislative bodies may enact on the joint powers without coordinating their activities and inconsistencies and uncertainties may prevail. It is represented in the conference of parliamentary speakers of the federal and state legislative bodies. To date, the only relevant development in this regard is the Forum of Speakers usually conducted once a year. Its role in terms of serving as a forum of legislative IGR is yet to be seen. Legislative IGR is particularly important in federations where the second chamber (the Senate or the HoF in Ethiopia) is either weak as in Canada or has little or no role in policy making at federal level. In such cases, the only way to facilitate effective interaction among the legislative bodies at federal and state level in areas of shared jurisdiction is through legislative IGR. Experience from other federations indicates that legislative IGR are mechanisms for converting (surely after going through a process) executive negotiated pieces into laws by the respective legislative bodies. This can take many forms but mirror legislation, agreed policies and complementary schemes are the most common ones.<sup>61</sup> Mirror legislation is where executive (of both level of governments) negotiated draft law is submitted to the respective legislative body or a proposed uniform law prepared by an independent body is adopted by both levels. Agreed policies refer to cases where both levels agree on general policies short of a draft law and then leave each legislative body to enact a law within the margin of appreciation. In concurrent and framework powers there is this jurisdictional and territorial limit on the power of the respective

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<sup>59</sup> Lehner, *supra* note 52 at 217.

<sup>60</sup> *Ibid.*

<sup>61</sup> See Opekin, *supra* note 2, pp. 133-134.

legislative bodies. Thus, depending on what type of legislation it will take, one level of government enacts a complementary law in cooperation with the other level.

Coming back to the third institutional level we have the broad range of interstate, also called horizontal IGR. These relationships may concern some or all of the regional states depending on the need that gave rise to such institutional structure. According to Klatt, functions assigned to the states in the Basic Law can be carried out on the basis of *common agreement* between the individual state ministers responsible for particular policy areas so that their decisions can have uniform application throughout the country.<sup>62</sup> The highest-ranking institution in this field is the conference of Minister Presidents (Heads of Governments of the states), which in Germany meet formally once a year but that can sometimes be more frequent. One step below this level are the conferences of *equivalent ministers* from different states whose responsibilities cover the *same areas* of policy.<sup>63</sup>

Very related to this is the conference of cantonal governments in Switzerland<sup>64</sup> established in October 1993. Although it formally belongs to the horizontal intergovernmental relations, it also plays a crucial role in expressing cantonal needs and views to the federal government on foreign policy. It was an active body in the negotiation process of Swiss constitutional reform. Another body, the Federal Dialogue that was set up in 1998, discusses issues of common interest between the federal parliament and cantonal delegates and takes place three to four times a year. There are also forums where members of cantonal governments, like German federalism without the center, in which respective heads of cantonal offices (for instance of finance and health) gather to promote co-ordination among the cantons. Similar patterns and trends are also emerging in Ethiopia. To mention some, we have the various cooperation agreements among some of regional states like the agreements between the Afar regional state and the two neighbouring regional states (Amhara and Tigray); agreements among regional states mainly inhabited by pastoral communities; frequent meetings among bureau heads of education and experts within the federal and regional state civil service etc. While the exact content and the process involved in such agreements and conferences is yet to be studied, this rather confirms the idea that IGR is by and large the result of an evolving process.

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<sup>62</sup> Hartmut Klatt, 'Centralizing Trends in the Federal Republic: The Record of the Kohl Chancellorship' in Charlie Jeffery and Peter Savigear eds., *German Federalism Today* (New York: St. Martin's Press, 1991) p. 122.

<sup>63</sup> The whole objective of the three levels of interstate meetings is to facilitate mutual consultation and co-operation in all fields, particularly in the area of shared competencies; co-ordination and preparation of voting, particularly at *Bundserat* level; co-ordination on matters of administration of federal law at third level. See Uwe Leonardy, 'The Institutional Structures of German Federalism,' in Charlie Jeffery ed., *Recasting German Federalism: The Legacies of Unification* (London: Pinter, 1999) p. 10.

<sup>64</sup> Lehner states that the system of intergovernmental relations between the federal government and the states in Switzerland is less institutionalized when compared to Germany. Franz Lehner, *supra* note 52, p. 214.

Horizontal co-ordination (or federalism without the center) between the states themselves though strictly speaking is not part of federal-state relations surely has impact on the vertical IGR. Horizontal IGR has significant impact in terms of facilitating vertical relationships because it is here that the regional states harmonize the implementation of federal laws.<sup>65</sup> In both Germany and Switzerland, interstate relations have direct impact on the vertical relationship between the federal government and the states. Functions assigned to the states could be carried out on the basis of common agreement between the individual state ministers responsible for particular policy areas.

Horizontal IGR, among other things, provide opportunities for securing consensus or help develop common understanding among actors representing the governments before facing the federal government on specific policy issue.<sup>66</sup> At the same time it is also an avenue for sharing and learning experiences or for dealing with specific issues among all or some of the constituent units.

### **3.1 Co-operative Intergovernmental Relations: Principles/Guidelines**

The structures and processes for IGR whether formalized or not must be guided by important principles if IGR is intended to achieve the desired objectives. There is already enough evidence indicating that failure to adhere to those guidelines because of lack of awareness or simply because one level of government lacks resources and capacity would lead to manipulations of one type or another. These guidelines partly emanate from the federal principle itself and partly from federal political practice. One of the cardinal principles that guide IGR is the respect for the constitutional status, institutions, powers and functions of government in the other sphere and not assuming any power or function except those conferred by the Constitution.<sup>67</sup> This might appear obvious but the practice of IGR both in Ethiopia and in many other federations indicate that there is a likelihood that over the years the overwhelming resource potential of the federal government and the relative lack of skill and resources on the part of the constituent states often leads to overlooking this vital principle and IGR may in the end be an instrument for centralization of power. It is thus important that actors in the IGR process respect the autonomy and institutions of the other government if IGR is to remain a relevant means for coordinating, consultation, planning and implementation of common programs. In the Ethiopian context, at least in the initial stage, the states may indicate, and this has a lot to do with the experience of the *Kilil Guday Zerf*, some suspicion to the system of IGR for fear of domination by the federal government and subsequent loss of autonomy, fear already hinted by the question stipulated at the beginning of this piece. But once they understand its role and importance as well as the point that this is a forum for bargaining with the federal

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<sup>65</sup> Nicolas Schmitt, *Federalism: The Swiss Experience* (Pretoria: HSRC Publishers, 1996) pp. 49-54.

<sup>66</sup> Thomas Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Inquiry* (Boradview Press, 2006) p. 218.

<sup>67</sup> This principle can be derived from the German constitutional discourse called federal comity, South African Constitution Section 41 and Ethiopian Constitution Art 50 (8).

government on matters of common interest and if conducted based on sense of partnership between the two governments then in the long run such fear is expected to be minimized. IGR after all is aimed at enhancing shared rule without undermining self rule and only if used inappropriately it could be an instrument of centralization and by then it has lost its objective.

The second important principle relates to the need for mutual respect, trust, good faith and cooperation among the actors in the IGR process. Federalism as a concept is about the partnership between the federal and state governments. In so long as each level of government acts within the respective autonomy stipulated in the constitution, each level of government must treat the other with respect and particularly so in the process of IGR. The co-operation and trust that is expected to exist in the process is something that logically derives from the partnership and covenant inherent in the federal principle.<sup>68</sup> It is hoped that this will promote a favorable political culture that will encourage tolerance, consultation and coordination based on a sense of political partnership that in the end enhances the respective autonomy of the two levels of governments. Some eminent experts in this field indeed state that these are important values and preconditions for IGR to be effective or remain to be crucial factors for its success.<sup>69</sup> This principle has a lot to do with the political culture of a given polity in general and within the political elite in particular. In the Ethiopian situation this is something that requires a lot of improvement given the fact that the relationship among the various political actors has been very much influenced by the age old centrist political culture, history of subordination and mistrust. Despite a rich tradition of dispute resolution mechanisms and culture of tolerance in the society,<sup>70</sup> the political elite on both sides of the political spectrum sometimes manifest authoritarian political culture<sup>71</sup> inherited from the two previous regimes. This stands in sharp contrast to the federal political culture. The latter requires that actors need to work together for a 'common good' and respect their areas of differences, a theme inherent in the notion of unity in diversity.

Very much related to the two principles is the idea of negotiation as an inherent aspect of the IGR process and structure. If the respect for autonomy of each level of government and the idea of mutual respect is to have meaning and the goals of IGR to be achieved, it is imperative that the process should not be based on the dictates of one government over the other but should have some element of bargaining and

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<sup>68</sup> Daniel Elazar, *Exploring Federalism*, (Tuscaloosa: The University of Alabama Press, 1987) pp. 2-5.

<sup>69</sup> Ronald Watts, 'Intergovernmental Relations: conceptual Issues,' in Norman Levy and Chris Tapscott eds., *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government* (School of Government, University of Western Cape, 2001) p. 39

<sup>70</sup> Alula Pankhurst and Getachew Assefa eds. *Grass-roots Justice in Ethiopia: The Contribution of Customary Dispute Resolution* (Addis Ababa: United Printers plc., 2008).

<sup>71</sup> The Red Terror that according to some authorities is said to have claimed 250,000 lives and the post May 2005 election are clear examples in this respect. But more could be said from the fact that there are many political parties sharing same or related programs but un able to forge a meaningful coalition. I think this state of situation has a lot to do with the political culture of the political elite.

negotiation. A brief elaboration of the evolution of IGR in Germany particularly the notion of ‘joint tasks’<sup>72</sup> is particularly relevant here.

The system of co-operative federalism in Germany, a rather informal contact at first between the two governments, started to be institutionalized and took on a complex form with the introduction of the ‘joint tasks.’ Indeed, the joint tasks mark the first feature of co-operative federalism. With the joint tasks, planning, decision-making and financing responsibilities in areas that were considered to be within the domain of the states were now brought to the joint decision-making process. Thus, the relatively dual federal system was giving way to co-operative arrangements through the joint tasks. Significant developments in this regard are the constitutional amendments that had bearing on IGR. In 1969 the Basic Law was amended with three articles covering fiscal relations and co-operation between federal and Land governments. Particularly, Article 91(a) introduced the so-called ‘joint tasks’ of the two levels of government in some fields. Federal government was authorized to participate in these traditionally Länder functions if they are deemed to be in the national interest and if its participation is necessary in order to improve the standard of life in the federal republic. The introduction of interlocked federalism or co-operative federalism brought about a considerable change in the distribution of powers between the federation and the states thereby creating a new pattern of decision-making.<sup>73</sup> Thus, the emergence of joint tasks resulted in a considerable shift of effective policy powers and functions from the states and from the federal government to an elaborate *bargaining system*. However, as will be illustrated later the process and structure of IGR are to a large extent influenced by the federal government.

The third principle relates to the decision making process within the IGR structure. First, it should be stated clearly that the IGR structure and process in its full swing is not merely limited to passing on binding decisions. Such forums undertake countless consultations, co-ordinations, information sharing and the passing of decisions is just one component of the entire package. But once the need for making a binding decision arises, it is vital to explore what form of decision making procedure best suits the goals of IGR. Obviously, simple majority (50+1) would have serious negative repercussions on the sense of partnership and mutual respect that we already indicated above. This kind of procedure will create rather sense of ‘win/lose’ situation that will

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<sup>72</sup> See Art. 35, 91 of the Basic Law that require the federal government to assist the states in maintaining law and order and in time of natural catastrophes. See Arts. 91a, 91 b, 104a. Joint tasks refer to areas in which the federal and state governments engage in joint planning, decision-making and financing in areas that were traditionally within the jurisdiction of the states. In principle the process of decision-making requires unanimous agreement between the federal government and the states. Financial relations between the federal government and the states were also changed in favor of the federation. It covers broad economic and infrastructural issues that require huge financial investments normally beyond the capacity of the states. By 1969-70 the joint task was constitutionalized by Articles 91a and 91b of the Basic Law. Since then joint tasks are no more about division of functions but about joint decisions. Hartmut Klatt, *supra* note 62: 121-123. Also Franz Lehner, *supra* note 52 at 209.

<sup>73</sup> *Ibid.*, at 207.

in the end affect the spirit of cooperation desired between the two levels of governments. Thus, the ideal way would be decision making process based on consensus where every actor is kept on board. Yet, the German federal experience indicates that there is also negative side to this procedure particularly when it is too formalized. German co-operative federalism is noted by its critics as an 'interlocked' system implying a low degree of freedom of action of involved agencies and institutions. It implies a commitment to securing consensus among the states and the federation on policy formulation and implementation facilitated by a multitude of coordinating committees. German co-operative federalism requires consent from multiple actors for political action resulting in the obstruction of clear and effective policy-making. By granting the states a collective veto in the *Bundesrat* and a monopoly over the implementation of federal law, it locks the two levels of government, 'the states and the federation into a position in which neither can dispense with the other in executing any policy of significance.' This is commonly described as the 'joint decision trap.'<sup>74</sup>

The joint decision-making process underscores the fact that neither of the levels of government possesses the power and capacity to control policy areas and related activities at the other level of government. As a result, once agreement is reached it can hardly be changed.<sup>75</sup> Yet, it is difficult to bring to consensus all those who have a stake in the process and that calls for a painful and protracted process of accommodation.<sup>76</sup> Thus securing consensus in all the circumstances could lead the IGR into inefficiency whereby necessary policy issues are frustrated by the vested interests of too many participants. The best compromise between simple majority and consensus would be to pass on decisions based on a qualified majority.

While these are some of the principles that guide the complicated processes and actors in IGR, federal practice indicates that 'IGR generally oscillate between conflict and cooperation.'<sup>77</sup> In some federations like the U. S. A., particularly after the emergence of the welfare state, the states have to comply with conditions attached to the fiscal transfers. In Germany, the Lander are required to comply with binding framework legislation. One should also bear in mind that in a dynamic and genuine federation that operates in a politically diverse atmosphere, IGR becomes a forum where disputes pit one level of government against another, one ideology against another, one political party against another etc and hence tensions arise between the principles and imperatives of power relations. Thus, IGR in reality combines cooperative,

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<sup>74</sup> This is also called enmeshment or entanglement and was coined by the noted German writer and critic of the system of co-operative federalism Fritz Scharpf, 'The Joint Decision Trap: Lessons from German Federalism and European Integration,' *Public Administration* 66 (1988): 238-278; Daniel Halberstam and Roderick Hills, 'State Autonomy in Germany and the United States' 574 *Annals* 173, *The Annals of the American Academy of Political and Social Science*, (2001): 176-177.

<sup>75</sup> Lehner, *supra* note 52 at 215.

<sup>76</sup> For the complicated interests that need to be accommodated in the process see note 58 *supra*.

<sup>77</sup> Hueglin and Fenna, *supra* note 66, p. 215.

competitive and conflictual features.<sup>78</sup> For instance, John Kincaid argues that ‘federal government as a senior partner is a commanding partner and without some constitutional revision, state and local government may not possess much leverage to compel co-operation because co-operative federalism or intergovernmental relations are mainly based on the will to co-operate or a balance of power that can force co-operation.’<sup>79</sup> But the states have over the years lost a significant portion of their powers and are no more equal partners. In short, the view is that the present state of federal practice is coercive<sup>80</sup> rather than co-operative.

Equally, in Germany critics state that the preconditions under which co-operative federalism used to operate no longer exist today and with it co-operative federalism in Germany is dead.<sup>81</sup> According to Jeffrey, German co-operative federalism is not just a set of institutions and procedures but also a set of ideas focused on solidarity, consensus, and the desirability of common standards across the federation.<sup>82</sup> Indeed, it had some favorable conditions when it was set-up in the 1960s, some of which include a confidence in the capacity of the government economic intervention after 1966 to secure economic and social goods and West Germany’s relatively high degree of social and economic homogeneity. This was further reinforced by the period of congruence in party politics at federal and state levels, facilitating both vertical intra-party co-ordination and the consensual spirit of decision-making which operated at the crossroads of territorial and party politics in the *Bundesrat*.<sup>83</sup> In this respect, European federal systems contrast with the competitive policy of the United States. Through financial schemes, the level of federal interference has increased guaranteeing uniform living conditions and, Leonardy wrote, the United States cooperative federalism, is to some extent changing into a coercive one. The superior financial strength of the federal government in the form of grant-in-aid to state projects and the states inability to finance such projects seem to be at the center of the problem.<sup>84</sup>

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<sup>78</sup> John Kincaid, ‘Intergovernmental relations in the United States of America,’ in Peter Meekison ed., *Intergovernmental Relations in Federal Countries: A Series of Essays on the Practice of Federal Governance*, (Gatineau: Gauvin Press, 2007) p. 44

<sup>79</sup> John Kincaid, ‘From Co-operative to Coercive Federalism,’ in John Kincaid ed., *American Federalism: The Third Century*, The Annals of the American Academy of Political and Social Sciences (Newsbury Park: Sage publications, 1990) at 144.

<sup>80</sup> Coercive federalism is defined by Zimmerman as follows: while co-operative federalism is a regime in which the different levels recognize each other as equivalent and take each other’s interest into account, in the scheme of coercive federalism, Congress employs extensive regulatory powers on the states and also coerces them to implement national policies. Besides, it also implies extensive use of pre-emptive powers by Congress and lastly the intertwining of the two planes of government in implementing in specific functional areas creates accountability and responsibility problems. In short, partnership and co-operation between unequal powers is impossible and that takes away one of the essential features of cooperative federalism, *bargaining and negotiation*. Zimmerman, *supra* note 11 at 27.

<sup>81</sup> Charlie Jeffery, ‘German Federalism from Co-operation to Competition’ in Maiken Umbach ed., *German Federalism, Past, Present, Future* (Houndmills: Palgrave, 2002) at 176;

<sup>82</sup> *Ibid.*, at 172.

<sup>83</sup> *Ibid.*, at 172.

<sup>84</sup> Uwe Leonardy, *supra* note 53, p. 54

#### 4. THE PRACTICE OF IGR IN ETHIOPIA: MAKING SOME SENSE OUT OF IT

As noted in the second part of this paper, the Ethiopian Constitution offers little guidance on managing federal-state relations relative to roles and tasks. There is no much study of how the relationship between the federal government and the states will be managed on a sector-by-sector basis. It has taken a century or more for other federations to settle these relationships by legislation, litigation, political practice, and tradition. It is time to point out once again that this institutional and policy gap needs to be noted and addressed.

Close observation of the existing practice indicates that the federal government has found (this should be clearly noted as the regional states seem to be on the receiving end) at least three ways of influencing the state governments thereby facilitating the enforcement of not only joint programs but also federal laws and policies: namely through, formerly, the *Kilil Guday Zerf* (Office for Regional Affairs) and presently, the Ministry of Federal Affairs. This may be considered as co-operation through executive institutions; party structure and the process of policy making. The following section is devoted to the discussion of the three sub-topics.

##### 4.1 Co-operation through Executive Institutions

The political relationship between the federal government and the states is regulated by both formal structures weakly defined in the constitution<sup>85</sup> and various proclamations as well as practice outside the legal framework. One such mechanism is the Ministry of Federal Affairs (MoFA). The activity of the Ministry of Federal Affairs in the states is one of the semi-formalized practices that has an impact on federal-state relations at least with respect to some of the regional states. An understanding of the role of MoFA requires some background on its evolution and the links with its predecessor, the *Kilil Guday Zerf*.

An exploration of the pre-2001 federal experience and the role of the now *defunct* office for Regional Affairs on intergovernmental relations, indicate that a ‘two tier

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<sup>85</sup> This refers to the role and function of federal executive organs that are bound to enforce federal laws and policies throughout the country but in many cases remain, in terms of institutional structure, limited to the federal capital Addis Ababa. Surely the constitution under Art 50 (2) imply that each level of government will have its own legislative, executive and judicial organs thus dual structure but in reality that is not the case at least for some federal institutions where either state executive is delegated to enforce federal policy or the federal government resorts to ad hoc arrangements. The duality implied under Article 50(2) should, therefore, imply something beyond these few institutions to cover the whole field of other federal powers enumerated under Articles 51 and 55 of the federal Constitution. It is not by accident that until very recently the federal government did not have many federal institutions in the states despite constitutional powers to establish such offices. One has to travel from Jijiga or Rama to Addis Ababa to get a passport. Federal police force is one such instance. It is only with the judicial system that one discerns a relatively clear system of relationships between the federal government and the states.



system'<sup>86</sup> of federalism is emerging in Ethiopia. 'Although the constitution does not make such a distinction, in practice one is forced to make a distinction between the regional states of Tigray, Amhara, Oromia and SNNPRS with their relatively greater level of political and economic development on the one hand and the other four states, Gambela, Benshangul-Gumuz, Afar and Somali, otherwise known as 'emerging states,' or 'less developed states' which stand out for their lack of development and historical political marginalization on the other.'<sup>87</sup> While the former states, at least in relative terms exercised their powers with little or no interference from the MoFA or its predecessor, the latter states were not capable of assuming the full responsibility of state governments.

It could be stated that the emerging states more or less failed to articulate regional interests as political entities, and hence they have not yet been able to evolve into viable entities as stipulated in the constitution, even after a decade of federal experience. Certainly, there are many contributory factors to this state of fact.<sup>88</sup> It must be noted that the federal system was introduced after the fall of the most centralized regime that neglected the bulk of the ethno-linguistic groups. Thus, from inception most of the constituent states lacked skilled manpower and resources to man the newly established regional institutions. There were only a few hundred experts, for example, in Afar, Somali, Gambela and Benishangul-Gumuz regional states in 1995/1996 and the situation remained the same until the Ethiopian Civil Service College took the responsibility of training civil servants for these regions with a view to breaking the historic marginalization from political power and resources. Historic marginalization also meant that there was little or no infrastructure in the less integrated regions, making self-rule difficult. Lesser integration into historic Ethiopia also implies that the inhabitants of low land regional states, in relative terms, being mostly pastoralists lacked the tradition of indigenous settled administration and a disciplined ruling party capable of articulating regional interest. Thus, there is lack of not only disciplined and institutionalized local parties but the local politics operates under a socially fragmented and sectarian political elite.<sup>89</sup> As some of these regions are also located on the borders with neighboring states, local politics is very much interlinked with regional politics (the Somali region being the classic case) and thus subject to manipulation and maneuver by internal and external forces. These and other

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<sup>86</sup> John Young 'Along Ethiopia's Western Frontier: Gambella and Benishangul in Transition,' *The Journal of Modern African Studies* 37: 2 (1999) at 344

<sup>87</sup> *Ibid.*

<sup>88</sup> Some of the constituent states under discussion include: Afar, Somali and Gambela. The two-tier nature of the federal system (those with relatively better experience in self-rule versus marginalized ones) has been made clear in a number of studies. See for instance John Young, *supra* note 86; Jon Abbink as well remarked that in the constituent states under discussion, there have been dismal failures. See his article "Ethnicity and Constitutionalism," *Journal of African Law* 41:2 (1997) at 173; also Dereje Feyissa, "The Experience of Gambella Regional State," in David Turton ed. *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective* (Oxford: James Currey, 2006): pp. 208-230.

<sup>89</sup> See for example Abdi Ismail Samatar "Ethiopian Federalism: Autonomy versus Control in the Somali Region" *Third World Quarterly* 25: 6 (2004) pp. 1131-1154.

factors facilitated governmental and party interference from the center. The low level of political development in these regions means that the ruling party plays a greater role in local administration than in other constituent states.

Thus, close observation of the performance of these regional states suggests that they have not yet been able to articulate distinct regional interests, a viable political unit that can compete with the federal government in intergovernmental relations. In short, some do not seem to have acquired the status of nation/nationality, which the Constitution seems to generously grant them.<sup>90</sup> This reflects that the federal system is in practice asymmetric in many respects. For instance, as far as intergovernmental relations is concerned, the constitutional principle “Member states ...[of the Federation]... shall have equal rights and powers”<sup>91</sup> is compromised to a considerable extent in relation to some of the member states. The fiscal competence of the states, the court structure, the political implications of Articles 46 and 47 (constituent states for some and not for all) are clear evidence of an already existing political asymmetry. Whether this calls for a formal asymmetric arrangement with greater powers of the federal government or it should be seen as a transitory challenge is a thorny issue, but in the short run, it seems to legitimize the *de facto* greater intervention of the federal government formerly through the Kilil Guday and currently through MoFA in these regions than others.

The initial argument for greater role of the federal government in the emerging states was based on the notion of capacity building to bring them on a par with the other regional states. In the long run, it aimed to enhance these regional states’ capacity to utilize their constitutional rights to administer their own affairs. Yet later developments, according to critics, indicated that this objective was a mechanism of controlling the states by the center. Thus, the Office for Regional Affairs at least according to some observers from the bottom was viewed as a key instrument in controlling these states.

The ruling party, at least until 2001, had its own informal ‘king maker’s in the emerging states and through them it intervened in several policy issues in state affairs. According to some critics, the king makers at times exceeding their informal mandates of capacity building virtually run the regional governments and hindered self-administration.<sup>92</sup> The criticism is that some section of the local population developed the perception that the king makers emerged as heads to whom the regional government are accountable to. ‘It is acknowledged that they participate in regional council meetings, reconcile differences between coalition parties in government and conduct the crucial *gim gema*<sup>93</sup> session. They are responsible for developing the political position of the regional government, review appointments and dismissals.’<sup>94</sup>

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<sup>90</sup> See, for instance, an interesting article about the crisis in Gambela by Dereje Feyissa, *supra* 88 at 61.

<sup>91</sup> Art. 47(4).

<sup>92</sup> Aalen, *supra* note 15, p. 86.

<sup>93</sup> *Gim gema* literally refers to evaluation and has a long and unique history in the ruling party.

Indeed, the role of some of the king makers was visible even in some of the regional states like SNNPRS and Oromia outside of the emerging states between 1997-2001. The point is that the federal government's concern over these peripheral states, as the most marginalized ones is appreciable. The issue is simply that the assistance and supervision by advisors or party officials goes too far until the ordinary person observes that the key persons running the regions in fact are not the elected regional officers but the appointees of the federal government. In the end this practice seemed to have perpetuated the regions dependency on the center. Virtually every critical political decision had to be considered by these watchdogs.<sup>95</sup>

The above political reality led to the emergence of dual face of IGR in Ethiopia. In the regional states of Tigray, Amhara, Oromia and SNNPRS perhaps because the ruling coalition party in each of the states is believed to be the strong wing of the ruling party that runs the federal government, federal intervention was relatively less formal. In the second group of states there was close supervision earlier on by the Regional Affairs of the Prime Ministers Office and presently by the Ministry of Federal Affairs.<sup>96</sup>

March 2001 was in some sense a land mark where we observe that with the split within (Tigray People Liberation Front) TPLF, an influential coalition member of the ruling party, EPRDF decided to withdraw those king makers as well as the party figures with a view to enhancing state autonomy.<sup>97</sup> It was believed that their role had gone too far,<sup>98</sup> to the extent of making such states puppet states rather than

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Continuous sessions are held when serious public complaints or 'unwanted' officers become red tapes to government policy. Its proponents state that it is an evaluation of performance records, part of the routine in public administration whereas its critics hold that it is a means to purge critical thinkers or the opposition from office.

<sup>94</sup> John Young, *supra* note 86 p. 342.

<sup>95</sup> *Ibid* p. 330, 336.

<sup>96</sup> Comparing the two groups, Aalen, like Young, states that all in all the four emerging states were the units in the Ethiopian federation, which experience the most severe central interference in regional affairs. They were governed by formally independent parties but were nevertheless practically run by officials from the regional affairs department and centrally assigned party cadres without formal positions. The low level of political development in the emerging states means that EPRDF plays a greater role in local administration in these regions than in other parts of the country. Aalen, *supra* note 15 at 88.

<sup>97</sup> In March 2001, the party chairman of TPLF and current Prime Minister was challenged by an opposing faction. At a critical party decision 12 members voted against and 16 in favor, two being absent, one the late Kifle G. Medhin and Mulugeta Chaltu who resigned from his position in 2003. Apparently the cause of the split as alleged by the dissenters is that the PM had been too complicit with Eritrean matters during the war with Eritrea from May 1998- December 2000 (Indian Ocean News Letter March 24, 2001). The dissenters were expelled from their party as well as government position. This had a domino effect on other member parties of EPRDF in the SNNPRS and Oromia. Senior party members from those who shared the view of TPLF dissenters were equally expelled from party and government positions (Indian Ocean News Letter, June 30, 2001) (Africa Confidential Oct. 26, 2001).

<sup>98</sup> This fact is no more contested. Even a senior member of the ruling party *Ato Sebhat Nega*, in an interview held with *Woyin* admits that low ranking EPRDF cadres were practically ruling some of the regions, relegating the elected state officers. For full content of this interview see at

autonomous states. The record of the Office for Regional Affairs was not, therefore, that impressive.

#### *MoFA between 2001 and 2005*

It was in this context that the Ministry of Federal Affairs then *de jure* replaced the Regional Affairs Office in the Prime Minister's Office in 2001. The most relevant parts of the powers and duties of this office as formalized by a proclamation read:

- b) without prejudice to the provisions of Articles 48 and 62(6) of the federal constitution, facilitate the resolution of misunderstandings arising between regions; and
- c) *give assistance* to the regions with particular *emphasis* on the *less developed ones*;<sup>99</sup>

One may wonder about the differences between these two institutions apart from the fact that now the new institution's function is more legalized and has been set up as one of the federal ministries. According to the then Minister of State, 'the objective of providing additional support, that is, more federal impetus to the emerging states has remained the same. The new element added is a more or less coherent policy framework, a vision that hinges around capacity building of the emerging states. There was a similar mission earlier on but it focused on the traditional concept of training and infrastructure. Now capacity building is all-inclusive including change in attitude, in work ethos, guidelines, procedures and institutional capacity.'<sup>100</sup> He also points out that now it is intergovernmental relations rather than inter-party relations. Intergovernmental relations, assume the state party as partners and as coalitions. Implying that even if the parties that run the emerging states are not members of EPRDF, his office is working with them, in the fields specified by law, and the federal government is not trying to replace them. According to Gebreab the office recognizes the state executive and the ruling parties in these regions as partners or coalition governments and influences them indirectly using the government venue rather than the party channel. He says, 'I am not a political advisor but a representative of federal government'<sup>101</sup> implying his key role as instrument of intergovernmental co-operation at least in these states.

Looking at the list of powers of the new Ministry and the practice, it is the assistance, not to all the states but to the less developed states, that remained as *its main focus*. Its role as an instrument of intergovernmental relations between the federal government

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<http://www.aiga1992.org/woyin-sebaht5.html> as visited on July 22/2004. Several meetings held in July 2001, in the aftermath of the party crisis, chaired by a senior TPLF central committee member confirm the same position.

<sup>99</sup> Article 11, Proclamation No. 256/2001, 'Reorganization of the Executive Organs of the Federal Democratic Republic of Ethiopia,' *Federal Negarit Gazeta*, 8<sup>th</sup> Year No. 2, Addis Ababa, 12<sup>th</sup> October 2001; Art. 5(6).

<sup>100</sup> Interview with Dr. Gebreab Barnabas, Minister of State, Ministry of Federal Affairs, Walta Information Center, December 25/2002.

<sup>101</sup> *Ibid*

and *all the constituent states* was not explicitly stated and MoFA never attempted to establish relations with the other regional states. This rather crucial role was missing in its power. As can be gathered from the proclamation, it is not broadly organized to facilitate intergovernmental relations between the center and states and its supervisory and coordinating role is limited to few institutions.<sup>102</sup> In this sense, one could say the name MoFA was simply a misnomer.

In its conflict handling power (see section b above) there remained an overlap with what is stated under Articles 48 and 62(6) of the Constitution on the powers of the HoF. The general scope is that the HoF does the legal aspect of the conflict but the Ministry of Federal Affairs handles administrative, political and developmental affairs with the states. It facilitates political negotiations before, for instance, an issue is taken for referendum. In short, it undertakes a ‘non-binding consensus building or political negotiations.’<sup>103</sup> But there is nothing that prohibits the HoF from adopting the same process of dispute settlement in addition to its quasi-judicial function of constitutional interpretation and dispute settlement. After all one of the reasons for taking the power of interpreting the constitution from the regular judiciary to the political organ, HoF, was because it was felt, that the HoF has more democratic legitimacy than the courts. The HoF as a ‘representative of Nations and Nationalities’ was preferred to the courts, for its legitimacy as well as because constitutional interpretation was considered a political act. Indeed, one has to state explicitly that to the extent that the HoF exercises its powers to settle disputes between states and the crucial power of ‘determining the division of revenue derived from joint federal and state tax sources and the subsidies that the federal government may provide to the states’<sup>104</sup> it remains an important organ of intergovernmental relations. Thus clear tension between the mandate of the MoFA granted to it by a proclamation and the HoF’s mandate provided in the Constitution emerged and to date this tension remains unresolved.

#### *MoFA between 2005 to early 2008*

Significant development in this regard was the issuance of proclamation No. 471/2005.<sup>105</sup> The federal executive organs were reorganized and MoFA seemed to have assumed a new mandate that was missing in the previous proclamation. While the role of MoFA in terms of resolving misunderstandings arising between regional states and in assisting emerging regional states remained intact, the most relevant sections of the proclamation on the powers and duties of MoFA stated: to ‘cooperate with concerned federal and regional state organs in maintaining public order; *serve as*

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<sup>102</sup> One reason suggested is the lack of human resources. In the interview process it was pointed out that Gambella had only one medical doctor and in the opinion of Dr. Gebreab, it will be impossible to think at this time to set up its structure in the regions. Interview with Dr. Gebreab Barnabas January 3/2003.

<sup>103</sup> Interview with Dr. Gebreab Barnabas January 3/2003.

<sup>104</sup> Article 62(7); see also the power of the HoF to order federal intervention Art. 62(9).

<sup>105</sup> Proclamation No. 471/2005, ‘Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia,’ *Federal Negarit Gazeta*, 12<sup>th</sup> Year No. 1, Addis Ababa, 17<sup>th</sup> November 2005; Art. 21.

*a focal point in creating good federal-regional relationship and cooperation based on mutual understanding and partnership and thereby strengthen the federal system.*<sup>106</sup> Legally speaking the new proclamation provides for two vital points that have significant impact on IGR in Ethiopia. The first one arguably provided that MoFA is now mandated to serve as a focal point in creating good federal-state relationship. This was missing in the previous proclamation and the institutional gap seems to have been *partly* addressed. Partly because the more complex institutions, guidelines and in the Ethiopian situation, the daunting task of transforming IGR from the informal to the formal institutional level can not be effectively done by a sub-article in a proclamation on the reorganization of the federal executive organs. This is the hard lesson we draw from the other more mature federal systems. Related to this first point is the careful use of the phrase serving as *a focal point* in creating good federal-state relationship. The new mandate seems to have given recognition to the fact that other relevant federal and regional state institutions will continue to undertake some aspect of IGR as relevant to their routine functions but MoFA is to be the focal federal institution coordinating IGR nation wide. This brings us back to what we mentioned earlier in this piece: which federal institution is better suited to this very basic function and whether a department within MoFA is the right way of achieving this goal. The second important point is, the fact that the new proclamation has hinted at least to some of the principles that should guide IGR in Ethiopia: namely *mutual understanding and partnership*. The proclamation states that IGR is no more a forum where the federal government is to dictate its terms but should be based on some sense of partnership and mutual understanding. That regional states are no more on the receiving end but is a forum where they will be treated as partners in the process. Perhaps missing in the new mandate but very crucial in light of the discussion in this piece is that it could have been specific in stipulating that such good federal-regional state cooperation is linked to the coordination of shared programs and policies as there is often the temptation to widen its scope.

Even if early and the performance of MoFA with its new mandate is not that impressive, the new development should be seen as a step forward towards institutionalizing IGR in Ethiopia. Indeed, there is a good lesson that we draw from our own experience. It is important to point out that federal-state relations in Ethiopia have been very much linked to changes in party power.<sup>107</sup> As has been pointed out earlier, when TPLF split into two and the dissidents were expelled from the party as well as government positions they held, it had a *domino effect* on other member parties of EPRDF in the SNNPRS, and Oromia. Senior party members from OPDO, member of EPRDF as well as the ruling party in the State of Oromia, and senior party members in the party that ruled in the SNNPRS who shared the view of TPLF dissenters were equally expelled from party and government positions. Before this moment it was difficult to distinguish party structure from constitutional institutions.

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<sup>106</sup> See Article 21 sub 1 and sub 6.

<sup>107</sup> Aalen, *supra* note 15 at 104.

It appears that because ‘EPRDF has effectively merged with the state, the crisis of the Front is in effect a crisis of the Ethiopian state.’<sup>108</sup> The internal split in the TPLF and the following crises in the other states indicated how fragile and soft the government institutions were and it is tempting to state that there cannot be but a party channel. Institutions for intergovernmental relations, separate from party channels are, therefore, not only important for day-to-day co-ordination of federal – state relations but are also conditions for maintaining federal stability. These institutions should be permitted to evolve as autonomous government bodies so that they will survive any party crisis. This is also a question of transforming IGR from party politics to legally established institutions.

#### 4.2 Co-operation through Party Channels

We now turn to the second mechanism. Despite the formal constitutional division of powers as stipulated in the constitution, the lack of institutionalized federal–regional state IGR throughout was not without reasons. Implementation and coordination of shared policies and programs was facilitated to a large degree by party channels. Indeed, even after MoFA’s new mandate IGR through party channels still remains the most pervasive scheme used by the federal government to influence state governments as well as to guarantee uniformity of policies. MoFA’s new mandate and the experience between 2005 to early 2008 seem to confirm that it is hardly possible to state that MoFA has replaced fully the informal party based IGR in Ethiopia. Perhaps the use of party channels is not unique to the Ethiopian federation. Riker and Schaps state that ‘intergovernmental disputes are important features of federations although the excess may lead to a peril or the absence of which might be an indicator of full unification or the federal collapse.’<sup>109</sup> Federations constantly suffer from a lack of integration between policies of the federal government and the states. As a result, the institutional structure of most contemporary federations often provided mechanisms for settling intergovernmental disputes and for integrating policies. One such mechanism they outline is through political parties, which could be a source of harmony or disharmony.

If the officials of both sets of government are adherents of the same ideology or followers of the same leader or leaders, then they might be expected to pursue harmonious policies. India’s federalism during the first three decades was very much influenced by Congress Party’s dominance of both federal and state institutions and

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<sup>108</sup> Medhane Tadesse and John Young, ‘TPLF: Reform or Decline?’ *Review of African Political Economy* 30: 97 (2003) at 389; on the other hand some state that crisis of that magnitude could have led to military rule, civil war or anarchy but because the political elite demonstrated political maturity, it paved the way to a system that is conscious of managing different kinds of conflicts. See Tom Patz, ‘Ethiopia,’ in Ann Griffiths ed., *Handbook of Federal Systems 2005* (Montreal and Kingston: McGill Queen’s University Press, 2005) at 144.

<sup>109</sup> William Riker and Ronald Schaps, ‘Disharmony in Federal Government’ in William Riker, ed., *The Development of American Federalism* (Boston: Kluwer Academic Publishers, 1987): 73, 74, 75.

was the era of smooth functioning IGR later to be turned into short term crisis in the late 1970s and then to more or less stable federal – state cooperation operating in regionally based coalition parties.<sup>110</sup> But complete, harmonious and smooth functioning of IGR resulting from party harmony at federal and state level is unlikely to occur in genuine and dynamic federations. This is particularly so in federations inhabited by diverse ethno-linguistic and religious groups as in India, Switzerland and Ethiopia, for it is certain that in the long run one central vanguard party like Congress or EPRDF can not satisfy all local concerns and sub-state claims. If Livingston's claim that federal institutions are simply reflections of existing diversity on the ground has any meaning then the reality is that the more diverse the society is the more decentralized powers will be to constituent units.<sup>111</sup> Thus the present IGR calm and harmonious policy coordination via the party system within the Ethiopian federal system is likely to change with the consolidation of democracy in the country. The South African National Congress's current break down and possible split into two appears as well a political development along the patterns of India.

Nonetheless, the above is not to imply that regionally based political parties are the necessary preconditions for healthy IGR or for enhanced state autonomy. While it is true that such parties are expected to be jealous in terms of exercising regional state autonomy, there is a possibility in those circumstances for political deadlock and even the risk of fragmentation. As some have noted "if all constituent governments were controlled by one homogenous political party and the federal government by another, the degree of federal conflict would be tense. Between these two extremes lie all existing federations."<sup>112</sup> Indeed, there are good lessons to learn from Nigeria's decentralized federal experiment of three regions in the 1960's<sup>113</sup> and the current deadlock in the Belgian federation.<sup>114</sup> If all parties are regionally based with little or no nationally/federally based parties serving as inter-regional bridges, then there can not be any smooth functioning IGR and fragmentation might be a near possibility.

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<sup>110</sup> See for details Robert Bejesky, 'Hegemonic and Centralized Political Party systems: Undermining Egalitarian Principles of Federalism? A Cross-National Comparison of India, Mexico and the United States,' *Temple International and Comparative Law Journal* 14:2 (Fall 2000) pp. 363-399.

<sup>111</sup> See William S. Livingston, 'A Note on the Nature of Federalism,' *Political Science Quarterly*, 67:1 (Mar., 1952), pp. 81-95; Watts, *supra* note 7, p. 35.

<sup>112</sup> Riker and Schaps, *supra* note 109 p. 77.

<sup>113</sup> Nigerian federalism in this period was parliamentary one where leaders of the regional parties chose to head their respective regional governments and send deputies to the federal level thus resulting in weak federal government and strong states finally resulting in the attempted Biafran secession. The regional political leaders, for example Chief Awolowo was Premier of the West, Dr. Nnamdi Azikiwe was Premier of the Eastern region and Sir Ahmadu Bello remained Premier of the North. See J.A. Ayoade, 'The Changing Structure of Nigerian Federalism' in Isawa Elaigwu and A. Akindele eds., *Foundation of Nigerian Federalism: 1960-1995* (Abuja: National Council on Intergovernmental Relations 1996) at 52; Lincoln Joshua, *The Effects of Federalism on Inter group Relations in Multi-ethnic States: Evidence from Nigeria and Ethiopia 1960-1998* (UMI Dissertation, 2000) p. 82.

<sup>114</sup> See Frank Delmartino and Huges Dumont, 'Belgium: Unity Challenged by Enhanced Diversity,' a paper presented in June 2008 in Brussels as the seventh theme of the Forum of Federations on Unity and Diversity in Federal Countries (Forthcoming).



Thus, in a genuine and dynamic federation an IGR calm resulting from one highly disciplined party controlling all governments, both federal and the state is rare or might be a reality that occurs during the early phase of the federation where such party enjoys wide support because of its role in liberation or independence. Otherwise, the forces of diversity will not allow complete absorption to occur in a free society.<sup>115</sup> The other extreme situation also seems to pave the way for IGR deadlock and even fragmentation. There is the risk that they might enhance regional loyalty at the expense of federal loyalty. Between these two extremes lie all existing genuine and dynamic federations.<sup>116</sup> Ethiopia's smooth functioning of IGR based on one party dominated system is, therefore, expected to change in the long run and it is for this reason that we emphasized on the need for the principles that guide IGR and for some kind of framework policy/law on IGR.

The pros and cons of Ethiopia's one party dominated federal practice needs to be put in the right perspective though. It is often indicated either as an obstacle to the full enjoyment of regional state autonomy or as a panacea to all the country's challenges. On the positive side, given Ethiopia's diverse society and level of poverty, coherent and disciplined party at federal and state levels appears to be an asset, at least in the short run, but at times this exceeds its limit and affects state autonomy. The four major parties of EPRDF, Oromo Peoples Democratic Organization, (OPDO), the Amhara National Democratic Movement (ANDM), the Southern Ethiopian People's Democratic Front (SEPDF) and Tigray Peoples Liberation Front (TPLF) operate in the four regions of Oromia, Amhara, SNNPRS and Tigray respectively. In addition to the member states that are under direct control by EPRDF member parties, EPRDF has close allies and affiliated parties in the other regional states of the federation. These parties are formally autonomous from the ruling party but cannot be considered as opposition parties because of their tight links with the EPRDF.<sup>117</sup> The EPRDF has been instrumental in establishing the affiliated parties in Afar, Gambela, Benshangul Gumuz, Somali and Harar regional states. This largely centralized party structure appears to have impact on the autonomy of the regional states that is expected to exist in a federation.<sup>118</sup> The existence of some level of paradox between constitutional form implying wide autonomy and some level of subordination of the regional governments to the federal government in practice has already been pointed out by a lot of observers.<sup>119</sup> As a parliamentary federal system, the party discipline, the party system

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<sup>115</sup> Riker and Schaps, *supra* note 109 p. 76

<sup>116</sup> *Ibid.*, *supra* note 109 p. 77

<sup>117</sup> Aalen, *supra* note 15 at 83.

<sup>118</sup> By now there is ample evidence pointing to the fact that a centralized party system and federalism are more an oxymoron. It is certainly this anomalous combination that led many federal writers to conclude that many of the former socialist federal systems were federal in form and not in operation. See for example Alfred Stepan, 'Federalism and Democracy: Beyond the US Model,' *Journal of Democracy* 10:4 (October 1999): 22-23; Daniel Elazar, *Exploring Federalism* (Tuscaloosa, AL: University of Alabama Press, 1987); Ivo Duchacek, 'Antagonistic Cooperation: Territorial and Ethnic Communities,' *Publius: The Journal of Federalism* (Fall, 1977): 3-29.

<sup>119</sup> See Merera Gudina, *Ethiopia: Competing Ethnic Nationalisms and the Quest for Democracy 1960-*

combined with ‘democratic centralism’<sup>120</sup> seem to have great impact on how decisions are taken within the party and on the federal system. A central committee leads the ruling coalition. The central committee, often through the chairman, generates specific plans of action which are the basis for the EPRDF’s five-year plans that are implemented nationwide. The five-year plans to be implemented are adopted at federal level and become the basis for state government plans and policies.<sup>121</sup> While this state of facts is often presented as a one way process (federal governments dominance over the regional states or top down),<sup>122</sup> without challenging the federal government’s dominance others have indicated the existence of a much more complex informal interaction between the two levels of governments based on neo patrimonial system<sup>123</sup> where regional state and local political elites at least to some degree manipulate and influence the federal government. Nonetheless, it is the one party dominated federal practice along with its impact on the process of policy-making that explains the centralizing trend in the federal system. It is also this factor that appears to explain the fact that intergovernmental conflicts are rare, perhaps absent, from most of the contemporary conflicts that challenge the federal system. So far, boundary disputes, the issue of local tyranny, and not federal-state issues dominate the federal system. It is only in 2004 that the regime of fiscal transfers was brought to the table in the HoF.

What is apparent, therefore, is that except the difference, between the two groups of states distinguished above, which is a matter of degree, both groups of state governments are under the direct control and influence of the ruling party. This in turn seems to fit the extreme scenario mentioned above. Consequently, the constitutional right of the states to formulate and implement plans and policies are severely diminished by the fact that the state governments are in one way or another forced to follow the centrally designed policies and plans, resulting from the party structure.<sup>124</sup>

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2002 (Shaker Publishing: 2003) at 119; Assefa Fiseha, ‘Theory versus Practice in the Implementation of Ethiopia’s Ethnic Federalism’ in David Turton ed., *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective* (Oxford: James Currey, 2006) pp. 131-162.

<sup>120</sup> This is a very vague concept but implies that decisions are often reached at party level, often at the top executive level (small number of party leaders allege to have monopoly of theoretical knowledge, as ideologues, as sources) and flow directly (top-bottom, not the other way round) to the grass root party members. One is supposed to strictly execute the decision coming from this higher hierarchy. This in turn seems to be based on the idea that a party is supposed to lead, not to be led by the people. In Amharic they say ‘yehizib chira anketelim,’ which roughly goes like ‘we do not follow the *tail* of the people,’ interview confidential, January 3, 2002, Addis Ababa; see also Medhane and Young, *supra* note 108.

<sup>121</sup> Aalen, *supra* note 15 at 82.

<sup>122</sup> See Aalen, *supra* note 15; Andreas Eshete, ‘Ethnic Federalism: New Frontiers in Ethiopian Politics’ in *First National Conference on Federalism, Conflict and Peace Building* (Addis Ababa: United printers, 2003): 142-172.

<sup>123</sup> This concept implies the co-existence of formal and informal interactions in the political system (hybrid regime as is often called), patron-client relationship and institutional instability resulting from the informalisation of politics and the informal overshadowing the formal institutional approach. See for example Tobias Hagmann, ‘Beyond Clannishness and Colonialism: Understanding Political Disorder in the Somali Region, 1991-2004,’ *Journal of Modern African Studies* (2005) 43:4 pp. 509-36

<sup>124</sup> Aalen, *supra* note 15 at 85.

Yet, there is no governmental structure connecting the respective federal and state offices.

In our comparative studies, we earlier on noted the various complex networks of relationships between the federal government and the states in Germany, Switzerland and recently South Africa. In Ethiopia, except the party channel, there is hardly any institutionalized intergovernmental mechanism comparable to system of IGR in other federations. Nor can we state that MoFa's new mandate and subsequent practice has replaced the existing informal party based IGR. It should be noted that informal interactions between the two levels of governments are common in IGR even in more mature federations. What is rather troubling is when such informal interaction coupled with patron-client relationship shapes or predominates the process more than the formal/institutional one. There and then the informal interaction overshadows the formal one and it then becomes hardly possible to talk about institutional stability. It is the possibility of such risk that urges some level of formalization and guideline to IGR in Ethiopia.

#### **4.5 Co-operation through the Process of Policy-Making**

Another instrument of influencing the states and hence inter-governmental relations and enforcing federal policies is through the power of policy-making. The federal government has currently issued several policy documents.<sup>125</sup> These documents outline sometimes areas covering even elementary education that are according to the Constitution within the competence of the states. The documents might make some sense in the context of state governments that lack expertise to design the necessary policy areas but the authors sometimes forget that in a federal system, there is limit to the competence of the respective governments. The documents mainly originated as party documents are then published as federal documents and published by the Ministry of Information. Party members at federal and state level discuss them and decide to implement them in their capacity as government officers. In general, the states accept the economic, social and development plans issued by the federal government. In theory they can adapt the policies to fit their own circumstances but the federal government does play a key role in influencing through national policies mainly due to the party congruence and decision-making structure and also, because the states lack the required expertise to bring alternative policies.<sup>126</sup>

#### **Conclusion**

What lessons can we draw from the comparative study of IGR in other federations and the evolving practice of IGR in Ethiopia? Except for the scanty constitutional/legal

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<sup>125</sup> See for instance *Ye Ethiopia Democrasiyawi Republic Mengist Ye Masfesem Akim Ginbata Strategy ena Programoch* (Ministry of Information, Addis Ababa Yekatit 94 E.C); also *Be Ethiopia Ye Dimocraci Sirat Ginbata Gudayoch* (Ministry of Information, Addis Ababa, Ginbot 94 E.C.)

<sup>126</sup> Some authorities indicate that some of the states literally copy the federal policies. Interview with Suleman Dedefo November 26/2003. But Gebreab speaks of harmonization and customization of federal policy by the states as common practice. Interview January 3/2003.

clauses on IGR, one could safely state that IGR in Ethiopia is in its early phase. There is a felt need for understanding of the structures, processes and the principles by which it is guided as these are crucial requirements for the federation to be stable and effective. We have already noted that it is often dynamic and evolutionary but this should be preceded by conscious thought over its relevance.

We have also indicated that the system of IGR in Ethiopia to the extent that it exists relies heavily on party machinery and weakly on the government institutions. The MoFA although mandated to serve as a focal institution for IGR after 2005, its activities still remain limited to the traditional function of assisting the emerging regional states. Nor is it institutionally well organized for its new mandate. A function as important as IGR is placed within a department and even then poorly manned except a very enthusiastic head for IGR. These concerns raise the thorny issues of whether a department within MoFA will have the stature, influence, resource and capacity to undertake the coordination of nation wide IGR activities and surely the answer, as things stand right now is in the negative. It goes without saying that if MoFA is to remain relevant as a focal institution for the coordination of IGR, high level commitment and organization preferably at the ministerial level is crucial. The reliance on party instrumentality might be feasible in the light of the present resources, manpower constraints and urgency to eradicate poverty but it is very unreliable when there is a tension between government and party structure. In this respect Ethiopia has enough lessons to learn from the 2001 party crisis. The reliance on the party machinery, although understandable given the above factors and the party harmony at federal and state level, should be slowly replaced with formal institutional structure and relevant IGR policies and laws. The present relative calm in IGR disputes surely will change with the change in political party configuration at federal and state level and this is bound to happen upon the consolidation of democracy in Ethiopia. Thus the more we rely on *institutions and laws* than party channels the more *mature and stable* the federation will be. Indeed, this is a matter of transforming IGR from party politics to government institutions. Very much related to this point is that given the emerging trend and constitutional silence on IGR, there is a need for a general policy guideline or a framework law on IGR that formalizes existing acceptable practices but that also outlines who the main actors are, the objectives and structures and define the roles of the different organs in the process.

Finally, the role of the different government institutions in IGR, particularly that of the HoF and MoFA needs to be clarified if we are to avoid confusion and anarchy in the already weak and emerging IGR in Ethiopia. As the experience of other federations indicate surely one organ alone is not to run IGR effectively. Several federal and state institutions will continue to undertake IGR activities. The HoF or the MoFA which ever is picked to be the focal coordinating unit for the nation wide IGR system in Ethiopia should realize this point and hence define their respective role within this framework.