Subnational Constitutions in the Ethiopian Federal System in Light of the '*Demos*, the Federalists and Deliberative Democracy' Models of Subnational Constitutionalism

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Abstract

Constituent units of most federations are constitutionally empowered to endorse state constitutions and many of them have done so. So much so 'sub-national constituent power' is considered 'as one of the defining features of federal systems'. The cases in favour state constitutions are based on the notion that subnational communities in a federation are political communities (demos) with the power to determine how they are constituted, the need to protect individual liberties by instituting checks and balances and through additional bill of rights, and the need to enhance deliberative democracy. This article argues state constitutions in Ethiopia serve as institutional mechanism for ethnic communities of the country to self-determine. There is however barely any case to make in their favor in terms of protecting individual rights and enhancing deliberative democracy.

Introduction

After ousting from power the *Derg*, the military junta that ruled Ethiopia for almost two decades, the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) sponsored the 1995 Constitution which formally reconstituted Ethiopia, once a centralized unitary state, on federal basis.The federation is composed of a federal government and a subnational sphere of government which is comprised of nine states and a federal city.[1] It is also a dual federal system in that each level of government has the power to exercise

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[1] The Nine states are Amhara, Afar, Oromia, Tigray, Hareri, Somali, Gambella, South Ethiopian Nations Nationalities and Peoples (SNNP), and Benishangul-Gumuz. The federal cities are Addis Ababa, the capital of the federal government and the only city with constitutional recognition, and Dire Dawa which is put under the federal government since both the Somali and Oromia states lay claim on the city.

legislative, executive and judicial powers in relation to functions within its competences.[2] The federal government has exclusive competences on what are commonly considered to be exclusive national functions, including foreign affairs, currency, military and the like. The states are in turn authorised to exercise policy making power over social matters concurrently with the federal government while retaining exclusive competences in the areas of culture and language.[3] Importantly, they have the power to adopt, revise and amend their own constitutions.[4] Accordingly, the states adopted their first constitutions immediately after the promulgation of the federal Constitution and revised them in the early 2000s.[5]

Comparative studies suggest that subnational constitutions in general serve three important purposes: First, they serve as an institutional mechanism in which a subnational community determines how it is constituted. This is based on the notion that subnational communities in a federation are political communities (*demos*) with the right to self-determination. Secondly, subnational constitutions provide enhanced protection to individual rights and liberties by instituting checks and balances and providing additional bills of rights. This is what is referred to as the federalist case for state constitutions. Thirdly, they enhance 'deliberative democracy' by creating an institutional mechanism for deliberation on 'popular constitutional opinions'. This paper examines whether the Ethiopian state constitutions serve the above three purposes.[6]

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[2] Art 50 (2)(5)(6) & (7), Constitution of Federal Democratic Republic Ethiopia.

[3] Art 5(2). For more on the issue of concurrent powers, see Assefa Fiseha & Zemelak Ayele, *Concurrent powers in the Ethiopian federal system,* in CONCURRENT POWERS IN FEDERAL SYSTEMS: MEANING MAKING AND MANAGING 241-260 (N Steytler ed., Leiden: Koninklijke Brill NW, 2017).

[4] Art 50(5), FDRE Constitution.

[5] Ethiopia, having been a unitary state for over a century, had little previous experience of sub-national constitutionalism. The only experience it has in this regard was the ten years period between 1952 and 1962 during which Eritrea joined Ethiopia on federal basis. At the time Eritrea had its own constitution which was drafted by a commission that the United Nations General Assembly formed and adopted by Eritrean Constituent Assembly. The Eritrean Constitution of 1952 established a state council, an executive, a civil service, a judiciary, a flag, two official language (Tigregna and Arabic) and a bill of rights. It was so progressive that it prompted the revision in 1955 of the 1931 Ethiopian Constitution. The Eritrean Constitution, which had a life span of only 10 years, can be viewed as the first subnational constitution in the Ethiopian history. It was scrapped when the federation was dissolved in 1962 and Eritrea became one of the administrative units of the country until it seceded in 1994 to become an independent state. TEKESTE NEGASH, ERITREA AND ETHIOPIA: THE FEDERAL EXPERIENCE, (Transaction Publishers, 1997); The Constitution of Eritrea, Adopted by the Eritrean Constituent Assembly on 15 July 1952.

[6] J. L. Marshfield, *Models of Subnational Constitutionalism* 115(4) PENN STATE LAW REVIEW 1151-1198 (2011).

The paper argues subnational constitutions in Ethiopia to some degree serve as institutional mechanism of self-determination for ethnic communities of the country. There is however barely any case to make in their favor in terms of enhancing individual rights and enhancing deliberative democracy. The paper begins with a discussion on what state constitutions are, why they are necessary and under what conditions. It then examines the Ethiopian state constitutions in light of the demos, federalist and deliberative democracy models.

1. The *Demos*, the Federalist and the Deliberative Democracy Cases for State Constitutions

A state (subnational) constitution is, as all constitutions are, 'a set of rules' that binds all political actors in a state, defines the political and judicial institutions of the state and how they function.[7] In general, a state constitution is considered to be superior to ordinary state statutes. It is entrenched in a sense that it is (directly or indirectly) 'endorsed' by the relevant subnational community and that amending or revising it, in full or in part, is relatively difficult as so doing requires a special procedure.[8]

Constituent units of most federations are constitutionally empowered to endorse state constitutions and many of them have done so. Among federations with subnational constitutions are 'Argentina, Australia, Austria, Brazil, Germany, Malaysia, Mexico, Russia, South Africa, Sudan, Switzerland, the United States, and Venezuela. Provinces in Canada have constitutional statutes'.[9] Aspiring federations such as the Solomon Islands, Yemen, and Libya are also seriously considering empowering states to adopt their own constitutions.[10] Only a few federations, such as Belgium, Nigeria and India, stand as an

[7] *Ibid*, 1157.

[8] *Ibid*, 1158.

[9] J Dinan, *Patterns and Developments in Subnational Constitutional Amendment Processes*, 39 RUTGERS LAW JOURNAL 837-861 (2008).

[10] Article 180 of the Draft Constitution of the Solomon Islands provides that each state may adopt a state constitution to 'provide for and structure the government and administration' the state, to 'determine the number of Community Governments within the State' and to 'determine the criteria for qualification as a Community Government within the State'. The Solomon Islands Joint Constitutional Congress Second 2014 Draft for Proposed Constitution of the Federal Democratic Republic of Solomon Islands, (2014). < http://www.sicr.gov.sb/2nd%202014%20SI%20Constitution%20Draft%20(R)%20pdf%20-%208%205%2014.pdf> accessed on 06 February 2018.

exception in this regard. So much so 'sub-national constituent power' is considered 'as one of the defining features of federal systems'.[11]

In general, three major theoretical justifications are proffered in favor of subnational constitutions and subnational constitutionalism. The first justification is based on the conception of subnational units as *demos* or political polities. This justification conceives subnational units as previously independent political polities, which, having given up their independence and some of their political powers to join a larger political entity through a federal arrangement, without however completely losing their right to self-determination.[12] The assumption here is that the right to self-determination of subnational communities becomes restricted as soon as they join a federal arrangement. It is not however completely lost to them. The right to self-determination that they still retain is not also simply a right to self-govern as per national statutes through devolution or other similar mechanisms. It goes beyond that. It includes the power to 'determine how they will govern themselves; to determine, to a degree, how they will be constituted as political communities'.[13]

The power of a state to adopt a state constitution thus symbolizes that the people within it constitutes a political community with 'a degree of political self-determination' and that the state is a 'political unit' as opposed to a mere administrative unit.[14] State constitutions also serve as institutional mechanism through which the states determine how they exercise self-government. As an aspect of the exercise of their right to self-determination, states use their constitutions to define their political and judicial organs and disperse political powers among different political institutions. In this regard they may decide whether to establish republican or monarchical form of government, bi-cameral or unicameral legislature, presidential or parliamentary executive and the like. They also decide on symbolic matters including state flag, coat of arms and the like. This indeed depends on the 'subnational constitutional space' that the states have in terms of

[11] P Popelier, *The Need for Sub-National Constitutions in Federal Theory and Practice: The Belgian Case*, 6(2) PERSPECTIVE ON FEDERALISM 36-58, at 38 (2014). Sub-national units of unitary states in general do not have the power to adopt their own constitutions since they constitute mere administrative structures. Even autonomous regions in unitary states do not seem to enjoy the power to adopt their own constitutions. For instance, the autonomous regions of the Nordic states, such as Greenland, Aaland Island and the like, do not have their own constitutions. Eritrea had nonetheless its own constitution when it joined Ethiopia, then a unitary country, on federal basis.

[12] Marshfield, *supra* note 7, at 1169.

[13] *Ibid.*

[14] *Ibid.*

determining how they are constituted.[15] In federations such as the US, Australia, states have broad constitutional space to define their political, judicial and administrative structure while in states with quasi-federal systems, such as, South African, states have extremely narrow constitutional space regarding how they can self-constitute.[16]

The second justification is what is referred to as the 'federalist' argument.[17] This argument considers a federal system as principally a mechanism of protecting individuals' liberties and rights by dispersing government powers among 'institutions and levels of government' thereby preventing the concertation of power in any one level or branch of government so as to avert abuse of power.[18] Subnational constitutions in federal system, according to the federalist model, serve the purpose of protecting individual liberty by organising state government institutions in a manner that institutes separation of powers and checks and balances.[19] State constitutions also serve this purpose by providing more rights than the federal constitution does. As is the case in Australia, state constitutions sometimes are the only constitutional documents containing bill of rights.[20]

In addition, bill of rights in state constitutions serve as an important constitutional framework that state courts could use for protecting individuals' liberties. This is based on the assumption that a state court applies a provision in a state constitution principally driven by the welfare of the state and its citizens and not necessarily concerned about how a federal court or a court in other states would interpret a similar provision in a federal or state constitution. For instance, state courts in the US are autonomous in terms of interpreting state constitutions. They are not, hence, bound by precedents set by the federal Supreme Court based on a similar or even identical provision in the US Constitution.[21] Moreover, the US Federal Supreme Court often avoids critiquing state courts decisions so long as they are rendered exclusively based on a state constitution and/or statutes and that the US 'Constitution or federal treaties or statutes are [not]

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15 G.A. Tarr, *Explaining Sub-National Constitutional Space*, 115(4) PENN STATE LAW REVIEW 1113-1149, 1133 (2011).

16 In fact, the national constitution contains a default chapter on provincial government making provincial constitutions less than necessary. Hence, only the Province of Western Cape has adopted a provincial constitution.

17 Marshfield, *supra* note 7, at 1172.

18 *Ibid.*

19 *Ibid.*

20 Dinan, *supra* note 10, at 6.

21 R. Armstrong, *State Court Federalism*, 30(2) VALPARAISO UNIVERSITY LAW REVIEW 493-508, 496 (1996). See also Marshfield, *supra* note 7, at 1173.

drawn into question'.[22] By applying state constitution not only do state courts protect individual liberties but also contribute for the development of a constitutional jurisprudence at state level, an important 'benefits that flow from federalism'.[23]

Marshfield puts forward a third justification for subnational constitution which is based on the notion of 'deliberative democracy'.[24] Simply put, this argument is based on two premises. The first premise is that 'civic republicanism' requires deliberation by members of a political community so as to reach a 'reasoned consensus' regarding what the common good is or/and the institutional mechanism for achieving it.[25] Here deliberation itself is viewed as an 'ideal'. The second premise is that national constitution provides little opportunity for deliberation since it is, and needs to be, characteristically general, incomplete, and static.[26] Changing it is costly and introducing an erroneous change to it poses a grave danger and is not easily rectifiable for there is no 'enforcement mechanism operating above [it]'.[27]

Subnational constitutions on the other hand provide an ample room for the inclusion of 'popular constitutional opinion' that found no room in the federal constitution.[28] This is because first, state constitutions, though entrenched, could be changed relatively easily and with little cost.[29] Introducing changes to state constitutions also pose little danger since they operate within a national constitutional framework. Second, the revision or amendment of state constitutions often involve the public in form of proposing and/or ratifying constitutional amendments.[30] According to Dinan 'the vast majority of federations' allow either initiation of constitutional amendment by citizens or changes to state constitutions to be ratified by citizens of the states through a referendum or both. This is the case in several states of Argentina, Germany, Austria, Russia and the like. For

[22] D. A. Schlueter, *Judicial Federalism and Supreme Court Review of State Court Decisions: A Sensible Balance Emerges*, 59(5) NOTRE DAME LAW REVIEW 1079 -1117, 1082 (1984).

[23] Armstrong, *supra* note 22, at 496.

[24] Marshfield, *supra* note 7, at 1175.

[25] 'Civic republicanism' is contrasted with 'liberalism' which is simply focused on 'aggregating individual expressions of self-interests'. *Ibid*, at 1182.

[26] Tarr, *supra* note 16, at 11.

[27] Marshfield, *supra* note 7, at 1183.

[28] *Ibid*, at 1196.

[29] J. Dinan, *supra* note 10, having compared the state constitutions in over ten federations, concluded that state constitutions are as rigid as, or less rigid than national constitutions within which they operate. Dinan found no instance where a subnational constitution is more rigid that its national counterpart.

[30] Marshfield, *supra* note 7, at 3.

instance, forty nine of the 50 states in the US require popular ratification for amendment of state constitutions.[31]

A state constitution, though a supreme state law, is required to comply with a federal (national) constitution which is by definition the most supreme law of the federation. States have to make use of their power to adopt subnational constitutions within the 'parameters' that the federal constitution sets since 'the content of subnational constitutions is contingent on the rules of the particular federal regime within which they reside'.[32] Hence, state constitutions must be restricted to filling the constitutional spaces left to them by a federal constitution and they cannot cover matters that have already been covered by the former. State constitutions cannot also contain provisions that are inconsistent with the latter as so doing leads to the invalidation of offending provisions.

2. The Ethiopian State Constitutions in Light of the Demos, the Federalist and the Deliberative Democracy Models

2.1. The Ethiopian state constitutions and the *demos* case

As stated above, the *demos* model views subnational units as political communities and state constitutions as institutional mechanisms in which the former exercise the right to self-determination in a sense of determining how they govern themselves. This case or model seems, to some degree, applicable in the Ethiopian federation. The Ethiopian federation is conceptualized as a 'federation of ethnic groups', in which the various ethnic communities are 'joined together in a federal union'.[33] Under the federal dispensation Ethiopia is seen as a state 'founded by and belongs to all ethnic groups'.[34] The right to self-determination of all ethnic communities of the country is thus the foundational principle of the federal system.[35] Under the federal system, therefore, each ethnic community of the country is considered as a political community.[36] However, under the 1995 Constitution the ethnic communities do not have the power to adopt subnational constitutions. The states do. Moreover, not each ethnic community has its own state. Yet, as a rule, each community has the option to be within a multiethnic state or, as will be

[31] Dinan, *supra* note 10.

[32] Marshfield, *supra* note 7, at 1159.

[33] N.B. Herther–Spiro, *Can Ethnic Federalism Prevent "Recourse to Rebellion?" – A Comparative Analysis of Ethiopian and Iraqi Constitutional Structures*, 21 EMORY INTERNATIONAL LAW REVIEW 321-372 (2007).

[34] Alemante Gebre-Sellasie, *Ethnic Federalism: Its Promise and Pitfalls for Africa*, 28 YALE JOURNAL OF INTERNATIONAL LAW 51-107, 55 (2003).

[35] Preamble & Art 39, FDRE Constitution.

[36] Art 39 (3).

discussed below in section 3, to establish its own separate state. Therefore, currently, the states of Amhara, Oromia, Tigray, Afar and Somali each is in general viewed as a state belonging to a single dominant ethnic community whose names each of these states bears.[37] In the other states no single ethnic community is in the majority and the states are considered as commonly belonging to the endogenous ethnic communities of the states. A state constitution, hence, symbolizes that an ethnic community, or two or more ethnic communities collectively, constitute a political community of the relevant state.

As was indicated above the constituent power of a subnational political community is manifested in the latter's ability to determine its political goals, government structure and processes of governance using its state constitution. A perusal of the nine state constitutions shows that they have been used exactly for these purposes. The preamble of each state constitution describes the political goals and aspiration of the endogenous community (communities) of the relevant state.[38] The state constitutions contain sections dealing with political, economic, social and other 'fundamental' principles that are supposed to underpin their implementation and interpretation.[39]

The state constitutions have also established political (state council and executive organs) and judicial organs.[40] Each state constitution has established a state council. The federal Constitution does not have a prescription regarding whether a state council should be unicameral or bicameral leaving this for the states to determine in their constitutions by considering their internal contexts. The state constitutions, with exception of that of Hareri and SNNP, provide for unicameral state council. The Hareri and SNNP constitutions provide for a bicameral state council for the ethnic composition of the people and other political exigencies in these regions necessitated doing so.[41] The state

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[37] The state of Hareri bears the name of the Hareri community. Yet, the community is in the minority in the state. Moreover, the Hareri state is run on the basis of consociational arrangement in which the Oromo and the Hareri communities are equitably represented in representative councils and the executive. The state is also bi-lingual in that it uses both *Hareri* and *Afaan-Oromo* as its working language. Assefa Fiseha *Intra-unit minorities in the context of ethno-national federation in Ethiopia*, 13(1) UTRECH LAW REVIEW 178 (2017).

[38] See for instance Paragraph 5, Amhara State Constitution; Paragraph 4, Benishangul-Gumuz State Constitution (2002).

[39] See for instance Chapter 10, Afar State Constitution (2002); Chapter 11, Amhara State Constitution (2001).

[40] For detailed discussion on this see C. VAN DER BEKEN, COMPLETING THE CONSTITUTIONAL ARCHITECTURE: A COMPARATIVE ANALYSIS OF SUBNATIONAL CONSTITUTIONS IN ETHIOPIA (Addis Ababa University Press, 2017).

[41] Having over 50 ethnic communities within its jurisdiction, the SNNP is the most ethnically diverse state in Ethiopia. The state thus had to create an institutional mechanism that ensures the representation of all the ethnic communities of the region. The state constitution thus established the Council of Nationalities (CoN) along the line of the House of Federation, the second chamber of the federal Parliament. Each ethnic

constitutions define the process of law making in state councils including the minimum number of members of a state council that should be in attendance for a state council to proceed with its deliberation, how many times a year it should hold regular meetings, and when, how and by whom extraordinary meetings of a state council are called.

The state constitutions also define the process of forming a state executive. Indeed, the federal Constitution already prescribes for the states a parliamentary form of government and that the states do not have the option of creating a different executive (for instance, a presidential) system.[42] Yet, the federal Constitution is silent on the procedure of selecting state chief administrators. The state constitutions fill this constitutional gap by providing that a state chief administrator would be elected by and from among members of a state council representing the party or a coalition of parties that controls the majority seats in the state council.[43] The state constitutions also provide for the office of a deputy state chief administrator which is not mentioned in the federal Constitution. They further provide a procedure of nomination and appointment for other members of a state executive council.

community of the state has one representative in the CoN. An ethnic community having a population in excess of one million has an additional representative. On the other hand, the state of Hareri is considered as the homeland of the Hareri community which - with a population that makes only 10 percent of the population of the state - is in the minority. The state had to ensure the representation of other communities without compromising the right to self-determination of the Hareri community. The state constitution has hence created two houses called Peoples Representatives Assembly (PRA) and Hareri National Assembly (HNA). The PRA has 22 seats while the NHA has 14 seats. The two houses together constitute the Hareri State Council. The 14 seats in the HNA are exclusively controlled by Hareris through elections in which only ethnic Hareris take part both as voters and candidates. Other communities, including Hareris, are supposed to be represented in the PRA. In the 2015 regional elections, the Hareri National League and the Oromo Peoples Democratic Organization, representing the Hareri and Oromo communities, respectively, 'won' equal number of seats in the Hareri State Council. This means other communities, such as the Amhara which make up 20 percent of the population in the state, are completely excluded from any kind of representation in the Hareri state structure. C. Van der Beken, *Subnational Constitutional Autonomy and Institutional Autonomy in Ethiopia*, 2(2) ETHIOPIAN JOURNAL OF FEDERAL STUDIES 17- 44, 23 (2015).

[42] Article 45, which is within the chapter that deals with 'state structure' provides that '[t]he Federal Democratic Republic of Ethiopia shall have a parliamentarian form of government'. First, the chapter under which Article 45 is found is not simply about a single level of government but about the entire federal structure. Second, Article 45 does not simply refer to the federal government. It refers to the 'Federal Democratic Republic of Ethiopia' which, according to Article 50, is made up of both the states and the federal government. It is thus maintained that the constitution requires both the states and the federal government to adopt a parliamentary form of government. Under the current Constitution, the states do not have the option of choosing a presidential system.

[43] See for example Art 49(3)(5), Benishangul-Gumuz State Constitution; 51(3)(6), Gambella State Constitution.

The federal Constitution provides that the states could establish their own supreme, high and first-instance courts without defining the criteria and procedure for appointing judges for these courts; a constitutional lacuna that state constitutions filled.[44] Moreover, the state constitutions have established quasi-judicial bodies which are in charge of interpreting state constitutions. The states other than the SNNP provide for the establishment of a constitution interpretation commission[45] which, assisted by a constitutional inquiry committee,[46] is charged with resolving constitutional disputes that are based on the relevant state constitution.[47] In SNNP, the Council of Nationalities (CoN), the second chamber of the state council, is authorized to resolve constitutional disputes.[48]

Each state has the power and duty to create its own local government system on the condition that the latter is adequately empowered. Determining the number of tiers and units of local government and the specific functional competences that they exercise are hence matters that are left to be regulated in state constitutions.[49] Accordingly, the states have recognized local government in their constitutions which have established a rural local government composed of districts, in Amharic known as *woredas*. They have also defined the political (*woreda* council and executive) and administrative institutions of the *woredas*, how they would be composed, terms of *woreda* councils, procedure of decision making in *woreda* councils and the like.[50] The state constitutions further regulate the manner in which the states exercise supervision (regulation, oversight and intervention) over *woredas*.[51] They do not, however, in detail deal with urban local

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44 Art 78(3), FDRE Constitution.

45 Constitutional interpretations commissions are formed differently in different states. In Oromia and Somali, the CICs are composed of members of *woreda* councils. In Amhara, members of the three ethnic local governments (Awi, Oromo, Argoba and Himra) are represented in the state CIC. In Gambella and Benishangul-Gumuz, the CIC are composed of representatives of the endogenous communities of the regions. In any case a few of the CICs are actually operational. *Ibid.*

46 This is composed of a president and deputy president of a state supreme court, six practicing lawyers who are appointed by a state president, three members of a state council who are selected by a speaker of the state council.

47 Under the 1995 state constitutions, state councils had the power to resolve constitutional disputes. C. Van der Beken, *supra* note 42.

48 Art 58, SNNP constitution.

49 SOLOMON NEGUSSIE, FISCAL FEDERALISM IN THE ETHIOPIAN ETHNIC BASED FEDERAL SYSTEM 79 (Wolf Legal Publisher, 2006).

50 Chapter 9, Amhara State Constitution; Chapter 9, Benishangul-Gumuz State Constitution; Chapter 8, Afar State Constitution.

51 For more on this see ZEMELAK AYELE, LOCAL GOVERNMENT IN ETHIOPIA: ADVANCING DEVELOPMENT AND ACCOMMODATING ETHNIC MINORITIES 211-230 (Baden-Baden-Nomos Verlagsges, 2014).

government such as cities and municipalities. They simply authorize state councils to regulate urban local government through ordinary state statutes.

Finally, as was mentioned above, each state has ethnically heterogeneous population. Yet, there are remarkable differences in the degree of ethnic heterogeneity that the inhabitants of the nine states exhibit. The states of Amhara, Oromia, Tigray, Afar and Somali each has a dominant ethnic community and bear the name of its dominant ethnic community, but in the other states no single ethnic community is in the majority; this is especially true of the SNNP, Ethiopia's most diverse state. It is the responsibility of each state to determine how best to accommodate such ethnically diverse population within its jurisdiction. The states of Amhara, Gambella, Afar, Benishangul-Gumuz, and SNNP have thus constitutionally established ethnic local government called special zones and special *woredas* for territorially structured intra-state ethnic minorities[52] and devolved to the former functional competences in the areas of language, culture and social matters such as education.

From the above discussion it is clear that the Ethiopian state constitution serve as institutional mechanism through which the ethnic communities of the country, which are considered to be the subnational *demos* of the Ethiopian federation, could exercise the right to self-determination.

It should be noted though that, after having put the different government institutions of the states, the state constitutions have largely been relegated into the state of insignificance. They are not made relevant in the day-to-day activities of the states. Many state authorities barely know the existence of state constitutions, leave alone gauging their actions, decisions and statements against the state constitutions. For instance, a

[52] The Afar state constitution explicitly provides for the establishment of a *special woreda* for the Argoba ethnic community. The Amhara state Constitution establishes a special zone for each of the Himra, Awi, and Oromo ethnic communities that are found within the state. A *special woreda* has also been established for the Argoba ethnic community in this state though not by the state constitution. The Gambella state constitution specifically provides that the Anywaa (or Anuak), Nuer and Mejenger ethnic communities would have their own special zones. In SNNP there are 14 special zones and four *special woredas*. The nationality zones are: Hadya, Gurage, Kaffa, Sheka, Sidama, Silte, Wolayita, Dawro, Gedeo, Bench-Maji, Debub (South) Omo, Gamo-Gofa, and Kembata-Tembaro. The *special woredas* are the Alaba, Basketo, Konta, and Yem. Initially there were eight special *woredas*, which included Amaro, Burji, Derashe, and Konso special *woredas*. These four special *woredas* merged in 2011 to form Segen Zone, a decision that led to inter-ethnic conflicts. Zemelak Ayele, *The Politics of Local Government and Subnational Constitution*, 6(2) PERSPECTIVE ON FEDERALISM 89-115, 102 (2014).

study by Getachew Dissasa shows that the state presidents of the Oromia state not even once referred to state constitutions in their speeches.[53]

In addition, the states constitutions consider as political communities only territorially structured communities which are also viewed as endogenous to a certain state. Members of different ethnic communities which are considered as exogenous to a state had thus received barely any recognition in the state constitution. Quite the contrary some state constitutions, for example that of the Benishangul-Gumze, make distinctions between 'owners' of the relevant states and other communities that live within the states. Those in the latter category, which are not considered to form part of the subnational *demo*, are often excluded from any form of political representation and are considered as second-class citizens in the states.[54]

2.2. The Ethiopian state constitutions and the federalist case

As was discussed above, the federalist approach views state constitutions as a mechanism of protecting individual liberties. A state constitution is expected to do so by dispersing powers among levels of government (state and local government) and by introducing checks and balances among institutions (legislative, executive and judiciary) of a state government and by providing a bill of rights that serves as an additional mechanism for state courts to enforce individual rights. As was briefly mentioned in the introduction, the nine state constitutions of Ethiopia were revised in the early 2000. The revision was supposedly meant to serve two purposes. The first was to introduce separation of powers and checks and balances in the manner the state governments were structured, which was not the case previously. Under the 1995 state constitutions the executive branch of a state government was extremely powerful since a state president also acted as a speaker of a state council, an arrangement that ignored separation of power and failed to provide a mechanism of checks and balances between the two branches of a state government. It was found necessary to rectify this problem.[55]

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[53] Getachew Dissasa, *The role and relevance of subnational constitutions in the Ethiopian federal system in promoting effective self-rule and regional autonomy: The case of Oromia Regional State's Constitution* (Unpublished MA thesis: Centre for Federalism and Governance Studies: Addis Ababa University, 2018).

[54] The main source of this problem is indeed the federal Constitution which makes ethnicity the sole factor of political organization. The state constitutions simply reinforced the problem created by the federal constitution

[55] Van der Beken, *supra* note 42, at 37.

The 1995 state constitutions did not also devolve state powers to local government as required in the federal Constitution.[56] Local government was treated as an administrative structure rather than as an autonomous level of government, its functional competences were not clearly defined and it did not have revenue raising and expenditure autonomy and its budget needed the approval of a state government. The 2000 revision of state constitutions was meant to devolve political and financial powers from the states to local governments.

The inclusion of checks and balances and the devolution of power to local government were not nevertheless underpinned by a commitment to the protection of individual rights. First, the Ethiopian federal system is established principally for the purpose of protecting group rights (the right of ethnic communities) as opposed to individual rights. The Ethiopian federal Constitution and the constitutional practice are inclined towards giving precedence to group rights rather than individual liberties. Second, it is often alleged that less than altruistic political motives, that were linked to the division within the ruling party that occurred in the early 2000s, prompted the revision of the state constitutions.[57] The state constitutional revision was allegedly intended to weaken the political opponents of the late Prime Minister Meles Zenawi.

In any case in the past the checks and balances that are instituted in the state constitutions and the devolution of power to local government served little purpose in terms of averting abuse of power and ensuring the protection of individual rights. This was partly because all levels and institutions of government were controlled by a single political party; EPRDF. And, along with the democratic centralism principles based on which the party operated, the state branches of the party were required to act in line with the decision of the centre. The principle of checks and balances that are instituted by the state constitutions and the devolution of power to local government, the federal system itself for that matter, were, hence, undercut by concentration of power in the highest decision-making structure of the party.[58]

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[56] Art 50(4).

[57] The political division began within the TPLF and later spread to the other members of the EPRDF. The true reason for the division remains unclear. Some claim it has to do with the manner the Ethio-Eritrean war was managed while others argue the dispute relates to the growing corruption and nepotism in the party. In any case some members of the TPLF stood against the late Prime Minister Meles Zenawi. Some of those who opposed him were heads of state governments. The argument is thus the 2000 revision of state constitutions, which was undertaken at the initiative of the federal authorities, was meant to weaken the position of heads of state government who challenged Meles. See Zemelak, *supra* note 52.

[58] EPRDF is a coalition of four regional parties; the Tigray People Liberation Front (TPLF), Amhara National Democratic Movement (ANDM), Oromo People Democratic Organisation (OPDO) and Southern

The state constitutions have replicated the entire Bill of Rights of the federal Constitution providing barely any additional right to those that are in the federal Constitutions.[59] This is not however the biggest problem in this respect. As Van der Beken argues, even without having any additional rights, the bill of rights in the state constitution could lead to 'the materialization of one of the advantages of regional constitutions: the possibility for a better human rights protection at regional level'.[60] Moreover, some of the state constitutions, for instance, seek to expand human right protections by including the right to life in the list of non-derogable rights during a state of emergency that is declared by the state government.[61] The problem is that state courts are barred from judicially enforcing state constitutions and the bill of rights in them. As was mentioned above, state CICs are in charge of interpreting state constitutions. As a consequence, state courts cannot use the bills of rights in the state constitutions as additional constitutional mechanism for protecting individual liberties. The reason why state courts were barred from exercising this important judicial power is unclear. One possible reason could be that the states simply copied the federal model of constitutional interpretation without giving much thought to the matter.[62] The other possible reason is that the framers of state constitutions, like the framers of the federal Constitution, consider state constitutions as more of political documents than legal ones that they gave the power to interpret them to *ad hoc* political institutions.[63]

One may argue that the bill of rights in the state constitutions are still relevant for they guide the actions and decisions of the legislative and executive branches of a state government. Indeed, a state's residents, its government organs and those in charge of them, and political parties and party leaders are enjoined to respect its constitution.[64]

Ethiopian Peoples' Democratic Movement (SEPDM). The TPLF, ANDM, OPDO and SEPDM control the Tigray, Amhara, Oromia and SNNP states, respectively. The party has been operating on the basis of democratic centralism in which the state branches of the party are required to act in line with the decision of the centre. This arrangement is recently facing challenges since ANDM and OPDO refusing to be bound by decisions made by EPRDF's central structure and showing some degree of independence.

59 C. Van der Beken, *Sub-national Constitutional Autonomy in Ethiopia: On the Road to Distinctive Regional Constitutions*, at13, (*Paper* Submitted to Workshop 2: Sub-national Constitutions in Federal and Quasi-Federal Constitutional States World Congers of Constitutional Law, Oslo, 16-20 June 2014), 13.

60 *Ibid*, at 9.

61 See for instance Art 114(4), Amhara State Constitution, Art 106 (4), Afar State Constitution.

62 The House of Federation, the second chamber of Parliament, has the power to resolve constitutional disputes. Art 62(1), FDRE Constitution.

63 Gedion T. Hessebon and Abduletif K. Idris, *The Supreme Court of Ethiopia: Federalism's Bystander?* in COURTS IN FEDERAL COUNTRIES: FEDERALISTS OR UNITARISTS? 183 (N. Aroney and J. Kincaid eds., University of Toronto Press, 2017).

64 See for example Art 9(2), Oromia constitution.

However, in the absence of judicial review of the actions and decisions of state officials, the relevance of the bill of rights in this respect is gravelly diminished.

One still may argue that state constitutions are interpreted by state CICs and the latter can use the bill of rights for protecting individual liberties and expand the rights enjoyed by citizens of the states. This argument, however, ignores the fact that almost two decades after the adoption of the state constitutions, state CICs are established only in the Tigray, Oromia, SNNP and Amhara states. State laws that were supposed to establish these institutions are not even enacted in the rest of the states.[65] On the other hand the state courts have been in existence since the establishment of the federal system. Moreover, the CICs are more political organs than judicial ones whose interpretation of a state constitution is likely to be influenced by political exigencies rather than by a commitment to constitutionalism and the enforcement of the rights in the bill of rights of the state constitution.[66] Furthermore, in the states such as Oromia, there is even a legal requirement to the effect that the interpretation of the bills of rights in a state constitution conforms to the interpretation that the HoF gives with respect to a similar provision in the federal Constitution.[67] A CIC cannot be, therefore, expected to expand the rights that citizens of a state enjoy by giving expansive interpretation to the rights contained in the bill of rights of the state constitutions. This leaves the bills of rights in the state constitutions with little relevance.

It is maintained here that state courts should be empowered to resolve legal disputes by referring to state constitutions if the bill of rights in the state constitutions are to be of any relevance in terms of protecting individual liberties and rights. Three reasons are proffered in this respect. First, the states have the power to enact civil laws, including family laws, which state courts routinely apply for resolving legal disputes. The correct judicial enforcement of these laws necessarily requires state courts to refer to the bills of rights in the state constitutions. Else, the state courts are likely to make incorrect decisions. This is not a mere conjecture. The decisions of the state courts on family and other civil matters were quashed on several occasions by the Federal Supreme Court precisely because the state courts did not and could not take into consideration the implications of their decisions on certain fundamental rights of the parties involved in the cases.[68] The problems in the decisions of the state courts that the Federal Supreme

[65] Van der Beken, 23.

[66] Van der Beken, *supra* note 60, at 12.

[67] *Ibid.*

[68] For instance, the issue in *Tsedale Demissie vs Kifle Demissie* was whether Kifle should be awarded custody of his biological son, Benyam, whom he abandoned for over 12 years during which time Tsedale, Benyam's aunt, raised the child. Apparently motivated by the inheritance that Benyam's deceased mother left to her

Court reversed could have thus been easily rectified had the state courts have the power to refer to the bills of rights in the state constitutions. The rights, including the right of the child, women's right, family rights, cultural rights and the like, that the Federal Supreme Court invoked from the federal Constitution to reverse the decisions of the state courts are also found in the bills of rights of all state constitutions. Second, the interpretation by state courts of the rights in the bill of rights of state constitutions would help build a constitutional jurisprudence that could even be used as an important input in the interpretation by the HoF of some of the rights in the Bill of Rights of the Federal Constitution. Third, federal courts were barred from interpreting the federal Constitution principally because of the fear that judges would be tempted to embark on judicial adventurism and endanger the Ethiopian federal system. State courts could pose no such danger by interpreting state constitutions since state constitutions operate within the framework set by the federal Constitutions.

2.3. The Ethiopian state constitutions and 'deliberative democracy'

The ideal of deliberative democracy entails civic engagement when state constitutions are adopted, revised and amended, including on the very issues of whether there is a need to be adopt, amend or revise state constitutions. In Ethiopia, the federal Constitution simply authorizes state councils to draft, adopt and amend state constitutions.[69] It does not require state councils to involve the public in the process of adopting state constitutions. The state constitutions contain indeed a stringent procedure for their amendment which requires the approval of an amending bill by a two-thirds majority in a regional council and by a simple majority in the majority of the local councils in the states. The amendment of a state constitution also requires the assent of the councils of special zones in the states where they are found. Still the procedure does not provide for public deliberation. However, there is no mechanism for the public to initiate amendment nor

child, Kifle sought the custody of the latter. The SNNP *woreda*, high and supreme courts explicitly mentioned their thoughts that Kifle indeed seemed interested in Benyam's inheritance than the welfare of the child. Yet they decided, based on the state family law that, as the biological father of the child, he was legally entitled to the custody of the child. When the matter was brought to it, the Federal Supreme Court, after having agreed with the interpretation of the state supreme court of the state family law, reversed the decision by invoking the principle of 'the best interest of the child' from Article 32 of the FDRE Constitution and Article 3(1) of the Convention on the Rights of the Child. Similarly, the issue in *Zweditu Getachew vs Temesgen Desallegn* was whether a marriage contract in which Zewditu agreed, in case of divorce, to receive only 120 Birr per year and not to make any claim on other properties, was made based on equality of the two parties to the contract. The Federal Supreme Court annulled a marriage contract entered between the two parties to the case by merely referring to Article 34(1) of the Constitution which provides that a man and a woman 'have equal rights while entering into, during marriage and at the time of divorce'.

[69] Art 50(5).

is there a procedure for public referendum on an amendment on a state constitution endorsed by state and local councils. In any case, in practice the state constitutions are amended without the state councils paying strict heed even to the procedures the constitutions set out for this. For instance, the revision of the early 2000 was driven by the central government and state councils were reportedly asked to adopt the revised constitutions, without even following the amendment procedures provided in the 1995 state constitutions.[70] This was partly because of the hitherto hegemony of the EPRDF (which controlled all levels of government) and the political culture and the centralised decision-making process that was practiced in the Party. The Party left little political space to, and constrained the constitutional space of, the sub-national units of the Ethiopian federation.

The absence of deliberation on the content of state constitutions seems to have resulted in some 'popular constitutional opinions' being excluded from the state constitutions. The barring of state courts from resolving disputes based on state constitutions could be because of the lack of public deliberation on the contents of state constitution. Another popular constitutional opinion that found no room in the state constitutions seemingly because of the lack of public deliberation relates to traditional leaders and institutions. Traditional leaders and institutions in African societies are so important that several African countries have provided recognition to them in their national constitutions.[71] The South African Constitution, for instance, has a full chapter on traditional leaders.[72] The Ethiopian federal Constitution is on the other hand silent on traditional leaders and institutions despite imposing on the federal and state governments the 'duty to support… the growth and enrichment of cultures and traditions' that are not contrary to basic human rights and democratic norms.[73] The Afar and Somali state constitutions recognize, though inadequately, traditional leaders and institutions.[74] On the other hand,

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[70] Tsegaye Regassa, *Sub-national Constitutions in Ethiopia: Towards Entrenching Constitutionalism at State Level*, 3(1) MIZAN LAW REVIEW 33-69, 55 (2009); Solomon Negussie, *supra* note 38, at 239.

[71] See C. Logan, *The Roots of Resilience: Exploring Popular Support for African Traditional Authorities*, 112(448) AFRICAN AFFAIRS 353–376 (2013); L. Bank and R. Southall, *Traditional Leaders in South Africa's New Democracy* 28 THE JOURNAL OF LEGAL PLURALISM AND UNOFFICIAL LAW 407- 430 (1996).

[72] See Chapter 12, the Constitution of the Republic of South Africa (1996).

[73] *Ibid*, Art 91.

[74] Article 63 of the Afar state constitution provides that a council of elders would be established. It is however silent on how this council is to be formed, the role it plays, and the place and status it has within the state government structure. Likewise, Article 56 of the Somali state constitution provides that there would be a council of elders and clan leaders without providing further detail. The two state constitutions should, indeed could, have gone further in terms of defining the composition and the role of traditional institutions and how they interact with the formal government structure. This is especially important considering how revered traditional institutions are in the Afar and Somali communities and that the federal system is

the constitution of the state of Oromia is conspicuously silent on the *Gada* institution, a highly esteemed traditional institution of the Oromo people.[75] Perhaps the only indirect reference to the *Gada* in the state constitution is the inclusion in the state's flag of the Oda, 'a symbol that refers to the tree' under which *Aba Gadas* (leaders of the *Gada* system) hold their meetings.[76] Otherwise the word *Gada* is not even mentioned in the state constitution. One can safely assume that the Gada system would have received recognition in the Oromia state constitution had there been democratic deliberation on this specific matter.[77]

3. Emerging Trends

EPRDF and its affiliates had enjoyed an exclusive control over federal, state and local governments. This, along with the centralized decision making process on the basis of which the party operated, restricted the relevance of state constitutions in terms of effectively serving the three purposes that are considered above. Now there is a good chance that Prosperity Party (PP), successor to EPRDF, might not continue to enjoy an exclusive dominance of the Ethiopian political land scape. This is mainly because the public protests that were staged in Oromia and Amhara states for close to three years (2015-2018) had forced the party to open up the political space of the country. If things continue as they currently are, it is not likely that the next elections, unlike the previous one, will be simply PP's affair. Other political parties will also have representation both in national and state representative councils. The representation in state councils of new parties will certainly allow the representation of hitherto excluded popular constitutional opinions which may require the revision of state constitutions.

predicated on providing a constitutional space for the development of the traditions and culture of each community.

[75] For more on the *Gada*, see MOHAMMED HASSAN, THE OROMO OF ETHIOPIA: A HISTORY 1570-1860 (Cambridge University Press, 1994).

[76] Van der Beken, *supra* note 42.

[77] The non-recognition of the Gada system in the Oromia state constitution is indeed strange considering how the federal government and the Oromia governments clamoured to have this institution registered by the UNESCO as 'intangible cultural heritage'.[77] Even more so when one takes into account that the government had to call on the Abba *Gedas* (heads of the *Gada*) to calm down angry protesters and prevent inter-ethnic violence when the state was seized with public protests beginning from mid-2015. The non-recognition in the Oromia constitution of the institution of *Gada,* hence, manifests the exclusion of a 'popular constitutional opinion'. Federal Democratic Republic of Ethiopia Ministry of Foreign Affairs, *Efforts to Inscribe Gada System on UNESCO World Heritage List Moving on the Right Track <http://www.mfa.gov.et/newsdisplay/-/asset_publisher/OTLO09lVyEXz/content/efforts-to-inscribe-gada-system-on-unesco-world-heritage-list-moving-on-the-right-track> accessed on 05 February 2018* .

Moreover, PP has regional and local structures. Of course, the regional and local structures of the party, unlike the former members of EPRDF, do not have distinct legal existence. Detractors of the new party have been claiming that PP is 'bad news' for the Ethiopian federal system since it is structured along a unitary principle.[78] However, it seems that the regional and local structures of the PP will not be encumbered by the principle of democratic centralism since the new party has moved away from the revolutionary democracy ideology of its predecessor.[79] This may allow the states to enjoy an enhanced autonomy and to use their state constitutions to the same effect.

In addition, for the first time since the establishment of the federation, the provision of the federal Constitution which allows an ethnic community to secede from a state within which it is found and establish its own state has been given effect. Members of the Sidama ethnic community overwhelmingly voted in favor of seceding from the SNNP and establishing their own state. Moreover, the Sidama state does not seem to be the last state to be created. Over ten communities have already demanded their own state and it is likely that at least few more states will be created. On a positive note, these developments provide an ample opportunity for experimentation with subnational constitutions. The establishment of new states is likely to lead to the adoption of new subnational constitutions which are drafted in a process that is unconstrained by EPRDF's centralist tendencies. This should give states the necessary political space to make use of their constitutional space and, thus, their constitutions. Both the existing and the newly created ones will thus be able to use their subnational constitutions to introduce (within the constitutional space available for them) different institutional design in the manner they structure their governments.

The new trend is not without a problem, though. The downside is that the states may use state constitutions to continue discriminating against ethnic minorities and so-called exogenous communities. As mentioned above, states, such as, Benishangul-Gumuz have already used their state constitutions to make distinctions between 'owners' of the state and others. Indeed, such discriminations could be challenged based on the federal constitution. However, the constitutional adjudication mechanism at the federal level has not been effective in terms of ensuring laws and executive decisions are consistent with the federal constitution.

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[78] Awol Kassim 'Why Abiy Ahmed's Prosperity Party could be bad news for Ethiopia' (Aljazeera, 5 December 2019) <https://www.aljazeera.com/indepth/opinion/abiy-ahmed-prosperity-party-bad-news-ethiopia-191204130133790.html> accessed on 13 December 2019.

[79] See **የብልፅግና ፓርቲ ፕሮግራም** available at <https://addisstandard.com/wp-content/uploads/2019/11/AS-Exclusive-Prosperity-Party-Program-.pdf> accessed on 13 December 2019.

Conclusion

State constitutions in Ethiopia play an important role of serving the ethnic communities of the country (subnational units of the Ethiopian federation) as institutional mechanisms in which the latter could determine how they are constituted. In this respect they define state government structures and processes of governance, establish a local government system and provide territorial and non-territorial mechanisms for managing intra-state ethnic diversity. They, however, serve little purpose in terms of providing additional protections to individual liberties. They fail to provide additional rights to those that the federal Constitution provides. Importantly, state courts are barred from using state constitutions as additional constitutional mechanism for judicially protecting individual rights. The state constitutions leave a lot to be desired in terms of enhancing deliberative democracy. The public is not involved in their adoption and revision. The constitutions also provide nothing by way of requiring the involvement of the public in terms of initiating and or ratifying amendments to them. In practice they were adopted in 1995 and revised in the early 2000s in a rushed, centrally driven, and politically motivated drafting and adoption processes which did not involve the public that the state constitutions are supposed to govern. There is, however, an emerging trend which is likely to lead to enhanced multiparty democracy and reduced centralization which may provide the states the necessary motive and space to use their constitutions more creatively.

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