6 The Supreme Court of Ethiopia: Federalism's Bystander

GEDION T. HESSEBON AND ABDULETIF K. IDRIS

One influential description of federalism is that of a covenant of constituent units that stipulates the terms for self-rule and shared rule.[1] Normally, the terms of a federal covenant are enshrined in a constitution, which is regarded as the supreme law of the land. Furthermore, when disputes arise concerning the meaning and implication of the covenant, courts play the role of an umpire between the parties in dispute.[2] Usually, the highest court of the land or a constitutional court interprets the constitution and adjudicates controversies pertaining to the ambit of self-rule and shared rule. Therefore, in many federal countries, the judiciary plays an important role in delineating the spheres of competence of the different orders of government. The jurisprudence developed in this process is indispensable to understanding the nature of federalism in most countries.

The Federal Democratic Republic of Ethiopia provides an exception to the preceding claim. After more than two decades of federalism, Ethiopia has very little federalism case law, and the federal and state judiciaries have had virtually no role in shaping the development of Ethiopian federalism. In this chapter, an attempt will be made to explain the reasons for this perhaps peculiar state of affairs. To facilitate this discussion and provide some background, the next section will

1 Daniel J. Elazar, *Exploring Federalism* (Tuscaloosa: University of Alabama Press, 1987); Daniel J. Elazar and John Kincaid, eds.,*The Covenant Connection: From Federal Theology to Modern Federalism* (Lanham, MD: Lexington Books, 2000); and Michael Burgess, *Comparative Federalism: Theory and Practice* (Oxon, UK: Routledge, 2006), 49.

2 Ronald L. Watts, *Comparing Federal Systems,* 3rd rev. ed. (Montreal and Kingston: McGill-Queen's University Press, 2008), 159.

describe Ethiopian federalism. That section will be followed by a discussion of the judiciary and of the House of Federation, which is one of the two federal houses and the ultimate authority with the mandate to interpret Ethiopia's Constitution. The final section of the chapter will discuss and analyse the extra-legal explanations for the lack of federalism jurisprudence in Ethiopia.

I. The Ethiopian Federal System

1. Background to Ethiopian Federalism and Country Profile

The population of Ethiopia is more than 96 million, making it Africa's second-most populous country.[3] The latest official census shows considerable diversity in both religion and ethnicity. More than eighty ethnic groups live in Ethiopia, and almost all of them speak their own language.[4] Despite the overwhelming ethnic and linguistic diversity, the four largest ethnic groups make up 73.7 per cent of the total population (the two biggest ethnic groups being the Oromo and the Amhara, constituting 34.5 per cent and 26.9 per cent respectively of the total population). There are only ten ethnic groups with a population exceeding one million.[5] With the exception of major urban centres such as Addis Ababa, there is a high degree of ethnic concentration in the settlement patterns of the population.

Almost half the population adheres to Ethiopian Orthodox Christianity, a third of the population is Muslim (33.9 per cent), and a fifth of the population comprises Protestant Christians (18.6 per cent).[6] These religions crosscut ethnicity, and Orthodox Christianity and Islam have ancient roots in Ethiopia going back to the fourth and seventh centuries, respectively.[7] Although Ethiopia is one of the lowest ranking countries on the UN's Human Development index, during the past decade, its economy has been on the rise. As of 2014, its GDP was US$51 billion,

3 See World Bank, "Ethiopia: Country at a Glance," http://www.worldbank.org/en/country/ethiopia.

4 Federal Democratic Republic of Ethiopia, Population Census Commission, *Summary and Statistical Report of the 2007 Population and Housing Census*, 16–17, http://ecastats.uneca.org/aicmd/Portals/0/Cen2007_firstdraft.pdf.

5 Ibid.

6 Ibid., 17.

7 John S. Trimingham, *Islam in Ethiopia* (Oxford: Oxford University Press, 1952), 38–42.

and its per capita income adjusted for purchasing power parity was about $1,430.[8] Relatively speaking, the disparity in wealth is not substantial among the population at large, but inequality is increasing because of growing urban income inequality.[9] There also is a disparity in the level of development between the more populated central highlands and the peripheral lowlands, which have historically benefited very little from public investment in the provision of social goods and services.

Since 1995, the Ethiopian state has been reconfigured with a federal constitutional dispensation. The Constitution of the Federal Democratic Republic of Ethiopia (FDRE), establishes nine "national regional state" governments and a federal government.[10] The Constitution does not provide for administrative units below the state level but obliges the regional states to establish subregional administrative units with adequate powers to enable the people to participate directly in their own governance.[11] An important and perhaps distinguishing feature of Ethiopia's federal system is that it is established with a view to ensure the right to self-determination of the nations, nationalities, and peoples of Ethiopia.[12] The right to self-determination of the country's ethnolinguistic groups is considered to be the cornerstone of Ethiopia's federal system.[13] Because self-governance is provided as one of the components of the right to self-determination,[14] there has been an attempt to provide each major ethnic group with its own regional state or subregional administrative unit. While six ethnic groups in the country

8 See data from World Bank, https://www.google.nl/publicdata/explore?ds=d5bncppjof8f9_&met_y=ny_gnp_pcap_pp_cd&idim=country:ETH:ERI:KEN&hl=en&dl=en#!ctype=l&strail=false&bcs=d&nselm=h&met_y=ny_gdp_pcap_pp_kd&scale_y=lin&ind_y=false&rdim=region&idim=country:ETH&ifdim=region&hl=en_US&dl=en&ind=false, last updated 2 June 2016; and http://data.worldbank.org/country/ethiopia.

9 See "Global Gini Index (Distribution of Family Income) Ranking by Country," Mongabay.com, 2010, http://data.mongabay.com/reference/stats/rankings/2172.html.

10 FDRE Constitution Articles 47(1) and 50(1).

11 FDRE Constitution Article, 50(4).

12 See Fasil Nahum, *Constitution for a Nation of Nations: The Ethiopian Prospect* (Trenton, NJ: Red Sea, 1997). "Nations, Nationalities, and Peoples" is the phrase used in the Constitution to refer to ethnic groups. No distinction is provided between the three terms.

13 See Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study* (Oisterwijk, Netherlands: Wolf Legal, 2006).

14 FDRE Constitution Article 39(3).

have eponymous national regional states, where in five of which they constitute the overwhelming majority,[15] the other regional states have very diverse ethnic make-ups, necessitating a complex arrangement of special sub-state territorial administrative units.[16]

The Constitution explicitly provides for only two orders of government: the federal or national order and the regional state governments. The *zonal*, *wereda*, and *kebele* administrations are established by the regional state constitutions. Addis Ababa is accorded a special status in the Constitution as the capital city of the federal government.[17] The Constitution grants residents of Addis Ababa the right to self-governance while recognizing the special interest of the Oromia National Regional State over Addis Ababa.[18] Even though the Constitution does not foresee the establishment of territories to be directly administered by the federal government, the city of Dire Dawa has also, through federal legislation, become a chartered city and federal territory just like Addis Ababa.[19] This arrangement was meant to be provisional resolution of an intractable dispute between Oromia and Somalia regional states, both of which claimed Dire Dawa (an important commercial and industrial hub) as falling within their territory.[20]

The FDRE Constitution was adopted in 1994. The Constitution was drafted and adopted during a three-year transition that started in 1991 at the end of a long civil war that pitted the Marxist-military junta, popularly referred to as the Deurg, against various armed ethno-national political groups.[21] The end of the civil war brought these victorious liberation fronts to power. In particular, the Tigray Peoples' Liberation

15 The Harari people make up a minority in the state with the same name.

16 See also Tsegaye Regassa, "Sub-National Constitutions in Ethiopia: Towards Entrenching Constitutionalism at State Level," *Mizan Law Review* 3 (2009): 63; Zemelak Ayitenew Ayele, "The Constitutional Status of Local Government in Federal Systems: The Case of Ethiopia," *Africa Today* 58 (2012): 89–109.

17 FDRE Constitution Article 49.

18 Ibid.

19 See *The Diredawa Administration Charter Proclamation No. 416/2004*.

20 John Markakis, "The Somali in Ethiopia," *Review of African Political Economy* 23 (1996): 567.

21 For an overview of Ethiopia's constitution-making process, see Kifle Wedajo, "The Making of the Ethiopian Constitution," in *The Making of the Ethiopian Constitution*, ed. Göran Hydén, 132–43 (Pretoria: Africa Institute of South Africa, 2001); see also Theodore M. Vestal, "An Analysis of the New Constitution of Ethiopia and the Process of Its Adoption," *Northeast African Studies* 3, no. 2 (1996): 26.

Front (TPLF), which was a principal protagonist of the civil war, and its allies, which together formed the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF),[22] established the new federal system. Arguing that the formation of the modern Ethiopian state at the turn of the twentieth century was an imperial project that had resulted in the subjugation and assimilation of various ethnic groups, the EPRDF championed the right to self-determination up to and including secession and an identity-based federalism as solutions for these historical injustices. The EPRDF argued that while breaking up the Ethiopian state was undesirable, its radical reorganization was necessary to save Ethiopia from dissolution and chaos. The Constitution proclaims the "Nations, Nationalities, and Peoples of Ethiopia" as the sovereign constituent powers who came together to enter into a covenant and form the Federal Democratic Republic of Ethiopia. These legal and political propositions give Ethiopia's federal system the appearance of a *coming together* federalism in which sovereign nations, nationalities, and peoples came together to form the federation while, in reality, federalism was adopted as a means of *holding together* a country that was on the brink of disintegration.[23]

The EPRDF was the major proponent of federalism, contending that it was imperative to adopt federalism and embrace the right to self-determination in order to hold the country together and stave off its disintegration.[24] The option of federalism, particularly its ethnic component as introduced in Ethiopia, was found to be objectionable by those who considered it a harbinger to the total dismemberment of Ethiopia.[25] Traumatized by Eritrea's independence and the breakdown of Yugoslavia, Ethiopian nationalists had a hard time accepting the new federal setup. Nevertheless, the EPRDF, which was leading a transition government until the adoption of the FDRE Constitution, adopted the new Constitution through a constituent assembly in which

22 For a brief description of the party composition of the EPRDF, see below.

23 Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia*, 211.

24 Andreas Eshete, "The Protagonists in Constitution Making in Ethiopia," in *Constitution-Making and Democratization in Africa*, ed. Göran Hydén, 69–78 (Pretoria: Africa Institute of South Africa, 2001).

25 See Minase Haile, "The New Ethiopian Constitution: Its Impact on Unity, Human Rights and Democracy," *Suffolk Transnational Law Review* 20, no. 1 (1996–7): 68. See also John Young, "Regionalism and Democracy in Ethiopia," *Third World Quarterly* 19 (1998): 191, 194.

its dominance was absolute. Although the constituent assembly was popularly elected through first-past-the-post elections conducted in more than 500 single-member district constituencies, and although there were many forums of direct participation in which public opinion was sought, the EPRDF was virtually the only organized political group taking part in the constitution-making process.[26] The assembly deliberated on the draft constitution and adopted its provisions through simple majority votes.[27] All other significant political actors were either in exile or looking from the margins during the adoption of the FDRE Constitution. This was true for groups that opposed and groups that favoured the adoption of a federal system.

Since its adoption, the federal system has undergone no major constitutional, structural, or territorial reforms. Significant political developments have affected federalism in Ethiopia, however. During the early days of the federation, the dominance of the TPLF within the EPRDF as well as that of the federal government over the regional states was very visible and overwhelming.[28] After the TPLF's accumulated experience in the armed struggle against the Deurg, it had the most organized, disciplined, and cohesive leadership among the four members of the EPRDF. Furthermore, the TPLF had firm control over the newly established military and security services, which were formed largely by former TPLF fighters. The TPLF was therefore visibly dominant and played the role of tutor and overseer to the other parties within the EPRDF. Senior TPLF members who were assigned to be informal political advisers in the regional states played a prominent role in running the regional state governments.[29]

Over time, the dominance of a single party within the EPRDF as well as that of the federal government over the regional states has become less

26 See Meaza Ashenafi, "Ethiopia: Process of Democratization and Development," in *Human Rights under African Constitutions: Realizing the Promise for Ourselves*, ed. Abdullahi Ahmed An-Na'im (Philadelphia: University of Pennsylvania Press, 2003), 31–3.

27 Article 11, Transitional Period Charter of Ethiopia No. 1.

28 John Young, "Ethnicity and Power in Ethiopia," *Review of African Political Economy* 23 (1996): 538.

29 International Crisis Group, *Ethiopia: Ethnic Federalism and Its Discontents*, Africa Report no. 153, 4 September 2009, 17, http://www.crisisgroup.org/~/media/Files/africa/horn-of-africa/ethiopia-eritrea/Ethiopia%20Ethnic%20Federalism%20and%20Its%20Discontents.ashx.

visible (although still very much present).[30] This change has been a result of two developments. First, the other parties within the EPRDF recruited members who were more educated and qualified than their original founders. Second and perhaps more important was the split within the TPLF in 2001, which led to the expulsion of many of its senior leaders. Together these developments reduced what had been a lopsided relationship between the TPLF and the other members of the EPRDF and allied parties.

When the FDRE Constitution was adopted, the very idea of a federal system was controversial.[31] Although they were not part of the constitution-making process, there were significant political actors who argued that maintaining a unitary system was essential to ensure the state's territorial integrity. However, over the past two decades, it has become quite clear that federalism will stay, at least as long as the EPRDF is in power. In May 2015, the EPRDF won 500 of the 547 seats in the House of Peoples' Representatives, while EPRDF allies won the other 47 seats. None of the political actors in the mainstream consider a unitary state to be a viable option. In principle, federalism has come to be seen as the most appropriate compromise between Ethiopia's centrifugal and centripetal forces.[32] Almost all major opposition political groups and even the most vehement critics of the EPRDF seem to support the idea of federalism, although they would prefer a federalism with less pronounced or no ethnic component. Some criticize the ethnic dimension of the federal system, the distribution of powers among the different orders of government, as well as the inclusion of a secession right that entitles nations, nationalities, and peoples to secede from the FDRE.[33]

30 Jan Záhořík, "Ethiopian Federalism Revisited," in *Africanists on Africa: Current Issues*, ed. Patrick Chabal and Peter Skalník (Berlin: LIT Verlag, 2009), 136. See also Christophe Van der Beken, "Federalism and the Accommodation of Ethnic Diversity: The Case of Ethiopia," in *Proceedings of the 3rd European Conference on African Studies*, 2009, 14; Jon Abbink, "Ethnic-Based Federalism and Ethnicity in Ethiopia: Reassessing the Experiment after 20 Years, "*Journal of Eastern African Studies* 5, no. 4 (2011): 596–618.

31 Aaron Tesfaye, *Political Power and Ethnic Federalism: The Struggle for Democracy in Ethiopia* (Lanham, MD: University Press of America, 2002), 5.

32 All major opposition political groups and even the most vehement critics support the idea of federalism these days, although they would prefer a federalism with less pronounced or no ethnic component.

33 See Assefa Mehretu, "Ethnic Federalism and Its potential to Dismember the Ethiopian State," *Progress in Development Studies* 12 (2012): 113–33; and Alem Habtu, "Multiethnic Federalism in Ethiopia: A Study of the Secession Clause in the Constitution," *Publius: The Journal of Federalism* 35 (2005): 313–35.

However, there are those who are happy with the federal arrangement as it is provided in the Constitution but who criticize the practice on the ground that the system is neither federal nor democratic. These groups contend that behind the rhetoric of federalism and empowerment of hitherto oppressed ethnic groups, the Ethiopian state is still centralized and oppressive.

Ethiopia's federal system is unusual in that the judiciary has no significant role in devising the system's doctrines, principles, and rules. This is so because, as will be discussed below, the Constitution and subsequent laws regarding constitutional interpretation have precluded the judiciary from undertaking constitutional review and interpreting the Constitution.[34] The role of interpreting the Constitution and resolving constitutional disputes has been entrusted to the House of Federation.[35] The House of Federation is a non-legislative federal house with significant powers, particularly over the functioning of the federal system. These powers include the authority to interpret the Constitution, determine the formula for distributing federal transfers to the regional states, resolve disputes between regional states, determine matters of civil law on which there is need for federal legislation, and authorize federal intervention into regional states.[36]

2. Structural Features of Ethiopian Federalism

As indicated earlier, the FDRE Constitution provides only for federal and state governments. The Constitution does not provide for a third order of government; it allows the regional states to determine their own subregional administrative structures. The only constitutional obligation the states have in organizing their internal administrative structure is the duty to ensure that "adequate power shall be granted to the lowest units of government to enable the People to participate directly in the administration of such units."[37] Of course, this right is relevant only to ethnic groups constituting a minority in a regional state where another ethnic group constitutes a majority or in regional states

34 See Article 83(1) of the FDRE Constitution. See also "Consolidation of the House of the Federation and Definition of Its Powers and Responsibilities Proclamation No. 251/2001" and "Council of Constitutional Inquiry Proclamation No. 250/2001."

35 FDRE Constitution Article 62(1).

36 See FDRE Constitution Article 62.

37 FDRE Constitution Article 50(4).

constituted by various ethnic groups. Taking their cue from these provisions of the Constitution, the state constitutions guarantee at least a two-tier system of local government.[38] They also provide special local governance units to accommodate minority ethnic groups or different ethnic groups that have no regional state of their own.[39]

The FDRE Constitution allocates legislative, executive, and judicial powers to both orders of government.[40] The allocation of powers is based principally on an extensive list of subject matters designated to fall within the jurisdiction of the federal government.[41] The Constitution also provides concurrent powers mainly with regard to taxation.[42] All powers that are not given expressly to the federal government or designated to be concurrent powers are reserved by the Constitution to the states.[43] Even though all residual powers are allocated to the states, the Constitution, perhaps superfluously or for good measure, still lists some powers belonging to the states. One reading of the list of state powers under Article 52(2) is that it partially fleshes out residual state powers. Furthermore, it is also possible to think of it as fortifying some of the essential powers of the regional states and also providing the states with administrative jurisdiction on matters such as land and natural resources over which the federal government has legislative jurisdiction. Had it not been for Article 52(2), the federal legislature's competence to enact laws on these matters would have given the federal government executive jurisdiction, because, in principle, executive and legislative powers go hand in hand in the Ethiopian federation, just like other countries that have a system of legislative federalism.

The powers given to the federal government include the usual subjects, such as defence, foreign affairs, regulation of interstate and

38 See the Revised Constitution of the Oromia National Regional State Constitution, Articles 70–101; the Revised Constitution of the Somali National Regional State, Articles 74–98; the Revised Constitutions of the Southern Nations Nationalities and Peoples' Regional State, Articles 80–114; the Revised Constitution of the Gambella People's National Regional State, Articles 75–109; the Constitution of the National Regional State of Tigray, Articles 68–69; the Revised Constitution of the Amhara National Regional State, Articles 73–107. See also Tsegaye Regassa, "Sub-National Constitutions in Ethiopia: Towards Entrenching Constitutionalism at State Level," *Mizan Law Review* 3 (2009): 61.

39 Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia*, 435.

40 FDRE Constitution, Article 50(2).

41 FDRE Constitution, Articles 51 and 55.

42 FDRE Constitution, Article 98.

43 FDRE Constitution, Article 52(1).

foreign commerce, and transportation.[44] They also include some very broad powers stated in quite general terms, including but not limited to the power to formulate policies for overall economic and social development, draw up and implement plans and strategies of development, and establish national standards and basic criteria for the evaluation of policies in public health, education, science, technology, culture, and the protection and preservation of historical legacies.[45] Even though residual powers belong to the states, given the long list of federal powers and how some of these powers are expressed in broad terms, the balance of power seems to tip to the federal government. This is so particularly when we take into account the fact that most of the lucrative sources of revenue are allocated to the federal government, such as the power to "levy and collect custom duties, taxes and other charges on imports and exports" and to "levy and collect income, profit, sales and excise taxes on enterprises owned by the Federal Government."[46]

The Constitution's division of power allows for some flexibility. In addition to the vague and broad language that lists some of the powers of the federal government, the possibility of delegating federal powers to regional states provides additional flexibility in the distribution of competences between the two orders of government.[47] Although the Constitution provides that federal powers can be delegated to the states, it does not stipulate the procedure through which such delegation is to be made; hence, no formal delegation has been made yet. However, though not formally designated as delegations of federal power, there are some instances in which regional states execute federal legislation. The difficulty is that there is no indication that the states have consented to such arrangements. As such, instead of federal powers being delegated to regional states, it could be seen that regional state structures are being commandeered to execute federal policies and laws. For example, some environmental protection legislation adopted by the federal legislature imposes an obligation on the regional states to establish environmental agencies and enforce environmental standards adopted by the federal government.[48]

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44 FDRE Constitution, Articles 51(6, 8, and 12).

45 FDRE Constitution, Articles 51(2 and 3).

46 FDRE Constitution, Article 97(1) and (3).

47 FDRE Constitution, Article 50(9).

48 See Environmental Protection Organs Establishment Proclamation No. 295/2002, Article 25; Environmental Impact Assessment Proclamation No. 299/2002, Article 12; and Environmental Pollution Control Proclamation No.300/2002, Article 7.

Given that the federal legislature unilaterally imposed this duty on the regional states, it is difficult to characterize this as a delegation of powers.

The Constitution is also silent on delegation of state powers to the federal government. However, in practice, the federal government has started to exercise the important power of administering land, which is expressly a power given to the states by the Constitution.[49] The federal government claims that it is exercising this power because it has been delegated authority by the concerned regional states.[50] Unfortunately, this matter has not been brought before the House of Federation; hence, there is no authoritative pronouncement on the constitutionality of federally administered land banks. This and similar practices show that the allocation of power by the Constitution is construed rather loosely, and its interpretation is determined largely by political actors through practice and usage.

What lies beneath is the centralized power structure of the ruling party, which is underpinned by the principle of democratic centralism.[51] This has meant that regardless of the distribution of powers in the Constitution, senior leaders of the ruling party who control the federal government can use the party channel to circumvent or, when necessary, ignore the constitutional allocation of powers. Another important inbuilt flexibility in the Constitution is a provision that empowers the House of Federation to authorize enactment of federal legislation on any civil matter that needs to be regulated by federal legislation in order to foster the creation of one economic community.[52] So far this power has been exercised only once, with regard to urban land registration.[53]

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49 FDRE Constitution, Article 52(2)(d).

50 Getnet Alemu, *Rural Land Policy, Rural Transformation and Recent Trends In Large-Scale Rural Land Acquisitions In Ethiopia*, European Report on Development, 2012, 15, http://erd-report.eu/erd/report_2011/documents/dev-11-001-11researchpapers_alemu.pdf. See also Alemu, "Understanding Land Investment Deals in Africa Country Report: Ethiopia" (Oakland Institute, 2011), 27. The matter has not been presented to the House of Federation; therefore, the House's position on the issue is not known.

51 Theodore M. Vestal, *Ethiopia: A Post-Cold War African State* (Westport, CT: Greenwood Publishing, 1999), 104.

52 FDRE Constitution, Article 62(2).

53 The House of the Federation was called upon to resolve a dispute among parliamentarians on whether the House of Peoples' Representatives has the power to legislate on nationwide urban land registration. See Getnet Alemu, "Rural Land Policy, Rural Transformation and Recent Trends in Large-scale Rural Land Acquisitions in Ethiopia," https://ec.europa.eu/europeaid/sites/devco/files/erd-consca-dev-researchpapers-alemu-20110101_en.pdf.

An important area on which the Constitution envisions federal legislation and state execution is land. The Constitution empowers the federal government to enact a federal land-law while providing the states the power to administer land and implement that law.[54] Although the constitutional language used does not imply that the law enacted by the federal government should be framework legislation, in practice states have adopted their own land administration law, and the federal land-law is seen as framework legislation.[55] In fact, some states have even adopted land laws on the basis of which they have redistributed land. This issue is of particular importance because all land is publicly owned and agriculture is the mainstay of the country's economy, providing livelihood for nearly 80 per cent of the population.

Another area involving the execution of federal law by the states is criminal law. The Constitution empowers the federal legislature to enact a criminal code and authorizes the states to adopt criminal laws on matters not covered specifically by federal criminal laws.[56] On this basis, the federal government has adopted a comprehensive criminal code. Given that this is federal legislation, one would expect its enforcement to be the task of the federal police, prosecutor, and judiciary. In reality, the Federal Courts Establishment Proclamation has indirectly left the application of a large part of the criminal code to the regional states. The proclamation has designated some crimes as federal crimes, but all other crimes are understood to be non-federal, and their investigation and prosecution are left for the regional states.[57]

Similarly in other areas, such as environmental law, the federal government has enacted laws that are predicated partially on the administrative apparatus of the regional states for their execution.[58] While these practices could be seen as instances of delegation, there is no indication that the consent of the states has been secured in advance or that the federal government provides the financial compensation it is constitutionally required to provide to the states when it delegates its powers

54 FDRE Constitution, Articles 51(5) and 52(2)(d).

55 Abebe Mulatu, *A Review and Analysis of Land Administration & Use Legislation and Applications of Tthe Federal Democratic Republic Ethiopia and the Four Regional States of Amhara, Oromia, SNNPR and Tigrai*, Ethiopian Civil Society Network on Climate Change (2011), 7.

56 FDRE Constitution, Article 55(5).

57 Federal Court Proclamation No. 25/1996, Article 4.

58 See Environmental Pollution Control Proclamation No. 300/2002

and responsibilities.[59] However, such issues do not give rise to public disagreements between the states and the federal government. The ruling party and its affiliates have absolute control over both regional and federal governments, so the trend so far is that neither the states nor the federal government jealously guard their competences and seem to accept in equanimity acts of the other that could be seen as deviations from the constitutional allocation of power.

An interesting aspect of the allocation of power between the states and the federal government is the constitutional delegation of federal judicial powers to the regional states. During the adoption of the Constitution, mindful of the lack of trained legal professionals who could fill parallel federal and state judiciaries, the constitutional drafters delegated the powers of the federal high courts and federal first-instance courts to the regional supreme courts and high courts respectively.[60]

The Constitution does not have a provision equivalent to the U.S. federal supremacy clause and does not clearly say which law will prevail in the case of inconsistency.[61] However, the most convincing view on this question is that federal law should prevail where federal and state powers overlap. In all other cases where the matter falls within the exclusive jurisdiction of the federal or state government, inconsistencies are to be resolved by invalidating the law that was enacted in contravention to the constitutional delineation of powers. This position is supported by the constitutional provision that obliges states and the federal government to respect each other's sphere of competence.[62] Because the power of interpreting the Constitution is vested in the House of Federation, in theory, this house has the ultimate power to decide the competences of the states and the federal government.

II. The Ethiopian Judiciary and the House of Federation

The FDRE Constitution establishes a Federal Supreme Court invested with "supreme federal judicial authority," and it mandates regional states to establish their own supreme, high, and first-instance courts.[63]

59 FDRE Constitution, Article 94(1).
60 FDRE Constitution, Article 78(2) and Article 80(2) and (4).
61 Assefa Fiseha, "Federalism and the Adjudication of Constitutional Issues: The Ethiopian Experience," *Netherlands International Law Review* 52 (2005): 1, 10.
62 FDRE Constitution, Article 50(8).
63 FDRE Constitution, Article 78(2) and (3).

The Constitution gives the House of Peoples' Representatives (HPR) the power to establish the federal high court and first-instance courts it deems necessary, either nationwide or in some parts of the country only.[64] Until the establishment of federal high and first-instance courts by the House of Peoples' Representatives, the Constitution provided that the powers of the federal high court and first-instance courts would be exercised by state supreme courts and state high courts respectively.[65] This arrangement was seen as temporary because the Constitution gave the federal legislature the option of establishing federal high and first-instance courts and put an end to the delegation of judicial powers. Accordingly, the federal legislature has established high courts and partially revoked the delegated judicial powers of five of the regional states where the regional judiciaries were deemed lacking in technical competence.[66] The HPR has also established federal courts in the capital city Addis Ababa and in the city of Dire Dawa.[67] The Constitution mandates regional states to establish their own supreme, high, and first-instance courts.[68]

In addition to ordinary state and federal courts, other organs exercise judicial power. In Dire Dawa and Addis Ababa, there are municipal courts with their own first-instance authority and appellate courts established by the respective charters of the cities enacted by the regional House of Representatives.[69] The cities also have their own small-claims social courts as well as a number of quasi-administrative tribunals.[70] Disputes over jurisdiction among federal and municipal courts of the two cities are resolved by the Federal Supreme Court.[71] Furthermore, both the state and federal orders of government include

64 Ibid.

65 Ibid.

66 Federal High Court Establishment Proclamation No. 322/2003. This proclamation establishes federal high courts in the states of Afar, Benshangul, Gambella, Somali and Southern Nations Nationalities and Peoples.

67 Federal Court Proclamation No. 25/1996, Article 24(2).

68 FDRE Constitution, Article 78(3).

69 Addis Ababa City Government Revised Charter Proclamation No. 361/2003, Article 43; and the Dire Dawa Administration Charter Proclamation No. 416 12004, Article 35.

70 Addis Ababa City Government Revised Charter Proclamation No. 361/2003, Articles 46–50; and Dire Dawa Administration Charter Proclamation No. 416 12004, Articles 38–41.

71 Addis Ababa City Government Revised Charter Proclamation No. 361/2003, Articles 42(1); and Dire Dawa Administration Charter Proclamation No. 416 12004, Article 34(1).

sharia courts that decide on family and succession disputes among parties who have agreed to settle their disputes in accordance with Islamic law.[72]

In the federal judicial hierarchy, the Federal First Instance court exercises only original jurisdiction, while the Federal High Court has both original and appellate jurisdictions.[73] The Federal Supreme Court has very limited original jurisdiction and serves as the highest court of appeal in the federal judiciary.[74] The cassation division of the Federal Supreme Court exercises the power of cassation review when petitioners contend there has been a fundamental error of law in the final decision of either a federal or state court.[75] The decision of the cassation division, which is decided with a panel of five or more judges, sets a binding precedent both for federal and state courts.[76] The Constitution does not lay down in detail the structure and powers of the judiciary. As a result, the power and the structure of the federal judiciary are provided for largely by a proclamation enacted by the House of Peoples' Representatives.[77] There are many constitutionally problematic issues arising out of this proclamation from the perspective of federalism. One could point to four such issues in particular.

The first problematic aspect of the proclamation is the blurring of the subject-matter jurisdiction of federal and state courts. The Constitution stipulates that the Federal Supreme Court shall have the highest and final judicial power over federal matters and that state supreme courts shall have the highest and final judicial power over state matters.[78] The Constitution does not really say what constitutes state matters or federal matters for the purpose of the judiciary. Logically one would suppose that federal courts will adjudicate disputes arising under federal law, and state courts will adjudicate matters arising under state law. The Federal Courts Establishment Proclamation provides something

72 See Federal Courts of Sharia Consolidation No. 188/1999; see also Mohammed Abdo, "Legal Pluralism, Sharia Courts, and Constitutional Issues in Ethiopia," *Mizan Law Review* 5, no. 1 (2011): 72.

73 Federal Courts Proclamation No. 25/1996, Articles 11–15 as amended by Federal Courts (Amendment) Proclamation No. 138/1998 and Federal Courts Proclamation Re-amendment Proclamation No. 454/2005.

74 Federal Courts Proclamation No. 25/1996, Article 8 and 9.

75 Federal Courts Proclamation No. 25/1996, Article 10.

76 Federal Courts Proclamation Re-amendment Proclamation No. 454/2005, Article 2.

77 Federal High Court Establishment Proclamation No. 322/2003.

78 FDRE Constitution, Article 80(1 and 2).

along these lines in principle.[79] Then, after laying down the principle, the proclamation goes on to enumerate the civil and criminal jurisdiction of federal courts.[80] The enumerated criminal matters leave a significant swathe of the criminal code, which is a federal law, outside the jurisdiction of federal courts. On civil matters, the proclamation provides that depending on who is a party to a civil litigation (e.g., in suits involving a foreign party), federal courts should assume jurisdiction even when the applicable law is a state law. Such allocation of judicial power has not been provided for in the Constitution, and the Federal Courts Establishment Proclamation seems to be an attempt to fill these constitutional gaps.

The second difficult issue is the cassation power of the Federal Supreme Court over the decisions of the state courts on matters that fall squarely within state jurisdiction.[81] This practice is based on the Federal Courts Establishment Proclamation and entitles the federal judiciary not only to interpret state laws but also to set binding precedents that must be followed by state courts in interpreting their own state law.[82] This is so despite the fact that state supreme courts have their own cassation divisions to review basic errors of law, which, according to the FDRE Constitution, have power of cassation "over any final court decision on State matters which contains a basic error of law."[83]

Those who argue in favour of the constitutionality of federal cassation over state matters invoke Article 80(3)(a) of the Constitution, which provides: "The Federal Supreme Court has a power of cassation over *any final court decision* containing a basic error of law."[84] Those in favour of the practice have interpreted "any final court decision" as including decisions by state courts on matters falling within state jurisdiction. Those opposed to this practice argue that the power of cassation of the Federal Supreme Court should not extend beyond decisions of state courts exercising constitutionally delegated federal judicial authority. This practice, in effect, gives an organ of the federal judiciary

79 Federal Courts Proclamation No. 25/1996, Article 3.
80 Ibid., 4 and 5.
81 See Muradu Abdo, "Review of Decisions of State Courts over State Matters by the Federal Supreme Court," *Mizan Law Review* 1, no. 1 (2007): 61–74.
82 Federal Courts Proclamation No. 25/1996, Article 10; and Federal Courts Proclamation Re-amendment Proclamation No. 454/2005, Article 2.
83 FDRE Constitution, Article 80(3)(b) (emphasis added).
84 Emphasis added. See Abdo, "Review of Decisions of State Courts," 68.

the opportunity to have the last say on questions of state law. Taken together with the legally binding precedent-setting power of the cassation division of the Supreme Court, this practice enables the cassation division of the Federal Supreme Court to dictate the interpretation of state law by state courts. This is very problematic and seems to run counter to the spirit and logic of the federal arrangement established in the Constitution.

The third constitutionally problematic issue, from the perspective of federalism, is the language of adjudication in state courts that exercise constitutionally delegated federal judicial authority. Although these courts are applying federal law and acting as federal courts exercising a delegated power, they normally do not use the working language of the federal government; instead, they use the working language of their respective states. This is particularly the case in states and sub-state autonomous administrative units that have working languages different from the federal working language. The matter is further complicated because most of these cases end up before the Federal Supreme Court for appellate or cassation review where Amharic is the working language.

When we come to substantive laws, almost all of the substantive legal codes of Ethiopia are taken from the civil law tradition, while procedural laws are modelled after common law countries. English is the most widely spoken foreign language in Ethiopia and given it is the medium of instruction in higher education, so Ethiopia's legal professionals have very limited access to materials and commentaries from civil law countries. So comparative learning and research as well as legal education are highly influenced by American common law literature, which is relatively more accessible. The influence of the common law is also due to the historical and contemporary links of legal education in Ethiopia with common law countries such as the United States.

Ethiopia's Constitution of 1994 stands apart from most constitutions adopted during the twentieth century in that it does not provide for judicial review or a specialized constitutional court. Some members of the drafting commission proposed the establishment of a constitutional court or decentralized judicial review, but the driving force behind the making of the new constitution, the EPRDF, rejected both proposals.[85]

85 See Minutes of the 94th Regular Session of the Council of Representatives of the Transitional Government of Ethiopia (unpublished), 213–17; and Minutes of the Constitutional Assembly (unpublished) 5:4–19, 1994.

Instead of a constitutional court or constitutional review by the ordinary judiciary, those who adopted and ratified the Constitution provided for a system of constitutional interpretation in which the upper house of parliament (i.e., the House of Federation) with the help of the Council of Constitutional Inquiry (CCI) serves as the authoritative and ultimate interpreter of the Constitution.[86]

The House of Federation is a non-legislative house in which every ethnic group in the country is represented by at least one representative, with one additional representative for every one million of each group's population.[87] Members of the House of Federation can be elected by the state councils of the regional states or be directly elected by members of the ethnic group they represent (the practice so far is election by state councils).[88] Although the House of Federation is supposed to provide the final and authoritative interpretation of the Constitution, the CCI is an auxiliary organ that is supposed to provide expert assistance to the House of Federation on the task of constitutional interpretation. This council is composed largely of lawyers and includes as ex officio members the president and the deputy president of the Federal Supreme Court.[89] Constitutional disputes arising in ordinary courts or raised outside the courts are supposed to be presented to the CCI first, and the council is expected to issue a recommendation that can be adopted or rejected by the House of Federation.[90]

The CCI can also reject a request of constitutional interpretation or a constitutional issue submitted before it if it is of the opinion that the matter does not require constitutional interpretation.[91] In such cases, the petitioner for interpretation or the applicant can appeal to the House of Federation.[92] In practice, most petitions brought before the CCI are rejected as not necessitating constitutional interpretation; so far, therefore, only a few of such appeals have been successful.

The number of petitions submitted before the council is small and many of them are rejected, so the House of Federation has decided only a handful of cases. Such decisions, however, are binding in all similar

86 FDRE Constitution, Articles 62(1), 82 and 83.
87 FDRE Constitution, Articles 61(1) and (2).
88 FDRE Constitution, Article 61.
89 FDRE Constitution, Article 82(2).
90 FDRE Constitution, Article 84(1).
91 Council of Constitutional Inquiry Proclamation No. 250/2001, Article 17(3).
92 Ibid., Article 18.

cases and set a precedent.[93] Unfortunately, the House has so far published only three of its decisions.[94] Apart from constitutional law scholars, the Council of Constitutional Inquiry and the House of Federation receive very little attention from legal practitioners and the media. Members of the CCI engage with the council part-time, and most have full-time jobs. Their meetings are never public and their proceedings are not published. Normally, the House of Federation also meets only twice a year,[95] and the press and the public at large pay very little attention to its activities as the ultimate interpreter of the Constitution. Cognizant of the problems in the institutional set up of constitutional interpretation, a bill to reform the organization of the CCI was adopted in August 2013.[96]

Given that the system of constitutional interpretation described above is unusual, why did the framers of the Constitution adopt this system? In the debates leading up to the Constitution's adoption, proponents of the system presented arguments to reject constitutional review by ordinary courts or a constitutional court. One major argument revolved around the nature of constitutional interpretation. Proponents argued that the power to interpret a constitution is, in effect, the power to amend a constitution in the guise of giving meaning to a constitutional text.[97] They also contended that giving unelected judges such a power over a document that is an expression and embodiment of the sovereignty of the nations, nationalities, and peoples (NNPs) of Ethiopia would be undemocratic.[98] They argued further that the Constitution is not just a legal document but also a pre-eminently political document; hence, its interpretation cannot be considered a mere technical exercise to be left to professionals but a political act in which the nations, nationalities, and peoples of Ethiopia in whom all sovereign power reside should have the final say.[99] So the arguments against constitutional review by judges were rooted in the equation of constitutional interpretation with

93 Consolidation of the House of the Federation and Definition of Its Powers and Responsibilities Proclamation No. 251/200, Article 11(1).

94 See *Journal of Constitutional Decisions* 1, The House of the Federation of the Federal Democratic Republic of Ethiopia 1.2007 (2000 Ethiopian calendar).

95 FDRE Constitution, Article 67(1).

96 Council of Constitutional Inquiry Proclamation No. 798/20, 13.

97 See Minutes of the 94th Regular Session of the Council of Representatives of the Transitional Government of Ethiopia (unpublished) 213–17; and Minutes of the Constitutional Assembly (unpublished), 5:4–19, 1994.

98 Ibid. See also FDRE Constitution, Article 8(1).

99 Ibid.

constitutional amendment, in the nature of the constitution as a political document, the need to maintain the sovereignty of Ethiopia's NNPs, and the perceived undemocratic nature of constitutional review by judges.

Therefore, Ethiopia's constitutional system entrusts a political organ, namely, the House of Federation, not courts, with the task of resolving disputes that might arise in the allocation of powers between the orders of government.[100] While constitutional courts or the ordinary judiciary serve as umpires for these kinds of disputes in most other federal states, in Ethiopia there is neither an ordinary court nor a specialized constitutional court with a mandate to interpret the Constitution in order to resolve federalism-related disputes.

The framers of the Constitution were very suspicious of the judiciary and feared that the new constitutional order could be undermined through the guise of interpretation by judges. To understand this fear, it is important to realize the political and sociological reality of the period in which there was a huge gap between those who were framing the Constitution and those who staffed the judiciary. The political sponsors of the Constitution were mainly ethno-nationalist rebels who had fought for almost two decades to overthrow the Dergue. They viewed those who staffed the judiciary, the bureaucracy, and academia as members or sympathizers of the previous regime. The political forces behind the new Constitution were rebels interested in a complete overhaul of the system; they saw the judiciary as an establishment institution with views that were not aligned with the new federal dispensation.

There has been much controversy among constitutional law scholars regarding whether or not the ordinary judiciary has residual or inherent power to interpret the Constitution. Some have also argued that the drafters of the Constitution did not intend to strip the judiciary of all power to interpret the Constitution. These arguments, though animating and interesting in academia, have not been well received in practice. Not to leave any doubt on the matter, the House of Peoples' Representatives has adopted two proclamations that unequivocally bar the ordinary judiciary from entertaining constitutional disputes.[101] Contrary to some views and even indications from the Council of Constitutional Inquiry that the constitutionality of administrative acts, as

100 Adem Kassie Abebe, "Umpiring Federalism in Africa: Institutional Mosaic and Innovations," *African Studies Quarterly* 13, no. 4 (2013): 65–7.

101 Assefa Fiseha, "Separation of Powers and Its Implications for the Judiciary in Ethiopia," *Journal of Eastern African Studies* 5, no. 4 (2011): 706.

opposed to legislative acts, could be reviewed by ordinary courts, the proclamations clearly provide that all constitutional disputes concerning acts of legislatures (federal and state) or acts of executives (federal and state) are to be decided by the House of Federation.

The courts have shown little inclination to carve out a role for themselves in the interpretation of the Constitution.[102] To avoid the trouble of being referred to the House of Federation, lawyers normally prefer to rely on statutory as opposed to constitutional provisions when they make claims. Courts also are careful not to be seen as usurping the power of the House of Federation; hence, they refrain from expounding on the meaning and implication of constitutional provisions. If and when they do refer to constitutional provisions, it is normally on matters considered to be politically non-sensitive or in perfunctory declarations of the constitutionality of a legislative or executive action in question. Therefore, the ordinary courts have not played a significant role in developing a constitutional jurisprudence.

III. Federalism Jurisprudence

Although it has been more than two decades since the FDRE Constitution came into force, very little constitutional jurisprudence has been developed in Ethiopia. This is particularly true in relation to federalism. The House of Federation has yet to determine a "division of power" dispute in exercising its authority as the final interpreter of the Constitution.[103] The few federalism-related constitutional disputes disposed of by the House were mainly related to the question of self-determination[104] and other parts of the Bill of Rights. The structural

102 Takele S. Bulto, "Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory," *African Journal of International and Comparative Law* 19, no. 1 (2011): 100.

103 Though, strictly speaking, we might not call them constitutional disputes, the House has also been called upon to resolve border disputes among the regional states. The most contentious and famous example is the Oromia-Somali Regional States Border case (2002). See *A Decision Rendered Regarding the Identity Claim of the Silte People*. See *Journal of Constitutional Decisions* 1.

104 A good example is the *Silte Case* (2001), which concerned whether the Silte constitute a distinct nation, nationality, and people. Until then, the Silte were regarded as a subgroup of the Gurage ethnic group. Representatives of the Silte successfully petitioned the House of Federation for their right to self-determination and were able to get recognition as a distinct ethnic group. See Ahmed Shide, "Conflicts along Oromia-Somali State Boundaries: The Case of Babile District," in *First National Conference on Federalism, Conflict and Peace Building* (Addis Ababa: United Printers, 2003), 96–112.

parts of the Constitution and those related to the allocation of powers between the federal and state governments have yet to be interpreted by the House. During the early days after the adoption of the Constitution, the CCI was presented with a challenge to the constitutionality of the land redistribution undertaken by the state of Amhara. The petitioners argued that a regional state does not have the power to redistribute land without a federal law authorizing such a measure, because the Constitution allocates the power to enact legislation for the regulation of land to the federal government and assigns to the regional states the power to administer land. The petitioners argued that the land redistribution carried out by the state is inconsistent with the constitutional distribution of competences between the two orders of government. The CCI dismissed the petition because it decided that Amhara was within its power to administer land when it undertook the redistribution of rural land; therefore, there was no need for constitutional interpretation, and it rejected the petition without referring it to the House of Federation.[105] The Council also pointed out that the House of Peoples' Representatives has adopted a land law that retroactively endorses state laws on land administration as long as they are not contrary to the federal Land Administration Proclamation of 89/1989.[106] The House of Federation did not, therefore, need to decide on the petition. The House of Peoples' Representatives followed up this decision by enacting a federal land administration law that retroactively endorsed the land law issued by Amhara and by other regional states as well. In the end, the case was not presented to the House of Federation and was dismissed after review by the CCI.

Although it is not a decision emanating from an adversarial case and is not widely reported, the House of Federation has issued an advisory opinion on the respective competence of the regional states and the federal government to enact legislation on family matters.[107] The advisory opinion was issued on the basis of a request by the Office of the Prime Minister of the FDRE. In its opinion, the House expressed the view that while the federal government can adopt a family law for the two

105 *Biyadglegn Meles et al. v. the Amhara National Regional State* (Council of Constitutional Inquiry, 1998); case unpublished, on file with the author.

106 Ibid.

107 Constitutional Inquiry Raised regarding the Promulgation of Family Law and the Decision of the House of Federation (April 2000), unpublished and available on file with the author.

chartered federal cities, the regional states can adopt family laws for the rest of the country on the basis of their residual power. Accordingly, the Federal Family Code adopted by the House of Peoples' Representatives is applicable only in Addis Ababa and Dire Dawa. Meanwhile, all regional states, except Afar and Somali, have adopted their own family laws.

Another recurrent federalism-related case the House of the Federation has to entertain involves to the right to self-determination. Because the Constitution recognizes the right of ethno-linguistic communities to full self-government, including the right to establish their own state within the federation, the petition of a group to be recognized as a separate community is directly related to the federal system. In dealing with these petitions, every group's effort to be recognized as a separate ethnic community necessarily involves the application of the constitutional criterion of peoplehood. However, the House, true to its political nature, has never systematically dealt with the meanings of the criteria laid down in the Constitution. Hence, even in this most recurrent of federalism cases, the House has not developed a meaningful jurisprudence.[108]

As can be seen from this discussion, save for an advisory opinion and a case that could have (perhaps should have) made it to the House of Federation, there is very little federalism case law in Ethiopia. With the enactment of the proclamations consolidating the powers of the House of Federation and the Council of Constitutional Inquiry, the House of Peoples' Representatives unequivocally expressed its view that the judiciary has no power to adjudicate constitutional disputes. While some scholars have argued that these proclamations are of dubious constitutionality, the judiciary has shied away from assuming a substantial role in resolving constitutional disputes. Occasionally the courts interpret some provisions of the constitutional bill of rights they consider to be innocuous, such as those concerning the rights of children,[109] but they have not shown any inclination to invoke other provisions of the Constitution.

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108 For the most recent of these petitions, see Minutes of the House of the Federation, 4th Parliamentary Period, 5th Year, 2nd Ordinary Session, 24 June 2015.

109 See, for example, *Tsedale Demissie v. Ato Kifle Demissie,* Federal Supreme Court Cassation Division Cassation file no. 23632, 5 October 2007, where the Cassation Division Cassation interpreted and applied the principle of the best interest of the child as enshrined in the FDRE Constitution.

Formally speaking, the House of Federation assisted by the CCI is expected to serve as the constitutional umpire and settle federalism-related disputes. However, the House cannot be said to have discharged this function either. If neither the courts nor the House of Federation are resolving federalism-related disputes, who is resolving disputes? This brings us to another peculiar aspect of the Ethiopian federal system as it has evolved during the last two decades.

Normally, federalism-related disputes arise in either of two scenarios. In the first scenario, the federal government and states disagree about the boundaries of their respective powers. In the second scenario, private entities aggrieved by an act of a federal or state government challenge the constitutional competence of a federal or state government to take the administrative or legislative measure that they are complaining against. In Ethiopia, neither scenario is likely to lead to litigation before a court of law or the House of Federation.

Such disputes are unlikely to end up in courts for the obvious reason that the Constitution and subsequent legislation have denied the courts the power to adjudicate them. These disputes are unlikely to be presented to the House of Federation for several reasons. The most important is that the ruling party, the EPRDF, controls directly or through its affiliates all regional state governments, the House of Federation, and the federal government. Formally, the EPRDF is a coalition of four regional and ethnic parties, each administering a major national regional state. Three of these parties – the TPLF, the Amhara National Democratic Movement, and the Oromo Peoples' Democratic Organization – are supposed to represent the three biggest ethnic groups in Ethiopia. The other member of the coalition is the Southern Ethiopian People's Democratic Movement, which is an amalgam of parties that ostensibly represent the ethnic groups that comprise the Southern Nations Nationalities and Peoples' Regional State. The remaining regional states are administered by other parties that are not formal members of the EPRDF but are affiliated with it in the status of partners. These parties are also included in the federal government, which has been controlled by the EPRDF since the inauguration of the FDRE. Formally, this gives the impression that Ethiopia has a very pluralistic federalism in which no party is administering more than one regional state.

However, despite this appearance of pluralism and decentralization, the EPRDF is a very centralized and hierarchical party. The top leadership of the party controls member organizations of the EPRDF as well

as its partner organizations.[110] All major policy decisions and initiatives emanate from the centre or must secure the approval of the central party leaders. Furthermore, in response to the principle of "democratic centralism," which is strictly observed within the EPRDF, despite internal disagreements and debate before decisions are made by the party leadership, once a decision has been adopted, the rank and file as well as the leaders of the party are expected to fully endorse the decision as if they had agreed with it from the beginning. These debates are often concealed from the public and even from ordinary members of the party. Usually only the top party leaders are privy to these debates. Once the debate is over and a decision has been adopted, it is the duty of all party members to implement the decision to the best of their abilities. No dissent or reservation is aired in public. Given this practice and culture of the EPRDF, which is rooted in the ideological views of the party as well as its genesis as an armed group that needed to maintain its cohesiveness for survival, dissent and debate in the party are not encouraged and are hidden from the public whenever possible.

It is unlikely therefore that EPRDF member organizations who control regional states will engage in legal wrangling with the federal government in front of the House of Federation. Any legislation, policy, or measure of the federal government or the regional states is usually sanctioned by the party. Protests and objections to such policies, measures, or legislation are unwelcome and unusual once the party's top leaders have adopted the decision. Democratic centralism leaves little room for second-guessing the party leadership, especially when such second-guessing would challenge the constitutionality of the acts endorsed by the top leaders. Any possible difference that member organizations of the EPRDF might have is addressed inside the party, seldom becomes public, and is not framed as a legal constitutional issue. This is a primary reason that not a single case has been brought before the House of Federation in which the different orders of government were pitted against one another. Furthermore, considering the fact that the EPRDF reigns supreme in the House of Federation, there is little to be gained by the members and partners of the EPRDF to take their disputes to the House of Federation.

110 See, for example, Abdi Ismail Samatar, "Ethiopian Ethnic Federalism and Regional Autonomy: The Somali Test," *Bildhaan: An International Journal of Somali Studies* 5, no. 1 (2005), 63–7.

To illustrate how this dynamic works, consider the abortive attempt by Oromia to adopt its own criminal procedure code.[111] The Oromia Regional State drafted a criminal procedure law as part of its judicial reform program. The process of drafting the criminal procedure code was undertaken after regional state authorities reached an understanding with federal authorities that regional states have the constitutional authority to adopt their own criminal procedure code. However, after the draft was complete, the federal government changed its position. The federal minister of justice notified state authorities that the power to adopt a criminal procedure law belongs to the federal government and that the regional state should not adopt its own criminal procedure law. Although the state had expended considerable resources in drafting its criminal procedure law, taking the matter to the House of Federation and challenging the position of the federal government was not a realistic option for the state.

This discussion still leaves unanswered the question of why private actors do not challenge the constitutionality of government actions based on the federal distribution of powers in the Constitution. There are several explanations for the lack of this kind of constitutional case. One is that the House of Federation is not an impartial arbiter of disputes. The House is clearly and by design a political organ, and since its inauguration, it has been controlled by the ruling coalition, whose cohesiveness and strict discipline are the attributes of a single party. As a result, challenging the constitutionality of a government act before this house – which is controlled by the same party that controls both the executive and the legislature in all orders of government in the country – make it a futile exercise. For example, in the general election of May 2015, the EPRDF and its allies won all contested seats at the federal and regional level, enabling it to continue its monopoly of seats in the House of Federation. Hence, almost no one pursues a constitutional case against the regional states or the federal government, because the House of Federation is not seen as an impartial umpire. However, although the House of Federation is not an impartial arbiter, some cases based on the bill of rights of the Constitution are presented to the House, while none based on the federal distribution of powers

111 The information for this paragraph was obtained from a judicial official from the Oromia National Regional State who was involved in the Justice Sector Reform of the state and who wishes to remain anonymous.

have been presented; therefore additional factors might explain the absence of federalism cases decided by the House of Federation.

One reason is the broad nature of federal powers under the Constitution. Many of the provisions that distribute powers between the federal government and the states are vague and general. Although there is an enumerated list of federal and concurrent powers, few matters can be considered federal subjects if the pertinent constitutional provisions are stretched a little. In addition to the reasons discussed above, the chances of any constitutional challenge to the constitutionality of the acts of the federal government on the basis of federalism are very slim.

The lack of real political plurality among the parties that control the orders of government also discourages proceedings on federal aspects of the Constitution. Such challenges are likely to be frustrated because the federal and state governments would stand together and render the case moot. If a third party challenged the actions of regional states, alleging that they had usurped federal powers, the federal government would somehow endorse the act of the regional states. The federal government could easily do so by delegating its power to the regional state. Another avenue to accomplish the same end would be for the federal government to adopt the same law or to take the same administrative measure itself. Any challenge to the actions of the federal government on the basis of the constitutional distribution of powers could be easily frustrated in a similar fashion. Although the Constitution says nothing about the delegation of state powers to the federal government, in practice the federal government has assumed the power of giving land to foreign investors, claiming that this function has been delegated to it by the regional states. Furthermore, the regional states can be counted on to do the bidding of the federal government if need be.

IV. Conclusion

The Constitution presents itself as a covenant among the nations, nationalities, and peoples of Ethiopia. Fearful that the covenant and its objectives would be subverted by professional judges, the Constitution's framers entrusted constitutional interpretation to a political organ in which Ethiopia's nations, nationalities, and peoples are supposed to be represented. This has precluded the judiciary from interpreting the Constitution and delineating the constitutional scope of the powers of the regional states and the federal government. The EPRDF has absolute control of both the federal and state governments, so disputes about the

scope of power of the two orders of government have been muted and resolved through the party apparatus. As a result, there is hardly any federalism case law. The centralized party structure in which commands are issued from the top has left little room for pluralistic interaction among orders of government and has obviated the need, as well as the opportunity, to develop a federalist jurisprudence.

Would the current arrangements function properly if the different orders of government were controlled by different political parties? In this eventuality, the absence of an impartial arbiter and the inherently partisan nature of the constitutional interpreter could create serious problems. So long as the same party or coalition of parties controls the House of Federation, intergovernmental disputes between the regional states and the federal government can be solved within the party coalition or settled by the House of Federation (of course, with the assistance of the experts in the Council of Constitutional Inquiry). But if the federal government and one or more regional states were controlled by rival parties, and if one of these parties controlled the House of Federation, it would be very difficult for the House of Federation to settle constitutional disputes among such parties. Given the mistrust and antagonism that characterizes the relationship of political parties in Ethiopia, the House of Federation would easily become entangled in the antagonism between the political parties. This would mean that it would not have the respect and trust of the parties in dispute necessary to resolve their conflict. Therefore, it might be necessary to consider this problem seriously and learn from the experiences of other federal countries before a crisis materializes.