

ADDIS ABABA UNIVERSITY
COLLEGE OF LAW AND GOVERNANCE
STUDIES

**The Constitutional Status of Upward Power Delegation in
Ethiopia: the case of large scale agricultural land
administration power**

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**Submitted in partial fulfilment for the Requirements for the
Degree of Masters of Laws (LL.M) at the School of Law.**

January 2018

Declaration

I, Kelemework Mideksa, hereby declare that “**The Constitutional Status of Upward Power Delegation in Ethiopia: the case of land administration power**”, is original and my work which has never been presented in any other university or academic institution for any degree or examination. I also declare that all sources and materials used have been duly acknowledged in this thesis.

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January 2018

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Acronyms

CCI – Council of Constitutional Inquiry.

FAO – Food and Agricultural Organization.

FDRE – The Federal Democratic Republic of Ethiopia.

HoF – The House of Federation.

HoPR – The House of Peoples’ Representatives.

IFAD – International Fund for Agricultural Development.

JLSRI – Justice and Legal Research Institute.

MoA – Ministry of Agriculture.

MoANR – Ministry of Agriculture and Natural Resource.

MoARD – Ministry of Agriculture and Rural Development.

SNNP – Southern Nations Nationalities and People.

UNCTAD – United Nations Conference on Trade and Development.

US – United States.

USA – The United States of America.

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Acknowledgements

First and above all, I would like to thank the Almighty God and His Mother St. Virgin Marry for their help in my entire life. It is their help that gives me strength to accomplish everything I wish.

I owe my thanks and gratitude to my advisor, Dr. Getachew Aseffa, who encouraged and supported me, in providing materials, reading drafts and making suggestions.

I thank my lovely wife, Wubet Gashaw for her tolerance, support and encouragements during my study.

Next, this research would not have been written without the assistance and support of a number of people. I am greatly indebted to my brother Fitsum Gebremikael (PhD), for his inviolable help and assistance through production of necessary materials. I can say all foreign sources cited in this thesis are the results of his generosity. Thanks Fitse!

Jember Taddele freely provided me with his unlimited 3G internet package throughout my three years' study. I have accessed the resources from the Office of the Prime Minister through Kalkidan. The latest laptop computer used for my LLM study was from my client Tewedros Desalegni. I can't forget the encouragement from Segni, Fele, and Bini. I thank you all.

Abstract

Vertical intergovernmental delegation manifests in several federations. Vertical intergovernmental delegation comprises both downward delegation from federal to regional government and inversely from constituent units to the central government. Most federations exercise downward power delegation. However, it is hardly possible to find a federal system which has well-developed practice of upward constitutional power delegation.

According to Article 50(9) of the FDRE Constitution, the federal government has the power to delegate some of its constitutional competences to regional states when that is deemed necessary. However, the Constitution is silent regarding upward power delegation. As per Articles 51(5) and 55(2)(a) of the FDRE Constitution, the power to enact laws for “utilization of land and other natural resources” has been given to the federal government. Pursuant to Article 52(2)(d) of the FDRE Constitution, the power to administer land is entrusted in regional states. Regional states started to delegate land administration power over large scale agricultural investments in 2008.

This thesis argues upward power delegation has no constitutional basis in Ethiopian federation. In the first place, there is no constitutional provision which empowers regional state governments to delegate power to the federal government. Furthermore, the Constitutional Assembly rejected upward power delegation proposal included in the draft constitution while adopting the constitution. Thirdly, the FDRE Constitution adopts a mechanism for transfer of power from regional states to the federal government, that is only with the blessing of the HoF. In other words, delegation is not a constitutional means to transfer regional states’ competence to the federal government.

Chapter One

Introduction

1. Background of the study

The 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution established a federal form of government.¹ The division of power between the federal government and constituent units is one of the hall marks of federations. As any federal constitution, the FDRE constitution divides legislative, executive, judicial and fiscal power between the federal and the regional governments under exclusive, concurrent and residual powers.²

The FDRE constitution manifests a legislative form of federalism. In a legislative form of federalism, the executive responsibility of a policy field entrusts to the level of government which legislates on it.³ In a similar fashion, the FDRE constitution entrusts the federal government and regional states with legislative, executive and judicial powers.⁴ More specifically, the responsibility of executing federal legislation is entrust to the Council of Ministers and the Prime Minister.⁵

However, the FDRE constitution manifests executive form of federalism in few areas including land administration and natural resources conservation. Executive form of federalism splits legislative and executive responsibilities between orders of governments. Therefore, while the legislative competence of a subject matter rests in the hands of the federal government, the executive responsibility assigned to constituent units.⁶ As per Articles 51(5) and 55(2)(a) of the FDRE Constitution, the power to enact laws for “utilization of land and other natural resources” has been given to the federal government. On the other hand, the power “to administer land and other natural resources in accordance with federal laws” has been made

¹ Fasil Nahum, *Constitution for a Nation of Nations the Ethiopian Prospect*, Asmera, the Red Sea Press Inc., 1997, p.35.

² FDRE Constitution, 1995, Articles 50,51,52,79,80 and 96-99, Proclamation No.1, *Negarit Gazeta*, 1st Year, No.1.

³ In legislative federalism, administrative responsibilities correspond with legislative authority. Therefore, each level of government is expected to execute its legislation by itself. R. Watts, *Comparing Federal Systems*, 3rd edn. Montreal, McGill – Queen’s University Press, 2008, p.92.

⁴ FDRE Constitution, at note 2, Article 50(2).

⁵ FDRE Constitution, at note 2, Articles 72 and 74.

⁶ Watts, at note 3, p.93.

the responsibility of regional states.⁷ Accordingly, the federal government enacted rural land administration legislation in 1997 and later amended in 2005.⁸

Regional states continued to exercise their power to administer land until 2008 when the federal government started exercising power on land leased for large-scale agriculture.⁹ The federal government claimed that regional states delegated land administration power to it.¹⁰ However, the fact was not confirmed by regional states.

The FDRE constitution regulates the issue of delegation between the two tiers of governments. The constitution delegates judicial authority of federal high and first instance courts to regional supreme and high courts respectively.¹¹ On the other hand, the federal government has the power to delegate some of its constitutional competences to regional states when that is deemed necessary.¹² The constitution is silent regarding delegation of power from regional states to the federal government. In practice, regional states have delegated power over administering land for large-scale agricultural investments to the federal government since 2008.

This research aims to examine the constitutional status of upward power delegation in the Ethiopian federal system by taking the case of power transfer made on large-scale agricultural land administration.

2. Research Problem

The FDRE constitution embraces down ward delegation of power from the federal government to regional states. Inversely, the constitution is silent regarding delegation of power from the regional states to the federal government. However, regional states have delegated since 2008 land administration competence to the federal government.¹³ Existing scholarship has not addressed the constitutional base of delegation generally and upward power delegation specifically. This research attempts to fill this gap.

⁷ FDRE Constitution, at note 2, Article 52(2)(d).

⁸ See Federal Rural Land Administration Proclamation, 1997, Proclamation No.89, Negarit Gazeta, 3rd Year, No.54, and Federal Democratic Republic of Ethiopia Rural Land Administration and Land Use Proclamation, 2005, Proclamation No. 456, Negarit Gazeta, 11th Year, No.44.

⁹ Dessalegn Rahmato, *Land to Investors: Large-Scale Land Transfers in Ethiopia*, Forum for Social Studies, 2011, p.10.

¹⁰ MoA, *Memorandum of Understanding signed between FDRE MoA and Oromia Regional State (in Amharic)*, 2010, p.2.

¹¹ FDRE constitution, at note 2, Article 78(2).

¹² FDRE constitution, at note 2, Article 50(9).

¹³ MoA, *Memorandum of Understanding signed between FDRE MoA and Gambela Regional State (in Amharic)*, 2009, p.5.

3. Research Questions

Inspired by the above noted research problem, this study aims at investigating the constitutional status of upward power delegation in Ethiopia. In the process of examining this general research question, the research will deal with the following issues: -

1. Whether or not upward power delegation has a basis in the FDRE Constitution;
2. The constitutional justification for the legal and policy regimes that have become the bases for undertaking upward power delegation.

4. Literature review

Upward power delegation was introduced in Ethiopian federal system in relation with administration of large-scale agricultural investment lands.¹⁴ It is not possible to find a comprehensive research work which addresses the constitutional aspect of upward power delegation in Ethiopia. Some legal researchers studied the phenomenon, but without examining it from constitutional point of view. Most studies undertaken on the subject matter focus on social affairs. There are also studies which were triggered either from investment or human rights perspectives.

A paper presented at World Bank conference on land policy and administration by Imeru Tamirat is noteworthy. Imeru notes that only the federal government is empowered by the FDRE constitution to delegate its constitutional competences to regional states. Regional states, on the other hand, are not clearly authorized to transfer their powers to the federal government.¹⁵ He concludes that “upward delegation by Regional states of their mandates to administer land to the Federal government stands on a shaky constitutional basis.”¹⁶ The study has not, however, exhaustively addressed constitutional aspects of delegation generally, and upward power delegation specifically. Furthermore, the alleged unconstitutionality of upward power delegation has not been affirmed strongly by the author.

In subsequent study, Elias N. Stebek examined whether land use contracts and Ethiopian land use right legal framework mutually benefits the nation and the investors.¹⁷ It assesses the Ethiopian legal framework on rural land use rights¹⁸ and evaluates the large-scale agricultural

¹⁴ Dessalegn at note 9, p.9.

¹⁵ Imeru Tamrat, *Governance of Large Scale Agricultural Investments in Africa*, Paper presented at World Bank Conference on Land Policy and Administration, Washington DC, 2010, p.8.

¹⁶ Imeru, p.8.

¹⁷ Elias N. Stebek, ‘Between ‘land grabs’ and agricultural investment: land rent contracts with foreign investors and Ethiopia’s normative setting in focus’, *MIZAN LAW REVIEW*, Vol. 5, No.2, 2011, pp.175-214.

¹⁸ *Ibid*, pp. 177-185.

land lease contracts in light of the Seven Principles for Responsible Agricultural Investments prepared by FAO, IFAD, UNCTAD and the World Bank Group.¹⁹ Although Elias N. Stebek has not shown clearly whether upward power delegation goes in line with the constitution or not, he has argued: -

“[A]llocation of extensive areas of land cannot be regarded as an administrative function. The federal government was entrusted with wide range of power on land. Allocation of land falls within this power. [...] The easier option for the federal government could thus have been enacting laws regarding the allocation of land beyond a certain threshold rather than resorting to an upward delegation.”²⁰

The third relevant endeavour is an article published in *Haramaya Law Review* by Sefanit Mekonnen in 2012.²¹ The research item “analysed the effectiveness of Ethiopia’s land and investment laws in safeguarding rural communities from the risks of agricultural foreign direct investment.”²² This scholarly writing did not examine constitutional bases for upward power delegation, but simply reported the scenario.²³

Finally, Assefa Fiseha, points out the absence of a clear provision in FDRE constitution that empowers regional states to delegate part of their power. Furthermore, he reports that although upward power delegation was proposed by the constitutional drafting commission, it was rejected by the Constitutional Assembly “on the basis of protecting the powers and functions of the states.”²⁴ However, Assefa Fiseha argues that “in the absence of express prohibition in the constitution, the states may delegate part of their powers to the federal government.”²⁵ Assefa further criticises the concern raised by the Constitutional Assembly as theoretically unfounded.²⁶

In sum, although the above mentioned scholarly works tried to address the constitutional aspect of upward power delegation they have not addressed comprehensively the general constitutional aspects of power delegation and upward power delegation specifically.

¹⁹ Ibid, pp. 189-213.

²⁰ Ibid, P.178.

²¹ Sefanit Mekonnen, ‘Rights of Citizens and Foreign Investors to Agricultural Land under the Land Policy and Laws of Ethiopia’, *HARAMAYA LAW REVIEW*, Vol.1, No.1, 2012, pp.31-42.

²² Ibid, P. 31.

²³ Ibid, foot note 25, p.34.

²⁴ Assefa Fiseha, *Federalism Teaching Material*, Justice and Legal System Research Institute, 2009, p.375.

²⁵ Ibid.

²⁶ Ibid.

Therefore, this research attempts to address the constitutional aspect of upward power delegation on administration of land.

5. Objectives of the Study

In general, the research is designed to explore and examine the status of upward power delegation under FDRE constitution, focusing on the authority to administer large-scale agricultural land. The study specifically aims to:

- ✓ Analyse the constitutional basis of power delegation;
- ✓ Examine the policy and legal frameworks of upward power delegation;
- ✓ Assess the constitutionality of upward power delegation;
- ✓ Elucidate the major draw backs of upward power delegation.

6. Significance of the Study

This research work will serve as a resource material to grasp basic features of power delegation enunciated in FDRE constitution. Besides, it helps to draw lessons from the selected federations on the subject matter.

More importantly, the study may help in understanding the constitutional status of legal and policy documents made for the execution of upward power delegation on large-scale agricultural land administration. It also helps to comprehend major cons of upward power delegation.

This research can serve as an important instrument for policy makers, mainly in examining the upward power delegation from the constitutional and federal set-up perspectives. More specifically, the research document may give insight to the House of Federation (HoF) to evaluate the constitutionality upward power delegation.

7. Research Methodology

Qualitative research design is employed to carry out this study. The study starts with conceptual analysis of delegation generally and power delegation specifically. Besides, three federations namely; German, USA and India have been selected to draw experiences on power delegation. The German federation has been selected for its well-established system of executive federalism. The US system is selected for exercising different forms of power delegation with

the absence of clear constitutional provision to do so. Conversely, the Indian federal system has been considered for having more elaborate constitutional provisions and experiences on power delegation. Constitutions, books, journal articles and regular or constitutional court's rulings will be consult in exploring the concept of power delegation and assessing the working practices of those three federations.

The discussion on power delegation in Ethiopian federal system, also follows the same methodology with the general part of the research. The FDRE Constitution, different legislations, policy documents and national economic development programs will be explored to uncover the background of upward power delegation in Ethiopia. The Constitutions of National Regional States, books, journal articles and minutes of Constitutional Assembly and the HoF will be consult in examining the constitutional status of upward power delegation. Eventually, three purposefully select key informants will be interview to fill limited gaps in literatures.

8. Organization of the Study

The thesis is divided into five chapters, each of which has its own sections and sub sections. By way of an introduction to the study chapter one sets the scene by offering the background of the study, statement of the problem, literature review, objective of the study, significance of the study and research methodology.

Chapter two generally deals with the practice of power delegation in federations. In this chapter the lessons of power delegation will be draw from the federations of German, USA and India.

The third chapter of the research mainly allocated for the discussion made on delegation of power under FDRE constitution. The discussion made in this chapter addresses both theoretical and practical aspects of power delegation in Ethiopian federal set-up.

The main theme of the thesis; i.e. constitutional status of upward power delegation in Ethiopia, will be address in the fourth chapter of research. The chapter starts with policy and legal backgrounds of upward power delegation. It examines the central issue by employing different methods of constitutional interpretations. The possible cons of upward power delegation were also pins in the last part of the chapter.

The fifth chapter summarizes the findings of the discussions under the title of conclusion and includes possible recommendations made.

Chapter Two

Delegation of Power in Federal Systems

2.1. Introduction

Delegation may have various meanings in different disciplines. Therefore, it is not possible to find single comprehensive definition for the concept of delegation. Tuck Raphael defines delegation as: “entrusting by a person or body of persons, of the power residing in that person or body of persons, with complete power of revocation or amendment remaining in the grantor (or delegator)”²⁷ from a constitutional law perspective.

There are two important notions associated with delegation of power in constitutional law. The first conception represents the constitutional assignment of power to legislative and executive institutions of government through democratic elections. In a democratic system, members of the policy making bodies are taken as acting on behalf of the general public. As John Locke put it, “the legislature exercises a delegated power from the people.”²⁸ More specifically, they are described by the phrase ‘peoples’ representatives’.²⁹ So the governing understanding is that the legislative organ makes policies and laws by using the power delegated from the general public.

The second aspect of constitutional power delegation expresses, the transfer of competence made between either the three bodies of government or between tiers in a federal system. While horizontal delegation represents the former, vertical delegation signifies the later. The horizontal - vertical dichotomy should not be taken in its strictest sense. The delegation between three branches described as ‘horizontal’, for the organs are working within one level of government. The transfer of power among the two tiers designated as ‘vertical’, based on the imaginary designs we have in our mind for federal structures.³⁰ Besides, constituent units exercise constitutional power in a defined part of a nation, whereas the federal government throughout the polity. Therefore, the nomenclature ‘vertical’, should not be taken as representing the subordination of regional governments to federal government. The core

²⁷ T. Raphael, ‘Delegation – A Way over the Constitutional Hurdle’, *Canadian Bar Review*, Vol. XXIII, 1945, p.89.

²⁸ J. Locke, *Two Treatises of Government*, 1823, section 141, p.167.

²⁹ For instance, the FDRE Constitution describes members of the HoPR as ‘representative of the Ethiopian people as a whole’ and ‘they are governed by the constitution, the will of the people and their conscience’. FDRE Constitution, at note 2, Article 54 (4).

³⁰ The relationship between federal government and constituent units described as vertical in tremendous writings. See for instance, Nigussie Afesha, ‘The Federal-state Intergovernmental Relationship in Ethiopia: Institutional Framework and its Implication on State Autonomy’, *Mizan Law Review*, Vol.9, No.2, 2015, P.344.

subject of this research is concerned with vertical delegation of power in FDRE Constitution, more specifically transfer of competence from regional states to the federal government. But it also addresses the issue of horizontal delegation in the meanwhile.

This chapter serves as a theoretical basis for the discussion in chapter three. This part of the thesis will address, the question of how federations entertain delegation of power. It draws on experiences of federations concerning delegation of power while also trying to examine theoretical aspects of upward delegation.

The chapter has three core sections. The first part of the chapter is dedicated to the issue of horizontal delegation. This part addresses experiences of federal systems regarding horizontal delegation and summarises arguments for and against horizontal delegation. The second part of the chapter discuss vertical power delegation. This section addresses the two aspects of vertical delegation of power, namely down ward and upward delegation. Finally, the third section tests the theoretical feasibility of upward power delegation.

2.2.Horizontal Delegation of Power

In a federal system the constitution divides authorities not only between the two levels of government, but also between the three organs of the government; namely the legislative, executive and judiciary.³¹ As noted by Lawrence, “constitutions are not grants of power but rather limitations on power.”³² Therefore, the original belief is that the three organs of government play constitutionally limited role in delivering public services.

The responsibilities of government are distributed among the three organs based on the doctrine of separation of powers, which proclaims that the three branches of government must have a defined authority. Hence, separation of powers “prevents the accumulation of excessive power in one branch”³³ of government. Montesquieu explained this issue in his book, *The Spirit of the Law*, in the following words: -

“When the legislative and executive powers are united in the same person, or in the same body or Magistrate, there can be no liberty. Nor is there liberty if the power

³¹ For instance, the USA Constitution Article I Section 1 vests all legislative power in the Congress, Article II Section 1 vests all executive powers in the President, and Article III Section 1 vests all judicial power in the Supreme Court.

³² M. Lawrence, ‘Private Exercise of Governmental Power’, *Indiana Law Journal*, Vol. 61, No. 647, 1986, p.658.

³³ M. Ventura, ‘The Legislative veto: A Move Away from Separation of Powers or A Tool to ensure Nondelegation’, *SMU Law Review*, 1996, p.402.

of judging is not separated from the Legislative power and Executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor. All would be lost ... if the same person or body exercise these three powers.”³⁴

The main concern of the doctrine is to prevent two or more core governmental responsibilities, namely law making, executing and interpreting from falling under the control of a single individual or body. The doctrine of separation of powers by defining the power of each organ of government and by introducing a check and balance mechanism between them, tries to protect the people from arbitrary administration. Therefore, in pure doctrine of separation of powers, parliaments make law, the executive administers or enforces law, and the judiciary adjudicates disputes about the law.³⁵

Nevertheless, in some cases, constitutional power may transfer horizontally from one branch of government to the other, specially from the legislative to executive organ by means of delegation.³⁶ Horizontal delegation of power is established in several federations based on a clear constitutional provision, whereas in few others without a clear constitutional provision.³⁷ As noted below, the German federal system best illustrates the former practice,³⁸ while the

³⁴ B. De Montesquieu, *The Spirit of the Law*, The Federalism Papers Project, 1949, p.157.

³⁵ M.J.C. Vile, *Constitutionalism and The Separation of Powers*, Liberty Fund Inc., 1998, p. 13.

³⁶ B. Cheadle, ‘The Delegation of Legislative Functions’, *The Yale Law Journal*, Vol. 27, No.7, 1918, p. 892.

³⁷ For instance, the South African Constitution did not directly empower the parliament to delegate legislative power to other branches of the government. However, the South African Constitutional Court in *Executive Council, Western Cape Legislature and Others Vs President of the Republic of South Africa and Others*, case reasoned in the following sentences to allow horizontal delegation of powers; “The legislative authority vested in Parliament under s 37 of the Constitution is expressed in wide terms -‘to make laws for the Republic in accordance with this Constitution’. In a modern State detailed provisions are often required for the purpose of implementing and regulating laws and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution parliament can pass legislation delegating such legislative functions to other bodies.” See, *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others*, Case No CCT.27/95, South African Constitutional Court, 1995, p.28.

³⁸ Basic Law for Federal Republic of Germany, 1949, Article 80(1).

US³⁹ and Indian⁴⁰ federal systems explain the later.

The German Basic Law under Article 80(1) clearly regulates horizontal delegation of constitutional power. It empowers the parliament to delegate some of its legislative competences to the executive body. Article 80(1) of the Basic Law, as Currie put it, “permits the federal legislature to empower any federal minister or the federal or state government as a whole to promulgate regulations having the force of law.”⁴¹ But the power of delegation of the law maker is not without limitations. The Basic Law “goes on to require, that the content, purpose, and extent of the authorization be specified by the statute itself”.⁴² These requirements have been interpreted narrowly by the Constitutional Court of Germany. Currie enumerates tremendous rejection of horizontal delegations made by the parliament, for not satisfying the constitutional requirements of defining the content, purpose, and extent of the endorsement.⁴³

Among federal systems that practice horizontal delegation without a clear constitutional provision promoting the US federal system provides a good illustration of the practice. The US constitution does not explicitly empower Congress to delegate its legislative competences to the executive. There are two views regarding horizontal delegation of power in the US. Some scholars argue that the practice of transfer of power from Congress to executive agencies is unconstitutional because “neither the constitutional text nor its history provide any firm guidance as to the existence or exact contents of a doctrine of delegation.”⁴⁴ In addition, since the doctrines of separation of powers and non-delegation are central to the US federal structure, “while the former urge the three government departments should be separate and distinct, the later prohibits any branch from giving away it power.”⁴⁵

³⁹ “The text of the United States Constitution has no reference to delegation,” but practically the US federal system manifest horizontal delegation. See U. Kischel, *Delegation of Legislative power to Agencies: A comparative Analysis of United States and German Law*, 1994, p. 216.

⁴⁰ Pursuant to Articles 245 and 246 of the Indian Constitution the legislative powers shall be exercised by the parliament and States Legislature. There is no clear provision which allows delegation of legislative power in Indian constitution. However, due to judicial pronouncements which follows the same line of argument with above cited South African Constitutional court, practically there exists delegation from judiciary to the executive organ in Indian federation. See Parminderkaur and R. Singh, ‘Delegation of Legislative Power to the Executive: A Comparative Analysis of Indian and United States Law’, *International Journal of Political Science, Law and International Relations*, Vol. 5, Issue. 5, 2015, p.2.

⁴¹ P. Currie, *The Constitution of the Federal Republic of Germany*, The University of Chicago Press, 1994, p.126.

⁴² Ibid.

⁴³ Ibid, pp. 126-127.

⁴⁴ Kischel, *Delegation of Legislative power to Agencies*, at note 39, p. 217.

⁴⁵ Ventura at note 33, p.402.

The second and the governing line of argument defends the constitutionality of horizontal delegation of power from Congress to administrative agencies. The proponents of this group argue that; Article I, Section 8 of the Constitution, which provides “the Congress shall have Power to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers” must be understood as allowing delegation. As a result, during the early years of American federalism; “the Supreme court ruled as horizontal delegation is constitutional and plays a role of filling up principal legislations with reasonable details. But the US Supreme Court introduced a new standard which evaluates whether a statute had provided sufficient standards to guide an agency in its decision-making process”⁴⁶ to rule on the constitutionality of horizontal delegation. In the present US constitutional system, Congress is exercises the authority to delegate administrative agencies⁴⁷. But the delegation “must be complete in itself, must declare legislative policy or standard and must operate to limit the delegated power.”⁴⁸ US courts entertained several cases evaluating whether delegation fits those criteria or not.⁴⁹ Nevertheless, Congress oversees and controls whether the execution of delegated power is executed for the purpose and within the limits made in the statute.

The Indian constitutional system envisages two types of horizontal delegation of power. In the first case, the constitution itself delegates some legislative power to the executive organ. The president of the Union government has the power to promulgate ordinances⁵⁰ during the recess of the parliament.⁵¹ In another instance, pursuant to Article 240(1) of the Indian Constitution, the president of the Union government can make regulation for certain Union territories.

The second instance is similar with the practice in US federalism. Indian courts while interpreting the phrase “Parliament may by law” of Article 312 of the constitution, followed similar reasoning given to Article I Section 8 of the US constitution by the Supreme Court. In doing so, Indian courts have argued that “there is nothing in the words of Article 312 which takes away the usual power of delegation, which ordinarily resides in the legislature.”⁵² In practice, the parliament is delegating the executive. But while delegating “the legislature must

⁴⁶ Kischel, *Delegation of Legislative power to Agencies*, at note 39, p.218.

⁴⁷ M.P. Jain, *Indian Constitutional Law*, 7th edn., 2014, p.164.

⁴⁸ R. Stengle and P. Rhea, ‘Putting the Genie Back in the Bottle: The Legislative Struggle to contain Rule Making by Executive Agencies’, *Florida State University Law Review*, Vol.21, no.415, 1993, pp.416-417.

⁴⁹ Jain at note 47, p.164.

⁵⁰ Ordinances were included in the definition given to the concept ‘Law’ by Indian Constitution. See The Constitution of India, 1949, Article 13(3)(a).

⁵¹ The Constitution of India, at note 50, Article 123(1).

⁵² Perminderkaur and Singh at note 40, p.2.

declare the policy of the law and the legal principles which are to control any given cases and must provide a standard to guide the officials or the body in power to execute the law.”⁵³ The basis and criteria of horizontal power delegation of Indian federal system are similar with that of USA.

Two important conclusions could be drawn from the preceding discussion. First, horizontal delegation seems inevitable even in the absence of a clear constitutional provision authorizing it. Second, endorsing legislation has been used as a mechanism to execute horizontal delegation.

2.2.1. Justifications of Horizontal Delegation of Constitutional Power

There are various justifications for horizontal delegation of power from legislature to executive branches. The first two justifications associates with the nature of the legislature and the merits expected from it. Even though the citizens of a nation entrust initially law making authority in the legislature, “the legislators cannot be expected to regulate the details of every governmental program.”⁵⁴ Reserving every detail of legislative powers under the ambit of the policy maker creates unnecessary burden on the legislative branch. This scenario further challenges the policy maker from passing quality legislation. So the horizontal delegation of power arrangement helps the legislature to focus on core principles and laws.⁵⁵

Furthermore, horizontal delegation of power paves a way for basic legislation to fine-tune technical details. The members of the legislative organ are not necessarily elected for their technical competence, rather for their loyalty to the general public. It is not always possible to include all technical details of a specific subject matter in statutes adopted by the legislature. So horizontal delegation of power enables the legislation to be supplemented by technical details.⁵⁶

Finally, horizontal delegation of power helps to meet emergency situations. The legislative organ is not expected to be in office throughout the year. Conversely, the executive is always in office since the mandate to operate day to day activities of government resides in it. There are possibilities of eruption of crisis or other forms of necessity, which may not have curved without endorsing legislation. The emergency situation may include war, economic crisis and

⁵³ Jain, at note 47, p.165

⁵⁴ Currie, at note 41, p.126

⁵⁵ A. Ross, ‘Delegation of Power: Meaning and Validity of the Maxim delegata potestas non potest delegari’, *The American Journal of Comparative Law*, Vol. 7, No. 1, 1958, p.4.

⁵⁶ Jain, at note 47, p.163.

natural disasters. So the existence of horizontal delegation of power serves to solve problems associated with those emergencies by entrusting law making authority in the executive organ.⁵⁷

2.2.2. Criticisms on Horizontal Delegation of Power

Horizontal delegation of constitutional power is not free from criticism. Although several in number, I will focus on three central objections to horizontal delegation. The first objection emanates from the very nature of the legislative organ. The legislative organ is formed by or is composed of representatives elected directly from the people. This branch of government has a policy-making power delegated to it from the citizens of a nation. The legislative organ exercises policy-making entitlement entrusted in it by the citizens of a nation. Conceptually it is exercising delegated power. In this regard the profound philosopher John Locke argued: -

“The legislative cannot transfer the power of making laws to any other hands, for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be.”⁵⁸

In the USA constitutional system, the doctrine of non-delegation is raised as one founding constitutional principle. In this connection, the Latin maxim “delegate potestas non potest delegari”⁵⁹ is famous in US constitutional system. The concept embedded in the maxim propagates that no delegated powers can be further delegated. It proscribes any organ of government from transferring its competence to executive. So initially Congress has no power to delegate its authority to the executive. More specifically “the legislature was an agent of the people and therefore legislature is under a disability to delegate power entrusted to it to any another body.”⁶⁰

The second argument which challenges horizontal delegation constitutional power centres on the principle of separation of powers. The principle of separation powers advocates drawing a clear line between the three organs of government. Any attempt to put the policy-making and executing competences under the control of a single body, especially the executive, is a heretic conception to the basic tenets of the principle. Delegation of legislative power to executive paves the way to the unity of the two powers in the hands of the executive. The scenario empowers the executive “to execute laws tyrannically which itself enacted tyrannically.”⁶¹

⁵⁷ Ross, *The American Journal of Comparative Law*, at note 55, p.5.

⁵⁸ John Locke, at note 29, section 141, p.167.

⁵⁹ Kischel, *Delegation of Legislative power to Agencies*, at note 39, p.216.

⁶⁰ Perminderkaur and Singh, at note 40.

⁶¹ Montesquieu, at note 34.

Finally, there is an argument which advocates the delegation of power from legislature to executive oppose the basic tenets of democracy. As per the proponents of this reasoning, delegation endangers the very thinking of democracy. It is said that “delegated legislation takes law-making away from the democratically elected persons to persons who are not elected.”⁶² Therefore law-making power has to always reside with the legislative organ.

2.3.Vertical Delegation of Power

Division of powers between the federal government and the constituent units of federation is a basic feature of federalism.⁶³ Every federal constitution distributes powers between federal and regional governments. In this regard Ronald Watts elucidated that; “constitutional distribution of powers between the federal and regional governments is one institutional characteristics of federal system.”⁶⁴ Distribution of powers between the orders of governments is a corner stone, upon which a federal structure can be established. The role of each level of government in the federal system is defined by constitutional provisions dealing with distribution of powers.

However, federal government may delegate vertically its authority to regional states or constituent units may delegate their power to federal government. Therefore, vertical delegation of power has two features: downward from federal to constituent units and upward from periphery to the centre. The following two sub-sections address these two features.

2.3.1. Downward Delegation of Power

Downward delegation of constitutional power represents the phenomenon in which powers constitutionally made under the competence of the federal organs are conditionally entrusted to the constituent units. Downward power delegation manifests itself in various federations based on constitutional provision,⁶⁵ while in few instances it is exercised even in the absence of a clear constitutional provision. While the German and Indian federal systems represent the former phenomenon, the US federal system best illustrates the later approach.

⁶² F. Benson, ‘Delegated Legislations in Nigeria: Challenges to control’, LLM Thesis, University of London, 2014, p.30.

⁶³ N. Montes, *Federalism and multiculturalism*, 2005, p.166.

⁶⁴ Watts, at note 3, p.83.

⁶⁵ For instance, the South African federal system provides downward power delegation based on clear constitutional provision. As per Section 44(a)(iii) of South African Constitution the national parliament has the power “to assign any of its legislative powers, except the power to amend the constitution, to any legislative body in another sphere of government.” Pursuant to Section 40 (1) of South African Constitution there are three spheres of governments namely; national, provincial and local. Pursuant to section 104(1)(c) of the South African constitution, the provincial government can further delegate its legislative power to local governments. See B. De Villiers (ed.), *Review of provinces and local governments in South Africa: Constitutional foundations and practice*, 2008, P.21.

Germany is a country of executive federalism. The German federal system is characterized by its “interlocked relationship between the federal and state governments.”⁶⁶ In the German federal system, the main legislative body is the federal Bundestag (national parliament).⁶⁷ As a result, “the federal government is primarily concerned with policy initiation, formulation and legislation, while the states are mainly responsible for implementation and administration” of federal made laws.⁶⁸ However, the *Länder* (constituent units) participate in the legislative process through another constitutional organ, the Bundesrat (Federal Council).⁶⁹

Although the main responsibility of the *Länder* is executive, there are three ways through which they may exercise legislative competence. Legislating under the authorization of the central government is one such instance.⁷⁰ Article 71 of the Basic Law reads:

On matters within the exclusive legislative power of the Federation, the *Länder* shall have power to legislate only when and to the extent that they are expressly authorized to do so by a federal law.

This constitutional text empowers the federal government to delegate its legislative competence on part or full of a specific subject matter entrusted to it by the Basic Law under Article 73. The authorization has to indicate the limits under which the *Länder* exercise legislative competence.⁷¹ Besides Article 80(1) of the Basic Law authorizes the federal government to delegate federal executive competence to the *Länder* government.

Indian federalism is another example of a constitutional system with a constitutional provision for execution of downward delegation of power. The Indian Constitution allows downward “inter-governmental delegation to be made either under an agreement between the governments or by legislation.”⁷²

⁶⁶ Watts, at note 3, p.35. German has integrated form of federalism. “The main law maker is the federal legislature, and *Länder* are administrators of federal legislation.” See Katy Le and Roy and Cheryl Saunders (eds.), *A global dialogue on federalism, Legislative, Executive and Judicial Governance in Federal Countries*, 2006, p.141.

⁶⁷ J. Gesley, ‘Germany’, in *National Parliaments*, 2016, p.72.

⁶⁸ Solomon Negussie, *Fiscal Federalism in the Ethiopian Ethnic-based Federal System*, 2006, p.68.

⁶⁹ Basic Law for Germany, at note 38, Article 50.

⁷⁰ The remaining two instances where, the exercise of legislative power under residual and concurrent arrangement. The German Basic Law entrusted the residual legislative power in *Länder* competence. In addition, *Länder* can exercise legislative power on policy matter included under concurrent list until it become the concern of the federal government. See Currie, at note 42, p.25 and also Basic Law for Germany, at note 38, Articles 70(1) & 72(1).

⁷¹ Solomon, at note 68, p.62.

⁷² Jain, at note 47, p.945.

The president of the Indian Union government has constitutional power to delegate federal executive responsibilities conditionally or unconditionally to state institutions or officers. In governing downward presidential power delegation Article 258 (1) of Indian constitution says:

Notwithstanding anything in this constitution, the president may, *with the consent of a state*, entrust either conditionally or unconditionally to the *Government or to its officer* functions in relation to any *matter to which the executive power of the Union extends*.
[emphasis added]

The executive responsibilities of the Union government of India is vested in the President of the federal government. And it shall be exercise by the President and his subordinates at federal structure.⁷³ The above mentioned constitutional provision allows the president of the Union to transfer federal executive power either to state government or to individual state officers. As per Article 154 of the Indian Constitution state executive power is entrusted in the Governor and shall be exercise by him or his subordinate. So the President of the union government may delegate his power either to officer in the executive body of states or institutions of the same body of government. But the delegation executes with the will of state governments. So the president is expected to seek the agreement of state institution or officer before delegating the power.

The legislature of the Indian Union government is also constitutionally empowered to delegate the implementation or regulation of federal competence to state officers or institutions. The Indian parliament is empowered to delegate federal powers under Articles 154(2)(b) and 258(2) of the constitution. Under the first noted constitutional provision “Parliament is not prevented from conferring by law functions on any authority subordinate to the Governor.”⁷⁴ In addition the secondly cited constitutional provision provides:

A law made by Parliament which applies in any State may, notwithstanding that it relates to a matter with respect to which the Legislature of the State has no power to make laws, *confer powers* and impose duties, or *authorize the conferring of powers* and the *imposition of duties*, upon the State or officers and authorities thereof. [emphasis added]

⁷³ The Constitution of India, at note 50, Article 53(1).

⁷⁴ Jain, at note 47, p.949.

The downward transfer of power effective by the legislature of the Union government has various unique features. In the first place the means of transfer of power is through adoption of legislation. Opposite to the delegation made by the president, the legislature is not duty bound to seek the will of the state authorities. The legislature of the Union can delegate regulation (adopting subordinate legislations) or executive powers to state governments.

The American federal system provides another illustration of the notion of downward delegation of power without a clear constitutional provision. The constitution of the United States of America does not expressly provide a provision which amounts to down ward delegation. Nonetheless, due to measures taken by Congress, the American federal system manifests vertical delegation of powers from the center to state governments.

Although the American Congress does not have express constitutional power to delegate any power to states, through time Congress has developed a trend to delegate to state governments either to regulate or to implement federal policy matters.⁷⁵ Greve elaborates this shift in the following manner:

“The American federalism was theoretically dual federalism. The levels of government were expected to play their defined role by the constitution. But later in practice the system was changed into cooperative federalism. State and local governments administer and implement federal programs.”⁷⁶

Moreover, some say even the system is changing “from cooperative to coercive by introducing unfunded mandates from federal to states.”⁷⁷ The cooperative federalism is executed through cooperative statutes adopted by Congress. Hence, Congress is using “delegation of federal [executive] power” as one means of implementing federal policies by states.⁷⁸ The delegation includes power to issue subordinate legislation; i.e. regulation and implementing federal laws enacted by the congress.

In another instance, there is a practice in American federalism by which the legislative competence of the Congress exercised by states. Barnett elucidates three scenarios to explain

⁷⁵ The practice is based on the broad interpretation given to Article I Section 8 of the Constitution, which was narrated in the discussion made on horizontal delegation of power.

⁷⁶ S. Greve, ‘Against Cooperative Federalism’, *Mississippi Law Journal*, Vol.70, 2000, pp.557-558.

⁷⁷ Watts, at note 3, p.30.

⁷⁸ D. Sarnoff, ‘Cooperative federalism, The Delegation of federal powers and The Constitution’, *Arizona Law Review*, Vol.39, No.205, 1997, pp.205-206.

the phenomenon.⁷⁹ The third phenomenon, which is “adoption of laws of states as laws of the United states,”⁸⁰ envisages downward legislative power delegation. In this case, states make those laws to be implemented within their territory or jurisdiction. But Congress empowered those laws, to govern the whole United States by devising an act of adoption. Barnett observes “state laws adopted by Congress to govern federal courts, federal executive officers, and criminal matters; as laws of the United states.”⁸¹ And then, concludes “the prospective operation of the law in regard to such trials constitute a delegation of power.”⁸²

The above cited argument shares some elements from the concept of unauthorized agent. Under unauthorized agency, the agent acts for the benefit of the principal without having previous authorization from the later. Then the act will be considered as if the agent acted having authority with the approval of the principal.⁸³ The principal ratifies the act of the agent if convinced that the act best serves his interest. In a similar fashion Congress has not given initial authorization for states to legislate but has adopted the legislation to be considered as if it was made by it. For the reason that, the competence to legislate on federal subject matter relies on Congress’ authority.

The mechanism and content of downward power delegation varies from federation to federation. Mechanism stands for the means devised for, and content represents the type of authority covered by the downward delegation. From the discussion made under this heading, the mechanism of downward power delegation can be summarized within two categories; namely legislation and agreement. Delegation through legislation includes; authorization in the German, authorization and conferring in the Indian and adoption in the USA federal system. Whereas, agreement explains entrusting in the Indian federal set-up.

In some federations, the national government delegates only legislative power to states.⁸⁴ But in other federations both legislative⁸⁵ and executive competences are included in the delegation.

⁷⁹ He writes “States exercise of concurrent powers in the absence of conflicting congressional legislation and involving powers of states which may be exercised only by reason of some positive action of congress” as the other two scenarios explaining downward power delegation. See James D. Barnett, ‘The Delegation of Legislative power by Congress to the States’, *The American Political Science Review*, Vol.2, No.3, 1908, p.347.

⁸⁰ Ibid, p.347.

⁸¹ Ibid, p.362.

⁸² Ibid, p.364.

⁸³ See Civil Code of the Empire of Ethiopia, 1960, Articles 2257 and 2192, Proclamation No. 165, 19th Year, No.2.

⁸⁴ South African federal system is a good example. See Villiers, at note 65.

⁸⁵ It is only derivative legislative power, which empower state governments to adopt subordinate legislation. But in German and South African cases, the delegation empowers state governments to adopt principal legislation.

The German,⁸⁶ USA and Indian federal systems are good examples to explain downward delegation of both legislative and executive powers. One striking point to make here before concluding this sub-section, judicial power is made out of the scene of delegation.

There are various justifications for downward power delegation. Downward constitutional power delegation is in line with the principle of decentralization embedded in concept of federalism.⁸⁷ Decentralization works towards enhancing democracy, good governance and accommodation of diversities. In the US federalism, downward delegation devised through the adoption of cooperative statute by the Congress. It is evident that; “Congress often enacts cooperative statutes based on a beliefs that the states regulation or implementation is more efficient, results in better decision making or renders government more accountable than the federal equivalents.”⁸⁸

On the other instance, operating a federal set-up by strictly observing the division of power in the constitution, may not be an easy endeavour. There may be a scenario, which demonstrate the constitutional competence of federal government can be best served by state governments. However, if there is a commitment to strictly follow the constitutional power arrangement, the phenomenon can be addressed only through constitutional amendment. Constitutional amendment process is not tranquil task. Even though there is variance in the degree of flexibility or rigidity, constitutional amendment demands the involvement of various actors and operation of extended procedures. So delegation plays a decisive role in addressing the temporary transfer of entitlement without operating elongated procedure of constitutional arrangement.

2.3.2. Upward Delegation of Constitutional Power

Upward delegation of power stands for the process of transfer of constitutional constituent unit’s competence to the central government. It is the opposite of downward delegation. It is hardly possible to find a federal system which has well-developed practice of upward constitutional power delegation.

⁸⁶ It is not genuine to expect downward delegation of power arrangement to cover vast areas of executive competence in German, because the federal system is executive in form from the beginning. See Currie, at note 41, p.66.

⁸⁷ See the link between the two concepts in the coming discussion on theoretical feasibility of upward power delegation.

⁸⁸ Sarnoff, *Arizona Law review*, at note 78, p.216.

The Indian federal system is one example to elaborate the phenomenon of upward legislative power delegation from states to federal government. Article 252(1) of the Indian Constitution makes a provision for delegation of legislative power by two or more States to Parliament so as to empower it to legislate with respect to a matter in the State legislative jurisdiction in relation to such States. Any other State may adopt such a law by passing a resolution to that effect.

The Urban Land Ceiling and Regulation Act of 1976 was enacted under this constitutional provision.⁸⁹ As stated under seventh schedule list II of the Indian Constitution, the legislative power over land is the competence of states legislature. Initially eleven states transferred their legislative power over the subject matter to the Union Government, and then six states adopted the Act.⁹⁰ The Act was enacted to prevent the concentration of land holdings in urban areas in a few private hands and make urban land available for housing of the middle- and low-income groups.⁹¹

The Australian federal system is the other example to demonstrate upward legislative power delegation. Section 51 (xxxvii) of the Australian Constitution reads:

[The federal parliament shall have power to make laws on] matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law;

Therefore, State parliaments can refer matters to the federal Parliament. That is, they can ask the federal Parliament to make laws about an issue that is otherwise a state responsibility. Any federal law then made about the issue only applies in the state or states that referred the matter to federal Parliament or that decide to adopt the law. As clearly noted by Saunders, “execution of the legislation falls within the executive power of the Commonwealth [federal] government.”⁹²

⁸⁹ Indian Urban Land (Ceiling and Regulation) Act 1976, fourth paragraph of the preamble.

⁹⁰ Indian Urban Land (Ceiling and Regulation) Act 1976, Section 1 (2) and (3).

⁹¹ Makarand Bakore, *Urban Land Ceiling Act: Appeal to Repeal*, Center for Civil Society, 2007, p.2.

⁹² Cheryl Saunders, *Formal and Informal Institutions and Mechanisms of Intergovernmental Relations in Australia*, a paper presented on Mechanisms of Intergovernmental Relations: International Experiences and Challenges for Brazil, Brazil, 2003, p. 5.

The Canadian federal system also has similar practice with a slight difference, which emanates from asymmetric nature of the federation. In this connection Section 94 of Canadian Constitution reads:

Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act *in that Behalf* the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and *until it is adopted and enacted* as Law by the Legislature thereof.[emphasis added]

The Malaysian federal system demonstrates similar pattern of upward legislative power delegation. The federal parliament of Malaysia may make laws with respect to any matter enumerated in the state list, “if so requested by the Legislative Assembly of any State.”⁹³

There are also instances that elaborates upward delegation of executive power. The Indian federal system is a good example to demonstrate the practice of upward power delegation from states to the Union government on executive competence. In this regard Article 258A of the Indian constitution reads as follows: -

Notwithstanding anything in this constitution, *the Governor of a state may, with the consent of the Government of India*, entrust either conditionally or unconditionally to that Government or its officer functions in relation to any matter to which *the executive power of the state extends*. [emphasis added]

As per the above mentioned provision of the Indian Constitution, constituent units through their Governors can delegate to the Union government executive powers assigned to them. The constituent units can make conditional or unconditional executive power delegation, but must seek the consent of the government of the Union. Therefore, the delegation executes only through an agreement made between the two levels of governments. Moreover, the constituent

⁹³ The Constitution of Malaysia, 1957, Article 76(1) (c).

units may delegate their executive power either to the government of the Union as an institution or officer of the Union government.

The upward executive power delegation was not originally included in the Indian constitution. In this connection Jain said that “This Article was inserted in the Constitution in 1956 by the Seventh Constitutional Amendment Act, as a corresponding provision to Article 258(1).”⁹⁴ The inclusion was associated with the construction of *Hirakud* dam⁹⁵. The construction cost of the dam was to be debited to the state of Odisha, but the execution of the construction was assigned to the government of the Union. The then democratic institutions like the Auditor General, criticized the act as it resulted in the violation of the constitution. Because at the time states have no constitutional power to delegate their executive responsibility to the central government. Then, after enormous discussions the government determined to amend the constitution. Eventually Article 258A was included in the constitution of India to empower the states to delegate their executive responsibilities to the Union government or its officers.⁹⁶

2.3.3. Is Upward Delegation of Power Theoretically Acceptable?

Division of powers between two or more levels of government is one basic feature of federalism.⁹⁷ Federal constitution outlines powers and functions of each order of government. However, it doesn't necessarily mean that, the division of power always works sharply.⁹⁸ As a result there will be intergovernmental relationship between federal and regional governments.⁹⁹ This results from the unavoidable realities of interdependence among orders of governments; complexities of the contemporary policy agenda; and the impossibility of drawing clear and separate lines of responsibility among tiers of government.¹⁰⁰

⁹⁴ Jain, at note 47, p.953.

⁹⁵ *Hariku Dam* is found in the state of Odisha. Its construction began in 1948 and finalized in 1957. It is producing 347.5 megawatts electric power. https://en.wikipedia.org/wiki/List_of_dams_and_reservoirs_in_India#Odisha (accessed 30 March 2017).

⁹⁶ A. Chanda, *Federalism in India: A study of Union- State Relations*, London, George Allen & Unwin Ltd., 1965, p. 109.

⁹⁷ T. Akindele and R. Opaopa, ‘The Theory and Practice of Federalism as a Structural Mechanism of Governance: How Adequate for Gender Struggle and Representation in Nigeria?’, *Anthropologist Journal*, Vol. 5, No. 3, 2003, p.170.

⁹⁸ *Ibid.*

⁹⁹ Intergovernmental relation deals with horizontally issues of common interest between constituent units and vertically between federal government and regional governments. See Aseffa Fiseha, ‘The System of Intergovernmental Relations (IGR) in Ethiopia: In Search of Institutions and Guidelines’, *Journal of Ethiopian Law*, Vol.23, No.1, 2009, p.96.

¹⁰⁰ G. Anderson, *Federalism: An Introduction*, Oxford University Press, 2008, p.59.

Most federations establish formal institution to facilitate intergovernmental relations. Besides federations also use other devices in the distribution of powers for the purpose of vertical cooperation and flexibility. Upward intergovernmental power delegation is one device for flexibility and cooperation in the relationships between orders of government. Express provision for vertical intergovernmental delegation cannot be found in most old federations. In this regard Watts said:

“the earlier federations did not expressly provide for [intergovernmental power delegation] most of the federations created later in the twentieth century enhanced their flexibility by including express constitutional provisions enabling delegation of legislative as well as administrative authority in either direction.”¹⁰¹

Federations follow strict procedures regarding upward power delegation. As noted in the above section, horizontal power delegation can be executed either based on clear constitutional provision or court (in some instances constitutional court) pronouncements. However, the case of upward power delegation is not the same. Courts have sometimes limited the scope for upward delegation of legislative powers due to the absence of clear constitutional provisions.¹⁰² For instance the Supreme Court of Canada in *Attorney General of Nova Scotia vs Attorney General of Canada* rejected a proposal which empowers provincial legislature to delegate to the federal Parliament authority to make laws relating to employment in industries falling within provincial jurisdiction. The Supreme Court reasoned that the constitution has not empowered state legislatures to delegate their power to the federal parliament and “if a power of delegation had been intended, it would have been expressly given.”¹⁰³ In the same fashion, the Indian Auditor General criticized the practice of upward executive power delegation in the absence of clear constitutional provision.¹⁰⁴

Upward power delegation arrangement puts constitutional competence of states under the control of federal government. While some scholars support vertical intergovernmental delegation made from constituent units to federal government, others criticize it. The following core arguments for and against the phenomenon helps to evaluate whether upward delegation of power is theoretically acceptable.

¹⁰¹ Watts, at note 3, p.121.

¹⁰² Jain, at note 47, p.121.

¹⁰³ V. La Forest, ‘Delegation of Legislative Power in Canada’, *McGill Law Review*, Vol.21, 1975, pp. 135 – 136.

¹⁰⁴ Chanda, *Federalism in India*, at note 96, p. 109.

There are various arguments against upward power delegation. Federalism “involves the combination of regional self-rule for some purposes and shared-rule for others within a single political system, so that neither is subordinate to the other.”¹⁰⁵ By enshrining those two forms of rules, federalism “become an important instrument to serve diverse and common interests in a given nation, establishing a union to discharge common functions and regional governments to accommodate diverse interests.”¹⁰⁶

Federalism, by devising division of power between the two orders of governments, works to achieve the aims of decentralization. Pippa Norris summarized benefits of decentralization as:

Decentralized governance has many advantages, especially for democratic participation, representation, and accountability; for public policy and governmental effectiveness; and for the representation and accommodation of territorially based ethnic, cultural, and linguistic differences.¹⁰⁷

Upward power delegation damages the very purpose of federalism by allowing accumulation power at the federal level. The practice will result in shrinking regional powers. Upward power delegation makes the federal structure on paper to resemble a unitary form in practice. That will adversely affect the enhancement of democracy, good governance and accommodation of diversities.

On the other hand, upward power delegation stands against the criterial rationale behind division of power between the two levels of governments. There is no generally accepted benchmark to list a policy matter either under the competence of federal or regional governments. However, the inference from practices in various federation indicates, policy matters affecting the whole nation are made under the competence of central government, whereas policy areas in need of regional customization are made under the authority of state governments. Dicey, for instance, argues that “whatever concerns the nation as a whole should

¹⁰⁵ Watts, at note 3, p.1.

¹⁰⁶ Legese Tigabu, ‘Ethnic Federalism and Conflict in Ethiopia: What Lessons can other Jurisdictions Draw’, *African Journal of International and Comparative Law*, vol.23, no.3, Edinburgh University Press, 2015, pp.462.

¹⁰⁷ P. Norris, *Driving Democracy: Do Power-sharing Institutions Work*, Cambridge University Press, 2008, Chapter 7, p.3.

be placed under the control of the national government” and all other matters “which are not primarily common interests should remain in the hands of several states.”¹⁰⁸

The policy matters left for regional states are those that are believed better regulated and treated in a diversified manner within the country. But those policy areas under the control of the federal government are deemed to be managed uniformly in the political system. Upward delegation set-up destructs this belief, by putting a policy area under the control of the central government to be executed uniformly, which was previously intended to be treated diversely by constituent units. Green argues against the practice of using states laws by federal courts that “states lack a legitimate interest in extending their law vertically”¹⁰⁹ to the federal structures.

There are also arguments which support upward intergovernmental power delegation. Although federalism provides division of power, it is not possible to provide a clear-cut authority for each order of government. As Watts notes, “it is impossible to have a watertight distribution of administrative or legislative jurisdiction among governments.”¹¹⁰ Therefore intergovernmental cooperation is indispensable in federal systems. Furthermore, “one of the mechanisms for promoting intergovernmental cooperation in a federal system is the delegation of power from one level of government to the other.”¹¹¹ Therefore intergovernmental delegation of power is very crucial to have a federal system which deliver astonishing public service nurtured by the coordination of levels of governments.

The other argument which supports vertical intergovernmental delegation is associated with the very concept of delegation. Delegation is a temporary solution which helps to curb specific challenges. Therefore, upward power delegation does not permanently alter the division of power between orders of governments.¹¹² Assefa argues, for instance, that “it is inherent in delegation that whoever has delegated power can also take it away at any moment. There is an undisputable right to reclaim it.”¹¹³ In other words, the delegator “does not lose its exclusive control by delegating for it retains its power of revocation.”¹¹⁴ Therefore, intergovernmental

¹⁰⁸ O. Hueglin and A. Fenna, *Comparative Federalism: A Systematic Inquiry*, Toronto, Broadview Press, 2006, pp.147-178.

¹⁰⁹ Greve, *Mississippi Law Journal*, at note 76, p.77.

¹¹⁰ Watts, at note 3, p.22.

¹¹¹ Solomon, *Fiscal Federalism*, at note 68, p.99.

¹¹² Solomon, *Fiscal Federalism*, at note 68, foot note 153, p.99.

¹¹³ Assefa, *Federalism*, at note 24, p.375.

¹¹⁴ Forest, *McGill Law Review*, at note 103, p.136.

delegation of power helps federations to solve different forms of challenges associated with governmental responsibilities without going through the formal procedure of constitutional amendment.

It is impossible to judge whether upward power delegation is acceptable theoretically from the outset. As noted in the above discussion, there are experiences of vertical intergovernmental delegations from constituent units to federal government. However, it is not possible to find upward power delegation which does not depend on a clear constitutional provision. It is hardly possible to observe vertical intergovernmental delegation from regional to central government that is based on court pronouncements like that of horizontal delegation between branches of government. Therefore, upward power delegation may be acceptable if it executes within the limitations defined by a constitution.

Chapter Three

Delegation of Power under FDRE Constitution

3.1. Introduction

The 1994 FDRE Constitution addresses both forms of power delegation, i.e. horizontal delegation between branches of the same level government and vertical delegation between federal and regional state governments. This chapter addresses delegation of power under the FDRE constitution. The chapter will examine how the FDRE constitution regulate horizontal and vertical power delegation. It will give detailed realities of delegation introduced by FDRE constitution. Therefore, it will serve as a background to evaluate the status of upward power delegation under FDRE constitution, which is the core theme of this research and which will be addressed in chapter four.

This chapter has two main parts. The first part discusses horizontal delegation of powers under FDRE Constitution. The second part considers the constitutional aspects of vertical power delegation. The discussions in both parts, covers theoretical and practical aspects of power delegation.

3.2. Horizontal Power Delegation under FDRE Constitution

The FDRE Constitution adopted the doctrine of separation of powers. The constitution promised that, the two tiers of governments will have legislative, executive and judicial power.¹¹⁵ The HoPR is the legislative organ of the federal government¹¹⁶. The prime minister and Council of Ministers jointly hold the highest executive power of the central government.¹¹⁷ The judicial power of the federal government is vested in federal courts.¹¹⁸

However, the FDRE constitution permitted horizontal delegation of power from HoPR to the Council of Ministers. The horizontal power delegation phenomenon is not indicated in the constitutional provisions enumerating the powers of the legislature. The constitution while listing the competence of the Council of Ministers, included the power to enact regulation based

¹¹⁵ FDRE Constitution, at note 2, Articles 50(2), 50(4), (6) and (7). The regional council is the legislature, regional administrative council is executive and regional courts are judiciary of regional governments.

¹¹⁶ FDRE Constitution, at note 2, Article 55(1).

¹¹⁷ FDRE Constitution, at note 2, Articles 72, 74 and 77.

¹¹⁸ FDRE Constitution, at note 2, Article 79(1).

on delegation made from the HoPR. In this regard Article 77(13) of the constitution reads as follows: -

“It [the Council of Ministers] shall enact regulations pursuant to powers vested in it by the House of Peoples’ Representatives.”

The HoPR based on this constitutional set-up delegates the Council of Ministers to enact regulation for the implementation of various policy matters. The House sometimes even further delegates specific executive agency to enact directives on concerned policy field.¹¹⁹

Horizontal power delegation puts inherent competence of the legislature under the ambit of the executive. For this reason, its execution needs due care. The implementation of horizontal delegation needs to assure that it does not affect the basic tenets of doctrine of separation of powers. Various federations have standards fixed either by constitutional document or umpiring body to measure the acceptability of horizontal power delegation.

The German Basic Law under Article 80 (1) urges that while delegating power horizontally from the legislature to the executive, “the content, purpose and scope of the authority conferred shall be specified in the law.” Therefore, any act of horizontal delegation without fulfilling those criteria will be made unconstitutional by the German Constitutional Court.¹²⁰ In US¹²¹ and Indian¹²² federal systems, although there is no clear constitutional provision, their supreme courts developed standards for the evaluation of horizontal power delegation. As per the standard developed by US supreme court, delegation “must be complete in itself, must declare legislative policy or standard and must operate to limit the delegated power.”¹²³ The India federal system also envisages the US criteria for horizontal delegation. Jain said; while delegating “the legislature must declare the policy of the law and the legal principles which are to control any given cases and must provide a standard to guide the officials or the body in power to execute the law.”¹²⁴ Those criteria are useful to evaluate whether the horizontal

¹¹⁹ The following can serve best examples; Urban Landholding Registration Proclamation, 2014, Article 54(2) Proclamation No.818, Negarit Gazeta, 20th Year, No.25, Customs Proclamation, 2014, Article 180(2), Proclamation No.859, Negarit Gazeta, 20th Year, No.82, and Industrial Parks Proclamation, 2015, Article 32(2), Proclamation No.886, Negarit Gazeta, 21st Year, No.39.

¹²⁰ P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Duke University Press, 1997, p.56.

¹²¹ Kischel, *Delegation of power*, at note 39, p. 225.

¹²² Jain, at note 47, p.164.

¹²³ R. Stengle and P. Rhea, ‘Putting the Genie Back in the Bottle: The Legislative Struggle to contain Rule Making by Executive Agencies’, *Florida State University Law Review*, Vol.21 no.415, 1993, pp.416-417.

¹²⁴Jain, at note 47, p.165.

delegation is acceptable or not. This can be made to manage horizontal delegation in a manner which does not destroy the basic belief of doctrine of separation of powers. In this regard there is nothing indicated in FDRE constitution and the decisions of HoF.

There are practical problems associated with the practice of horizontal delegation in Ethiopian federal system. In this regard two practices attracts due attention. The first instance will be horizontal delegation made from HoPR to the Federal Supreme Court. The other examination looks at two redundantly used expressions to execute horizontal delegation from the HoPR to Council of Ministers.

Article 77(13) of the FDRE constitution empowers the HoPR to delegates some of its legislative competence only to the executive organ, i.e. Council of Ministers. Nonetheless, in 2004 the parliament delegated law making authority to the Federal Supreme Court. The Criminal Code says; “In order to ensure the correctness and uniformity sentencing, the Federal Supreme Court shall issue a manual relating to sentencing.”¹²⁵ Therefore, by this very provision of the Criminal Code, the parliament delegated the Federal Supreme Court to legislate on determination of sentence.

The Federal Supreme Court adopted the first Sentencing Guide Line in 2010 and amended it in 2014. The guide line is a binding legal instrument in determining criminal sentence at all court levels. Public prosecutor and accused person or advocate, must have to made sentencing remarks only based on the sentencing guide line. Courts are also duty bound to obey the guide line in determining criminal sentence. Moreover, courts at all level are under obligation to report to Federal Supreme Court, if they determine sentence opposite to the provisions of the

¹²⁵ The Criminal Code of Federal Democratic Republic of Ethiopia, 2004, Article 88(4), Proclamation No. 414.

guide line.¹²⁶ The Revised Sentencing Guide Line is criticized for having an amending effect on the Criminal Code.¹²⁷

The FDRE constitution did not leave an indication to delegation to be made from the HoPR to the Federal Supreme Court. As the South African Constitutional Court argued, “a clear failure to deal specifically in the Constitution with an issue was not accidental.”¹²⁸ Therefore, the delegation made to the judiciary have no constitutional basis. The HoPR have no constitutional power to delegate its power to the judiciary. Furthermore, it is unusual to observe horizontal power delegation from legislature to judiciary.¹²⁹

There are two prominent expressions adopted by the HoPR, to vest rule making competence in the Council of Ministers. The first expression used to delegate the Council of Ministers on re-organization of organs in the executive branch. The second expression addresses general delegation to enact regulations for implementation of various policy matters. The following discussion will demonstrate these two scenarios of horizontal delegation.

The HoPR gave general delegation to the Council of Ministers to enact regulation on matters of organizing the organs in the executive branch. In this regard, the proclamation on the definition of powers and functions of the federal executive organs reads as follows: -

¹²⁶ See the cumulative reading of Articles 27 and 29 of the Revised Federal Supreme Court’s Sentencing Guide Line No.2/2014. There is no prudent legal instrument which prohibits manual to be considered as a law. Initially, Article 2(5) of Council of Constitutional Inquiry Proclamation No.250/2001 defined law to include only proclamations and regulations. But the proclamation is repealed by Article 34(1) of Council of Constitutional Inquiry Proclamation No.798/2013. On top of this, the manual is a binding legal instrument in determination of sentence. As per Article 80 (3) (a) of the FDRE Constitution, the Federal Supreme Court has a power of cassation over final decision containing a basic error of law. Pursuant to Article 10(4) of Federal Courts Proclamation Re-amendment Proclamation No.454/2005, interpretation of law given by Federal Cassation bench with not less than five judges shall be binding on all level courts of Ethiopia. Based on this legal set-up the Federal Supreme Court Cassation Bench accepted and rendered tremendous litigation concerning the Sentencing Guide Lines for committing basic error of law. See Ato Solomon Desalegni v Southern Region Public Prosecutor, File No.95438, Federal Supreme Court Cassation Bench, 15 May 2014, and Ato Samir Ibrahim v Federal Public Prosecutor, File No.95440, Federal Supreme Court Cassation Bench, 11 June 2014. Article 9 of the FDRE Constitution also equated customary practice and decision of state with law, late alone manual.

¹²⁷ ኑሩ ሠይድ, ‘የተሻሻለው የቅጣት አወሳሰን መመሪያ ቁ.2/2006 ችግሮች ዳሰሳ ጥናት’, የኢትዮጵያ ጠበቆች የሕግ መጽሐፍት, 2008, ገጽ. 150.

¹²⁸ H. Klug, ‘South Africa: From Constitutional Promise to Social Transformation’, in J. Goldsworthy (ed.), *Interpreting Constitutions: A Comparative Study*, Oxford University Press, 2006, p.286.

¹²⁹ The Indian system is an exception. The Indian Supreme Court “has been given a rule-making power for regulating generally its practice and procedure including such matters as persons practicing before it, procedure for hearing appeals, conditions for reviewing its own judgment, fees, grant of bail, stay of proceedings etc.” See Montesquieu, *The Spirit of the Law*, at note 34. However, “rules made by the Court need the approval of the President and they are subject to any law made by Parliament.” See Article 145 of the Indian Constitution.

“The Council of Ministers is hereby empowered, where it finds it necessary, to reorganize the federal government executive organs by issuing regulations for the closure, merger or division of an existing executive organ or for change of its accountability or mandates or for the establishment of a new one.”¹³⁰

The legal personality of a physical person emanates from birth. Institutions may acquire legal personality either by registration or legislation. Institutions such as political parties, trade organization and civic societies obtain legal personality, through registration before competent authorities. Governmental institutions attain legal personality by legislation. The legislative power of the federal government resides in the HoPR. However, the house transferred its legislative competence regarding organization (which includes; establishment, merger, division or closure) of federal executive organs, to the Council of Ministers by the above cited provision.

Unchecked exercise of horizontally delegated power may affect individual liberties.¹³¹ Therefore the legislative must keep controlling and oversighting power over the exercise of delegated power by the executive organ. To this effect, the above mentioned horizontal delegation platform is not free from difficulties. There is nothing said about the control and oversight of the parliament, on the exercise of the delegated power by the executive organ. The Council of Ministers can do anything it thinks ‘necessary’, regarding the organization of executive organs.

The second frequently used mechanism of horizontal delegation is empowering the Council of Ministers to make regulation for the implementation of diverse policy matters. In this regard most proclamation made by the parliament says:

¹³⁰ Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, 2015, Article 39, Proclamation No. 916, Negarit Gazeta, 22nd Year, No.12. The FDRE government made fundamental restructuring in its executive organ every five years following the national elections. To this effect four proclamations were made since the adoption of the constitution, namely; Proclamation No.4/1995, Proclamation No.471/2005, Proclamation No.691/2010 and the recently working Proclamation No.916/2015. The above cited provision was first introduced in 2010 by Proclamation No.691/2010. From this time onwards, the parliament was reserved itself only on the organization of ministerial offices and few exceptional government institutions.

¹³¹ A. Herrman, ‘To Delegate or Not to Delegate- That Is Pre-emption: The Lack of Political Accountability in Administrative Pre-emption Defies Federalism Constraints on Government Power’, *Pacific Law Journal*, Vol.28, 1997, p.1157.

“Council of Ministers may issue regulations that may be necessary for the implementation of this Proclamation.”¹³²

This provision establishes general form of horizontal delegation. General form of delegation may be open for abuse. The parliament has to define on which aspect of proclamation, the executive should regulate. The ‘content, purpose and scope’ criterion of German Basic Law can play a decisive role here.¹³³ Nonetheless, this was missed in the proclamations.

3.3. Vertical Power Delegation under FDRE Constitution

3.3.1. Downward Power Delegation

Downward power delegation is enshrined in two ways in the FDRE constitution. In the first case, the constitution clearly delegated federal judicial power to regional governments’ counter parts. Secondly, the constitution authorizes the federal government to delegate some of its powers to the regional states. This section elaborates two scenarios in slight details.

3.3.1.1. Downward delegation of federal judicial power

The FDRE Constitution establishes independent judiciary both at federal and state level.¹³⁴ The constitution formed dual court structure, i.e. the parallel existence of federal and regional courts.¹³⁵ The constitution organized judiciaries of both tiers of governments, to consist three court layers namely; supreme, high and first instance.¹³⁶

The constitution established Federal Supreme Court¹³⁷ and declares that “House of Peoples’ Representatives may, by two third majority vote, establish nationwide, or in some parts of the country only, the Federal High Court and the Federal First Instance Courts it deems necessary.”¹³⁸ The constitution discourages the establishment of Federal High and First Instance courts. Pursuant to Article 78(2) of the constitution, delegation was made principle, but organization of Federal High and First Instance courts exception. Besides, the constitution introduced especial majority, i.e. two third, for the organization of the two court layers. The constitutional makers showed strongest commitment to make a principle that, the judicial power of Federal High and First Instance courts to be exercised by regional courts. The

¹³² See for instance, Federal Tax Administration Proclamation, 2016, Article 136(1), Proclamation No.823, Negarit Gazeta, 22nd Year, No.110.

¹³³ Kommers, *The Constitutional Jurisprudence of Germany*, at note 120.

¹³⁴ FDRE Constitution, at note 2, Articles 78(1) and 50(7).

¹³⁵ FDRE Constitution, at note 2, Article 50(2).

¹³⁶ FDRE Constitution, at note 2, Article 78(2) and (3).

¹³⁷ FDRE Constitution, at note 2, Article 78(2).

¹³⁸ Ibid. See also Fasil, at note 1, p.99.

constitution follows this approach due to different reasons. If all layers of courts envisaged in the constitution established, it will create “procedural confusion and unnecessarily extended lack of uniformity in the administration of justice as well as wasting scarce resources.”¹³⁹

The act of the HoPR also reveals lack of encouragement in organizing Federal High and First Instance courts in partial or countrywide. The HoPR organized Federal High and First Instance courts in the two federal cities a year after the adoption of the FDRE constitution.¹⁴⁰ However, it took eight more years to establish Federal High courts in five regional states.¹⁴¹ Besides, they were established in regions known for being ‘less developed’,¹⁴² with one exception.¹⁴³ The reason behind this measure is lack of adequate legal professionals in those ‘less developed’ regional states. The *a contrario sensu* understanding of the position of the HoPR is that, the interest of the federal legislature is, as long as they have adequate organization, to leave regional courts to exercise delegated federal judicial power. Yet, Federal First Instance courts were not established out of Addis Ababa and Dire Dawa cities.

3.3.1.2. Constitutional Empowerment for Downward Delegation

The other scenario which demonstrate down ward delegation in the FDRE constitution is the power given to the federal government. The constitution clearly authorized the federal government to transfer some of its competences to regional states. In this connection Article 50(9) of the constitution reads as follows:

“The Federal Government may, when necessary, delegate to the States powers and functions granted to it by Article 51 of this Constitution.”

The constitution does not make an indication whether the federal government can delegate legislative or executive or both powers to regional states. The constitution simply says ‘the federal government may delegate its powers listed under Article 51’. Article 51 of the

¹³⁹ Fasil, at note 1, p.100.

¹⁴⁰ See Federal Courts Proclamation, 1996, Proclamation No.25, Negarit Gazeta, 2nd Year, No.13.

¹⁴¹ See Federal High Court Establishment Proclamation, 2003, Article 2, Proclamation No. 322, Negarit Gazeta, 9th Year, No.42.

¹⁴² Regulation made by the Council of Ministers for the establishment of Federal Board to provide affirmative support for less developed region defined ‘Less Developed Regions’ as it includes, “Regional States of Afar, Somali, Gambela, and Benishangul Gumuz and pastoralist areas in Oromia and Southern Nations Nationalities and People’s region”. See The Council of Ministers Regulation for the Establishment of Federal Board to provide affirmative support for less developed regions, 2004, Article 2(1), Regulation No. 103, Negarit Gazeta, 10th Year, No.44.

¹⁴³ See Federal High Court Establishment Proclamation, at note 142, Article 2. The provision announces the establishment of Federal High Courts in Afar, Benishangul Gumuz, Gambella, Somali and Southern Nations Nationalities and Peoples’ regional states. The first four regional states are known for less development and provided with variety of supports from the federal government.

FDRE Constitution included both legislative and executive powers of the federal government. This constitutional provision employed words such as; ‘formulate, declare, establish, enact, and determine’ to define legislative competences of the federal government. On the other hand, the same constitutional provision used, verses such as; ‘implement, execute, administer, and regulate’ to determine executive authorities of the federal government. The federal government can delegate both its legislative and administrative authorities.¹⁴⁴ Practically the federal government is delegating both legislative and executive powers to regional states.

For instance, the legislative power to “utilization and conservation of land and natural resources”¹⁴⁵ is the competence of the HoPR. Nonetheless, the federal rural land administration legislation authorized regional states to enact laws on the subject matter.¹⁴⁶ Almost all regional states adopted their respective regional rural land administration legislations following this authorization. Most regional rural land administration proclamations claim that they were made based on the authorization in federal land administration legislation.¹⁴⁷ Therefore, this scenario best explains that, the HoPR is delegating federal law making competence to regional states.

The FDRE constitution did not specify the mechanism of downward delegation to be made by the federal government. The German Basic Law specified legislation,¹⁴⁸ whereas the Indian constitution stated legislation and agreement¹⁴⁹ to be the mechanisms used to execute downward delegation of constitutional power. In the Ethiopia’s case, the HoPR authorizes federal executive organs to delegate power to regional counter parts. For instance, HoPR empowered all federal ministries to delegate part of their competence to regional governments by proclamation. In this connection Article 10(6) of proclamation no.916/2015 reads as follows:

¹⁴⁴ However, due to their nature certain powers like legislative powers on printing money, regulating foreign trade and customs duties and international relations are non-delegable. See Solomon, *Fiscal Federalism*, at note 69, p.99.

¹⁴⁵ FDRE Constitution, at note 2, Articles 51(5) and 55(2)(a).

¹⁴⁶ See Rural Land Administration and Use Proclamation, at note 8, Article 17(1).

¹⁴⁷ See the preambles of the Amhara Revised Rural Land Administration and Use Determination Proclamation, 2006, Proclamation No.133, Zikre Hig, 11th Year, No.18, Afar Rural Land Administration and Use Proclamation, 2009, Proclamation No.49, Benishangul Gumuz Rural Land Administration and Use Proclamation, 2010, Proclamation No.85, The Ethiopian Somali Regional State Rural Land Administration and Use Proclamation, 2013, Proclamation No.128, SNNP Rural Land Administration and Use Proclamation, 2007, Proclamation No.110, Debub Negarit Gazeta, 13rd Year, No.10, and The Revised Tigray National Regional State Rural Land Administration and Use Proclamation, 2013, Proclamation No.239, Tigray Negarit Gazeta, 21st Year, No.1.

¹⁴⁸ Basic Law for Germany, at note 38, Article 71.

¹⁴⁹ The Constitution of India, at note 51, Articles 154 and 258.

“[Each Ministry shall have the power], where necessary, delegate part of its powers and duties to regional state organs.”

Therefore, each ministerial office of the federal government may delegate its power to regional governments, when it deems necessary. Federal ministries usually delegate power to their regional counter parts by writing official letter.¹⁵⁰

The police power is another example for execution of downward delegation by authorization. The constitution indicated that the federal and regional governments will establish their respective police institutions.¹⁵¹ The federal government established its police commission. The federal police commission is authorized by the HoPR to “delegate, where necessary, regional police commissions to prevent and investigate crimes falling under the jurisdiction of federal courts.”¹⁵² The newly established Federal Attorney General also given the above cited common power of ministries.¹⁵³

The delegation of police and prosecution power can play a vital role. The constitution only delegated federal judicial power to regional courts. Therefore, regional investigative police officers and prosecutors needs delegation from respective federal agencies, to investigate and prosecutor criminal matters falling under the delegated jurisdiction of regional courts.

Finally, the constitutional provision dealing with expenditure responsibility of the two orders of governments, reveals the other element of down ward delegation. In this regard Article 94(1) of the constitution says; “Unless otherwise agreed upon, the financial expenditures required for the carrying out of any delegated function by a state shall be borne by the delegating party.” Besides, Article 79(7) of the Constitution says; “The HoPR shall allocate compensatory budgets for States whose Supreme and High Courts concurrently exercised the jurisdiction of the Federal High Court and Federal First-Instance Courts.” Therefore, with the absence of a clear agreement the federal government has an obligation to cover the costs of delegated federal responsibility.

¹⁵⁰ Nigussie, *Mizan Law Review*, at note 30, p.354.

¹⁵¹ FDRE Constitution, at note 2, Article 52(2)(g) for regional police and Article 51(6) for Federal Police.

¹⁵² Ethiopian Federal Police Commission Establishment Proclamation, 2011, Article 6(6), Proclamation No.720, Negarit Gazeta, 18th Year, No.2.

¹⁵³ Federal Attorney General Establishment Proclamation, 2016, Article 6(14), Proclamation No. 943, Negarit Gazeta, 22nd Year, No.62.

3.3.2. Upward Power Delegation

There is no clear constitutional provision, which empowers regional states to delegate their authorities to the federal government, in the Ethiopian federal set-up. The legislative and administrative powers on the utilization of land were clearly divided between federal and regional governments constitutionally.¹⁵⁴ Nevertheless, in recent years the federal government is exercising land administration power over large-scale agricultural investments, based on delegation made from regional state governments. In the following chapter of the research, the constitutional status of upward power delegation will be examining.

¹⁵⁴ FDRE Constitution, at note 2, Articles 51(5), 55(2)(a) for federal legislative powers, and Article 52(2)(d) for regional executive power.

Chapter Four

Constitutional Status of Upward Power Delegation in Ethiopia

4.1. Introduction

The general constitutional aspects of power delegation were dealt in the previous chapter. The discussion tried to reveal the position of FDRE constitution vis-à-vis horizontal and vertical power delegation. The constitution made clear provisions governing horizontal and downward power delegation, but is silent on upward power delegation. But in reality the federal government is exercising regional competence on administration of large-scale agricultural land.

This chapter deals with the core theme of the research, i.e. the constitutional status of upward power delegation in case of the administration of investment lands. The chapter is organized in three major sections. The first section will explore the scope of the constitutional competence of the federal and state governments with respect to land administration. The second section will present the historical development of upward power delegation over large-scale agricultural land. The third part assess the constitutional status of upward delegation of power. It also highlights the major draw backs of upward power delegation.

4.2. Legislative and Administrative Power over Land under FDRE Constitution

The FDRE Constitution confers legislative competence over land and other natural resources on the federal government¹⁵⁵, whereas regional states have administrative power over the same subject matter.¹⁵⁶ However, the constitution does not delimits the scope of federal legislative and regional administrative powers. In other words, “it is unclear where the legislative power of the federal government ends and the administrative power of states begins regarding land.”¹⁵⁷ Following this scenario, there is an argument which says “the federal government is clearly entrusted with wider powers regarding land (including enacting laws for its utilization and conservation) thereby rendering its power to allocate land¹⁵⁸ constitutional, while the powers of regional states is confined to the function of administering land and other natural

¹⁵⁵ FDRE Constitution, at note 2, Articles 51(5) and 55(2).

¹⁵⁶ FDRE Constitution, at note 2, Article 52(2)(d).

¹⁵⁷ Assefa Fiseha and Zemelak Ayele, ‘Concurrent Powers in the Ethiopian Federal System’, in Nico Steytler (ed.), *Concurrent Powers in Federal Systems: Meaning, Making, Managing*, 2017, p.251.

¹⁵⁸ Actually the power transferred to the federal government is not only to allocate land to investors. The MoARD (MoA) has the power to identify lands suitable for agricultural investment, the determine lease price, to transfer land to investors, to follow up investors progress in development of the land and to authorize investors to transfer land use rights to third party. See Articles 3 and 5 – 7 of the directive.

resources in accordance with federal laws.”¹⁵⁹ Therefore, the federal government can enact a law which empower itself with regarding the allocation of land beyond a certain threshold.¹⁶⁰ At this junction, it is crucial to explore what really is the power of federal government and regional states regarding land administration.

The main functions of government are “choosing and adopting of policies and carrying out them through the making and enforcing of detailed rules.”¹⁶¹ Among those core responsibilities “the power of choosing the policy to be adopted is the heart and essence of legislative power.”¹⁶² Legislative authority concerns with the activities of making, amending and repealing of rules of law.¹⁶³ Whereas the application of the rules falls under administrative power. Administrative authority is the power to execute and enforce rules of law.

The FDRE constitution specifically empowers the federal HoPR to enact law regarding the administration of land. This branch of government by its very nature plays a role of rulemaking, oversighting and controlling executive organ.¹⁶⁴ As noted by Fasil, HoPR’s “functions encompass the legislative, financial, deliberative, informative, and representative areas.”¹⁶⁵ Therefore, the FDRE constitution gives only rule making power on land administration to the federal government. The activity of allocating land resembles to administration rather than legislative authority.

The federal and regional power on land administration becomes more clearer from the reading of the Amharic version of the constitution.¹⁶⁶ The Amharic version of Articles 51(5) and 55(1) of the FDRE constitution used the expression “አግ ያወጣል” to define the power of the federal government on land administration. This is purely confined with legislative authority. On the other hand, the Amharic version of Article 52(2)(d) of the constitution says, “የፌዴራሉ መንግሥት በሚያወጣው አግ መሠረት መሬትና የተፈጥሮ ሀብትን ያስተዳድራል”. This provision of the constitution reaffirms that federal government’s role as legislative power on one hand and the power to administer land goes to regional governments on the other hand. The minute of the constitutional assembly also differentiate between the power of the federal

¹⁵⁹ Elias, *Mizan Law Review*, at note 17, p.178.

¹⁶⁰ Ibid.

¹⁶¹ Cheadle, *The Yale Law Journal*, at note 36, p. 898.

¹⁶² Ibid.

¹⁶³ B. Ojwang, *Separation of Powers under Kenya’s Constitution: Emerging Relationship between the Legislature and the Judiciary*, paper presented at the annual judges’ colloquium, Mombasa, 2016, p.6.

¹⁶⁴ Fasil, at note 1, p. 69. See also Article 55(17) and (18) of the FDRE Constitution.

¹⁶⁵ Fasil, at note 1, p. 69.

¹⁶⁶ FDRE Constitution, at note 2, Article 106. As per this provision of the constitution, it is the Amharic version of the constitutional text that have final legal authority.

and regional governments on land matters as “የፌዴራል መንግሥቱ ሕግ ያወጣል፣ ክልሎችም በሕጉ መሠረት መሬትን ያስተዳድራሉ።”¹⁶⁷ Allocation of land can’t be regarded as an act of law making.

Horizontal delegation of power most of the time made from legislative organ to executive body. This paves a chance for the executive to exercise legislative authority to some extent. At the federal level the HoPR delegates the Council of Ministers (the executive) to enact legislation. In the same fashion the federal government (which has legislative power) empowered regional states (which have only administrative authority) to adopt laws regarding land administration. This clearly manifests that the relationship between the federal and regional governments is legislative – executive regarding the administration of land.

The definition given for land administration by legislations gives an insight to differentiate between legislative and administrative power over land. The Federal Rural Land Administration Proclamation defined land administration as:¹⁶⁸

Rural land administration is a process whereby rural land holding security is provided, land use planning is implemented, disputes between rural land holders are resolved and the rights and obligations of any rural land holder are enforced, and information on farm plots and grazing land holders are gathered analysed and supplied to users. [emphasis added]

It is through allocation that security can be provided to land holders. And this process is made part of the process of land administration by federal land administration proclamation. In this regard the argument which says the federal government can allocate land beyond a certain threshold cannot hold water.

4.3. Historical Development of Upward Power Delegation on Administration of Large-Scale Agricultural Land

Even though the basic policy instruments were in place, the transfer of land to large-scale agricultural investors started in Ethiopia in 2007.¹⁶⁹ As per the ideological magazine of the ruling party, this happened because of three reasons. In the first place the areas within which

¹⁶⁷ HoF, *The Minutes of the Constitutional Assembly (in Amahric)*, Vol. 4, November 23- 29, 1994, (000116), p.31.

¹⁶⁸ Ethiopian Agricultural Investment Land Administration Agency Establishment Regulation No. 283/2013 under Article 2(3) also defined land administration as “an act of identification of agricultural investment lands on the basis of study and demarcating, entrusting, transferring, supervising and controlling same.”

¹⁶⁹ Desalegn, *Land to Investors*, at note 9, p.9.

land available for large-scale agriculture were less developed in infrastructure.¹⁷⁰ On the other hand, it was not possible to get labour since those lands are not populated. Finally, large-scale agricultural investment requires huge capital. The country's economy was unable to produce this capital for some years.

However, the phenomenon started to change since 2007. Desalegn revealed the departure as: -

“From 2007 onwards the federal and regional governments were actively promoting investment in large farm enterprises and seeking foreign investors. For this purpose, a number of promotional documents were prepared, some of which were posted on the website of the Ministry of Agriculture and Rural Development (MOARD) [now Ministry of Agriculture and Natural Resource]. Both Regional agencies and MOARD were keen to inform prospective investors that the country possessed plentiful land and water resources and that land transfers to investors would be made under favourable conditions.”¹⁷¹

During this period, the federal government played a coordinating role, while regional states keep land administration undertakings. Therefore, until 2008, large-scale agricultural investors acquire investment lands from respective regional authorities.

The federal government started to follow a different approach on large-scale agricultural land administration in 2008. The federal government “chosen Ministry of Agriculture and Rural Development (MoARD) now Ministry of Agriculture and Natural Resource (MoANR), to administer large-scale agricultural deals at national level.”¹⁷² To this effect, the Council of Ministers issued a directive in February, 2010.

As per the Agricultural Investment Administration Directive made by Council of Ministers the aim of upward power delegation is to make the agricultural development strategy export lead and to create an investor friendly land administration system.¹⁷³ The directive empowered MoA to identify land suitable for agricultural investment above 5000 hectares and also fertile lands below this size.¹⁷⁴ The power to administer the identified land transfers from regional states to

¹⁷⁰ EPDRF, *New Vision* (Amharic), September – October Year 2, Vol.3 No.7, 2011, p.29.

¹⁷¹ Desalegn, *Land to Investors*, at note 9, pp.9-10.

¹⁷² Desalegn, *Land to Investors*, at note 9.

¹⁷³ See the preamble of Council of Ministers' Agricultural Investment Administration Directive.

¹⁷⁴ Council of Ministers Agricultural Investment Administration Directive, 2010, Article 3(1). However, pursuant to the federal rural land administration legislation land use planning is regional responsibility. See Rural Land Administration Proclamation, at note 8, Article 2(2).

the federal government based on the consent of the former.¹⁷⁵ The requirement consent indicates that it is the federal government which initiates the delegation. On the other hand, it envisages that upward power delegation executes through an agreement between the orders of governments. Practically the federal government drafted the memorandum of understanding for the delegation and ordered regional states to sign it.¹⁷⁶ However, the delegation was started even before the enactment of the directive.¹⁷⁷

Agricultural Investment Administration Directive gives tremendous land administration power to the federal government. The MoA has the power to prepare project proposal, to promote lands identified for investment and to disseminate information regarding large scale agricultural investment land.¹⁷⁸ Besides the power to determine lease price based on regional laws,¹⁷⁹ to sign lease agreement and hand over agricultural land to investors is given to MoA.¹⁸⁰ The MoA also follow ups the execution of lease agreement and takes any necessary measure.¹⁸¹ Following the enactment of the directive, activities of land administration defined by federal rural land administration legislation¹⁸² such as information gathering, analysing planning and implementing were transferred from regional states to federal government, more specifically to MoA. The only responsibility left for regional governments is collecting lease payment.¹⁸³

The federal government received delegation of administration power on 3,631,415 hectares of land from four regional states between October 2008 and December 2010. The MoA received delegation to administer 180,604 hectares of land from SNNP regional state by memorandum

¹⁷⁵ Agricultural Investment Administration Directive, at note 174, Article 3(2).

¹⁷⁶ Interview with Ato Daneil Tesfalem, Legal Director of Ethiopian Agricultural Investment Land Administration Agency, on 3 April, 2016. According to Ato Daneil, the heads of states of major regions were not happy with the arrangement and complains whenever there is a consultative meeting between the Agency and regional government authorities.

¹⁷⁷ The directive was made on 5th of March 2010. However, the SNNP, Benishangul Gumuz and Gambela regional states delegated the federal government to administer 1,734,987 hectares of agricultural investment land between October 2008 and June 2009.

¹⁷⁸ Agricultural Investment Administration Directive, at note 174, Article 4.

¹⁷⁹ Ibid, Article 6. The MoA can also propose a lease price for regional states.

¹⁸⁰ Ibid, Article 5.

¹⁸¹ Ibid, Article 7.

¹⁸² The Federal Rural Land Administration proclamation, at note 8, under Article 2(2) defined 'land administration' as; "A process whereby rural land holding security is provided, land use planning is implemented, disputes between rural land holders are resolved and the rights and obligations of any rural land holder are enforced, and information on farm plots and grazing land holders are gathered analysed and supplied to users." In the same fashion, the Ethiopian Agricultural Investment Agency regulation, at note 169, under Article 2(3) defined land administration as "an act of identification of agricultural investment lands on the basis of study and demarcating, entrusting, transferring, supervising and controlling same."

¹⁸³ Agricultural Investment Administration Directive, at note 174, Article 6(3).

of understanding signed in October 2008.¹⁸⁴ The Benishangul Gumuz regional state also transferred its administration power over 1,149,052 hectares of land to MoA by three consecutive memorandum of understandings signed from 2008 to 2010.¹⁸⁵ The MoA again received delegation to administer 1,221,893 hectares of agricultural investment land from Gambela regional state.¹⁸⁶ The Oromia regional state also transferred administration power over 1,079,866 hectares of agricultural land to MoA in 2010.¹⁸⁷

The federal government transferred more than a million of hectares of agricultural investment lands to investors following the delegation made from regional states. The federal government established an Agency specifically assigned to administer large-scale agricultural investment lands in 2013.¹⁸⁸ The Agency was empowered to administer agricultural investment lands received from regional states through delegation.¹⁸⁹ This power latter transferred to Ethiopian Horticulture and Agricultural Investment Authority in 2017.¹⁹⁰ In the remaining part of this chapter, the thesis endeavours to examine the constitutional status of upward power delegation made on administration of land, more specifically large-scale agricultural land.

4.4. Constitutional Status of Upward Power Delegation

The examination whether upward power delegation has constitutional basis has to address among other endeavours at list the following three assessments. In the first place it is crucial to search if there is exists a clear constitutional provision which empower regional states to delegate power to the federal government. Secondly, there must be structural analysis of the constitution, to come with the constitutional perspectives regarding upward power delegation. Finally, it is critical to scrutinize the drafting history of the constitution, to draw the intention

¹⁸⁴ MoA, *Memorandum of Understanding signed between FDRE MoA and SNNP Regional State* (in Amharic), 2008, p.5.

¹⁸⁵ MoA, *Memorandum of Understanding signed between FDRE MoA and Benishangul Gumuz Regional State* (in Amharic), 2008, p.6. MoA, *Memorandum of Understanding signed between FDRE MoA and Benishangul Gumuz Regional State* (in Amharic), 2009, p.4. MoA, *Memorandum of Understanding signed between FDRE MoA and Benishangul Gumuz regional state* (in Amharic), 2010, p.4.

¹⁸⁶ MoA, *Memorandum of Understanding signed between FDRE MoA and Gambela Regional State* (in Amharic), 2009, p.5. MoA, *Memorandum of Understanding signed between FDRE MoA and Gambela Regional State* (in Amharic), 2008, p.6.

¹⁸⁷ MoA, *Memorandum of Understanding signed between FDRE MoA and Oromia Regional State* (in Amharic), 2010, p.7. MoA, *Memorandum of Understanding signed between FDRE MoA and Oromia Regional State* (in Amharic), 2010, p.6.

¹⁸⁸ The Ethiopian Agricultural Investment Land Administration Agency Establishment Regulation No. 283/2013.

¹⁸⁹ See Articles 5(1) and 6 of Ethiopian Agricultural Investment Land Administration Agency Establishment Regulation No. 283/2013.

¹⁹⁰ See Articles 6(41) and 13 of Ethiopian Horticulture and Agricultural Investment Authority Establishment Council of Ministers Regulation No. 396/2017.

of constitutional makers and to learn how the phenomenon was dealt in the drafting and adopting process of the constitution.

4.4.1. The FDRE Constitution does not empower regional governments to delegate power to the federal government.

In its general conception, Constitutionalism “denotes the commitment on the part of any given political community to be governed by constitutional rules and principles.”¹⁹¹ Constitutionalism propagates, “set of legal and political instruments limiting [governmental] power.”¹⁹² On the other hand, constitutionalism urges that the authority of government must derive from and is limited by a body of fundamental law. That fundamental law by large is constitution. Among other purposes, constitution is made to regulate the relationship between government and the community at large.¹⁹³ Besides, constitution is made to “enable a community to overcome common governance problems”¹⁹⁴ associated with unlimited governmental powers. Otherwise, unlimited governmental power is exposed to different forms of abuses. Therefore, constitutionalism propagates exercise of governmental power to have a base in the constitutional text of the nation. Failing to comply this, as Asok Chanda expressed, will be “ultra-virus” to the constitution.¹⁹⁵

In the process of examining the constitutional status of upward power delegation in Ethiopia, the first step must be assessing the constitutional text. The FDRE Constitution made basic division of power between the Federal and Regional governments under Articles 50-52.¹⁹⁶ In this regard, Article 50(8) of the constitution says; “federal and state powers are defined by this constitution”. For regional states, to delegate powers to the federal government, need to have constitutional empowerment to do so. As far as the FDRE constitution is concerned, it did not include a clear provision which vests delegating competence within the ambits of regional

¹⁹¹ S. Sweet, ‘Constitutionalism, Legal Pluralism and International Regimes’, *Indiana Journal of Global Legal Studies*, Vol.16, No.2, 2009, p.626.

¹⁹² P. Maduro, ‘How Constitutional Can the European Union Be? The Tension Between Inter-governmentalism and Constitutionalism in the European Union’, in Weiler and Eisgruber, (eds.), *The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper 5/04, 2004, p.2, <http://www.jeanmonnetprogram.org/papers/04/040501-18.html>], (accessed 16 April 2017).

¹⁹³ B. Fassbender, ‘The United Nation Charter as Constitution of the International Community’, *Columbia Journal of Transnational Law*, Vol.36, No.529, 1998, pp.533-534.

¹⁹⁴ Sweet, *Indiana Journal of Global Legal Studies*, at note 191, p.625.

¹⁹⁵ Chanda, *Federalism in India*, at note 96, p. 109.

¹⁹⁶ Article 50 define the basic structures of both tiers of government, Article 51 listed federal competence and Article 52 listed the authorities of regional governments.

governments. Therefore, regional states can't exercise a power which was not defined by the constitution.

General obligation to observe and obey the constitution is levied on all citizens, organs of state, political organizations and association.¹⁹⁷ Both orders of governments specifically have an obligation to “protect and defend the constitution.”¹⁹⁸ Furthermore, the constitution obliged the federal and regional governments to respect the constitutional power assigned to the other level. In this regard the constitution says; “the states shall respect the powers of the federal government. The federal government shall likewise respect the powers of the states.”¹⁹⁹ Accordingly, the federal government must have to deny the offer, when regional states try to transfer constitutional authorities by delegation. Regional states governments failed to comply with the commitment sated by constitution which amounts to alteration of the covenant. In conclusion, “in order to maintain the supremacy of the constitution, it is necessary that the constitution should not be subject of alteration by either of the level of governments.”²⁰⁰

There is an argument which says, nothing is wrong if regional states consented to delegate power to the federal government. In this regard Assefa Fiseha noted:

It is inherent in delegation that whoever has delegated power can also take it away at any moment. There is an undisputable right to reclaim it. As a result, in the absence of express prohibition in the constitution, the states may delegate part of their powers to the federal government.²⁰¹

Assefa's argument considers the phenomenon as simple as regular delegation authority made between principal and agent. However, the scenario is a matter of constitutional order. As boldly noted by scholars, “constitutions are not grants of power but rather limitations on power.”²⁰² Therefore, the government either state or federal has to act in accordance with the definition of power given by constitution. The Supreme Court of Canada made unconstitutional an attempt for upward power delegation in the absence of clear constitutional provision.²⁰³ Therefore, upward power delegation needs clear constitutional provision. The position of

¹⁹⁷ FDRE Constitution, at note 2, Article 9(2).

¹⁹⁸ FDRE Constitution, at note 2, Articles 51(1) and 52(1)(a).

¹⁹⁹ FDRE Constitution, at note 2, Article 50 (8).

²⁰⁰ Assefa Fiseha, 'Theory versus Practice in Ethiopia's Ethnic Federalism', in D. Turton (ed.), *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective*, 2006, p.133.

²⁰¹ Assefa, *Federalism*, at note 24, p.375.

²⁰² Lawrence, *Indiana Law Journal*, at note 32, p.658.

²⁰³ Forest, *McGill Law Review*, at note 103, p.136.

FDRE Constitution on upward power delegation becomes more clearer by looking at the rejection of the proposal to include it in the draft constitution.²⁰⁴ Therefore, the argument made for upward power delegation in the absence of clear constitutional provision does not hold water.

4.4.2. The FDRE Constitution Promotes Only Downward Delegation

Constitutional interpretation is necessary not only in case of ambiguity, but also circumstances of silence regarding a specific policy field.²⁰⁵ Besides, in the absence of clear provision on specific policy field, structural interpretation is very crucial to pin down the position of the constitution. Structural constitutional interpretation, “refers to a method of deriving constitutional rules from the relationships and interactions between various constitutional institutions.”²⁰⁶ Structural constitutional interpretation demands looking at “the overall structure of the constitutional text” to understand the position of the covenant on the subject matter in question.²⁰⁷ The FDRE Constitution is silent regarding upward power delegation. For this reason, the structure of the constitution needs to be scrutinized to ascertain its position on the question at hand.

The FDRE constitution addressed, the issue of power delegation generally and down ward delegation specifically, as discussed in the previous chapter. The constitution, on one hand delegated the judicial power of Federal High and First Instance courts to regional supreme and high courts respectively, and on the other hands, authorized the federal government to delegate some of its legislative and executive competences to regional state governments.²⁰⁸ Moreover, the constitution have also made a clear statement under Article 77(13) to allow horizontal power delegation from HoPR to the Council of Ministers.

The above dealt provisions of the constitution revealed that, the constitutional makers were conscious enough in regulating the subject matter of power delegation. However, the FDRE constitution, while including detailed provisions dealing with downward and horizontal delegations, did not leave even an indication of upward delegation. This is not a result of negligence or oversight, nonetheless an act done intentionally to discourage or rather prohibit

²⁰⁴ HoF, *The Minutes of the Constitutional Assembly (in Amahric)*, at note 167, p.26.

²⁰⁵ J. Goldsworthy (ed.), *Interpreting Constitutions: A Comparative Study*, Oxford University Press, 2006, p.1.

²⁰⁶ L. Westover, ‘Structural Interpretation and the New Federalism: Finding the Proper Balance Between State Sovereignty and Federal Supremacy’, *Marquette Law Review*, Vol.88, No.4, 2005, p.695.

²⁰⁷ M. Tushnet, ‘The United States: Eclecticism in the Service of Pragmatism’, in J. Goldsworthy (ed.), *Interpreting Constitutions a Comparative Study*, 2006, p.29.

²⁰⁸ FDRE Constitution, at note 2, Articles 50(9) and 78(2).

upward power delegation.²⁰⁹ The current upward power delegation made on large-scale agricultural land administration, lose constitutional base, for the reason that, the constitution in its all stands encouraged only delegation to be made from federal government to regional states. This conception will become more clear in the next discussion on the intention of the constitutional makers.

4.4.3. The constitution made a genuine procedure for the transfer of power from regional states to the federal government

Examining the mechanisms entrenched by FDRE constitution to relocate regional state governments' power to the federal government will give another insight on the subject matter of upward power delegation. The FDRE constitution introduced two instances by which the federal government may exercise the constitutional competence of regional states.

The first phenomenon is in relation to keeping regional peace and order with or without the consent of concerned states government. The constitution bestow power, “to maintain public order and peace within the State”²¹⁰ to regional states. Regional states are allowed to establish only police force. Consequently, if state police force fails to control regional security, the federal government shall deploy defence force, but only with a request from the concerned regional state.²¹¹ Hence, the responsibility of regional states to keep regional peace and order can transfer to the federal government through an agreement between the two tiers. Therefore, the constitutional mandate of keeping regional peace and order may execute by the federal government.

The second scenario connects with regional legislative power. The federal legislative organ may exercise State law making power based on the blessing of the HoF.²¹² The major division of powers “between the federal and state governments is out lined in Articles 52 and 52 of the constitution.”²¹³ As per Article 52 (1) of the constitution “all powers not given expressly to the Federal Government alone, or concurrently to the Federal Government and the States are

²⁰⁹ This line of argument goes with the ruling of South African Constitutional court which says “clear failure to deal specifically in the Constitution with an issue was not accidental.” See Klug, *Interpreting Constitutions: A Comparative Study*, at note 128.

²¹⁰ FDRE Constitution, at note 2, Article 52(2)(g).

²¹¹ FDRE Constitution, at note 2, Article 51(14).

²¹² The platform adopted by the FDRE constitutions shares the basic thinking in the German constitutional System. In Germany, “the Bundsrat (Council of States) has a suspensive veto over all legislations generally and an absolute veto over all legislations affecting the vital interest of the lander.” See Kommers, *The Constitutional Jurisprudence of Germany*, at note 120, p.97 and Currie, *The Constitution of Germany*, at note 41, pp. 61-67.

²¹³ Yonatan Tesfaye, *Ethnic Diversity and Federalism: Constitution Making in South Africa and Ethiopia*, Ashgate Publishing Limited, England, 2010, p.210.

reserved to the States.” The constitution listed the major legislative competences of the federal government under Article 55. Moreover, the constitution gave very restricted legislative power of civil matter to the federal government. However, the constitution allows the federal government to legislate on States legislative competence with the blessing of the House of Federation.

The transfer of regional legislative power to federal government is states under Article 62(8) of the Constitution in the following manner: -

“It [House of Federation] shall determine civil matters which require the enactment of laws by the House of Peoples’ Representatives.”

The constitution empowers the HoF to transfer only states’ legislative power to the federal government. Therefore, the House cannot allow the federal government to exercise regional states’ administrative power. On the other hand, the constitution did not leave the transfer legislative competence from states to the federal government without limitation. The HoF has to evaluate whether the enactment of HoPR on the civil subject matter is “necessary to establish and sustain one economic society.”²¹⁴ The provision reveals copious about the seriousness of the constitution on transferring power from states to the federal government. In the first place, the federal government may exercise regional legislative power only with the approval of the HoF. HoF is the mainstay of Ethiopian federal system.²¹⁵ On the other hand, the HoF cannot freely endorse the proposal for upward legislative power transfer. It must check whether the subject matter best serve ‘to establish and sustain one economic community’. The measuring criterion is among the basic convictions, of Nations Nationalities and Peoples to adopt the constitution, i.e. to establish the federal constitutional order.²¹⁶

Moreover, practical instances envisage that the HoF examines proposals for transfer of legislative power from regional states to the federal government. The HoF’s rejection of the request to enact county wide applicable family law can best serve as the first example in this regard. The proposal made to enact Family Code governing the whole nation by the federal government was rejected by HoF for not satisfying the criterion of ‘necessary to establish and

²¹⁴ FDRE Constitution, at note 2, Article 55(6).

²¹⁵ The constitution was made by the Nations Nationalities and Peoples of Ethiopia. All sovereign powers reside in the Nations Nationalities and Peoples and the constitution is the reflection of their sovereignty. The HoF is composed of representatives from those entities and the of interpreter constitutional. Consequently, the transfer of power from regional states to the federal government, is under obligation made to get the approval of this high constitutional organ. FDRE constitution, at note 2, Preamble, Articles 8 and 62. See also Fasil, at note 1, pp.51-52.

²¹⁶ FDRE Constitution, at note 2, the fifth paragraph of the preamble.

sustain on economic community.’ In the process of examining the proposal, the Council of Constitutional Inquiry(CCI)²¹⁷ in its recommendation to the HoF said that; “the power to enact family code was not clearly bestowing to either levels of governments. Therefore, pursuant to Article 52(1) of the constitution it falls under the competence of the regional states. On the other hands, family law can’t be considered as ‘necessary to establish and sustain one economic community’, because by large it depends on regional customs, religion and faith.”²¹⁸ The HoF accepted the recommendation of CCI and rejected the proposal unanimously. As a result, the Revised Family Code Proclamation no.213/2000 was made to govern family matters only in city administrations that are directly accountable to the Federal Government.²¹⁹

The HoF recognized the entreaty of HoPR on other instances through solemn debates. For instance, the law of registration of vital events and national identity card was enacted with the approval of the HoF.²²⁰ However, the HoF did not approved the request of the HoPR modestly. The experts participated in the drafting course revealed that, “the HoF took a look lasted discussion before accepting the proposal. Specially the debate on the issue ‘whether the parliament has to make detailed law or general governing principles governing the subject matter’ was very thoughtful.”²²¹ The approval was not unanimous, “the HoF invested a half a day discussion to accept the request and endorsed with constricted majority vote.”²²² The same line of arguments works for the Urban Land Holding legislation.²²³ The proclamation got the blessing of the HoF through critical debate.²²⁴

²¹⁷ CCI is a technical body which assists HoF in the process of constitutional interpretation. It has the power to investigate constitutional dispute and provides recommendation to the HoF. See FDRE Constitution, at note 2, Articles 82 and 84, and Council of Constitutional Inquiry Proclamation, at note 127, Article 3. See also Fasil, at note 1, p.73.

²¹⁸ HoF, *The Minutes of the Second Regular Meeting (in Amahric)*, 1999, p.15.

²¹⁹ Revised Family Code Proclamation, 2000, fifth paragraph of the preamble, Proclamation No.213, Negarit Gazeta, 6th Year, Extra Ordinary Issue No.1. Addis Ababa City Administration and Dire Dawa City Administration Council are accountable to the Federal Government. See FDRE Constitution, at note 2, Article 49(3), Addis Ababa City Government Revised Charter Proclamation, 2003, Article 61(2), Proclamation No.361, Negarit Gazeta, 9th Year, No.86, and of The Diredawa Administration Charter Proclamation, 2004, Article 51(1), Proclamation No.416, Negarit Gazeta, 10th Year, No.60, respectively.

²²⁰ Registration of Vital Events and National Identity Card Proclamation, 2012, Proclamation No. 760, Negarit Gazeta, 18th Year, No.58. The proclamation clearly stated in its fourth paragraph of the preamble, Article 55(6) of the FDRE Constitution, to manifest that the HoPR enacted the legislation based of the approval derived from the HoF.

²²¹ Interview with Ato Abat Gebretsadiq, member of the Registration of Vital Events and National Identity Card Proclamation drafting committee and Assistant attorney general at Federal Attorney General, on 29 March, 2017.

²²² Interview with Ato Addisu Legas, member of Registration of Vital Events and National Identity Card Proclamation drafting committee and legal drafter at Ministry of Justice (Now Federal Attorney General), now Legal Advisor to the President of National Regional State of Oromia, on 3 April, 2017.

²²³ Urban Landholding Registration Proclamation, 2014, Proclamation No.818, Negarit Gazeta, 20th Year, No.20.

²²⁴ HoF, *The Minutes of the first Emergency Meeting*, December 17, 2013, pp.29-44.

To conclude the discussion on the structure of the constitution, it formed an organized channel to transfer power from regional governments to the federal government. The channel is the HoF, and the measuring standard is purpose of establishing and sustaining one economic community. However, delegation is not means of transferring authority from regional states to the federal government.

4.4.4. Upward Power Delegation is Against the Intention of the FDRE Constitution Makers

Reconsidering the status of drafting history of a phenomenon is well- established approach in the process of constitutional interpretation.²²⁵ Legislative history is admissible aid in interpreting constitution. This approach is helpful as the proponents of originalism in constitutional interpretation argued, “to ascertain the original understanding of the meaning intended by the original framers [of constitution] and to give effect to that understanding.”²²⁶ Therefore, looking at the background documents of FDRE constitution is vital to examine, how upward power delegation was treated in constitutional drafting and adopting process.

The Constitutional Drafting Commission, initially drafted Article 50(9) of the constitution as allowing both tiers to delegate their respective constitutional power to one another. Nonetheless the Constitutional Assembly rejected portion of the proposal which authorizes regional governments to delegate part of their power to the federal government. The proposal of the constitutional drafting commission was referred to federal and regional power division committee of the constitutional assembly. Ato Hassen Ali, the chairperson of the committee, reported the findings and recommendations of the committee to the general constitutional assembly in the following phrases: -

With regard to the provision of Article 50 (9), the federal government may delegate part of its powers and functions to regional states and the regional states may reciprocally delegate part of their powers and functions to the federal government. The committee is of the opinion that it is appropriate for the federal government to delegate some of its powers and functions. However, letting the regional states delegate their power and function to the federal government will not only hinder their capacity of making decisions independently but also has psychological impact and this makes it inappropriate for regional states. They have also stated that regional states are

²²⁵ Klug, *Interpreting Constitutions: A Comparative Study*, at note 128.

²²⁶ W. Hogg, ‘Canada: From Privy Council to Supreme Court’, in J. Goldsworthy (ed.), *Interpreting Constitutions a Comparative Study*, 2006, p.82.

exercising the mandate entrusted to them by the public, delegation of this mandate is considered incongruous and the federal government has the responsibility of providing the necessary support for strengthening regional states.²²⁷ [translation mine]

The committee criticized the proposal on upward delegation, from three dimensions. In the first place, upward power delegation has undue influence in hindering regional state governments from creating their capacity and exercising their power. In second place, upward power delegation exerts psychological influence on regional states. This is based on the relative strength of federal government's power in every federation. Lastly, it is not prudent enough to allow regional states to delegate power to federal government, for the reason that, they exercise a power delegated from the people unto them.²²⁸ As noted by Cheryl Saunders, "as the centre draws its legitimacy from the people as a whole, so each of sub-national groups draws its legitimacy from the people in its geographic region, by whom it is chosen, whose interests it must serve and to whom it is accountable."²²⁹ For those reasons the committee asked rejection of the proposal for upward power delegation.

The constitutional assembly before ruling on the proposed amendment undertaken full-fledged discussion. The extended discussion of the constitutional assembly revealed other dangers of upward power delegation. For instance, Ato Abay Tsehaye (the then representative from region one [Tigray], now Director of FDRE Policy Studies and Research Center), said: -

If regional states choose to forward their mandate to the federal government, centralism may be in the making and such a practice may paralyze the power of regional states To the contrary, nations, nationalities and peoples being the source of power for the federal government and as the federal government is inept, it would be wise to delegate complicated matters to regional states.²³⁰ Overall, it is appropriate for delegation to be downward.²³¹ [translation mine]

²²⁷ HoF, *The Minutes of the Constitutional Assembly (in Amahric)*, at note 167, p.24.

²²⁸ The argument is in line with the prominent Latin maxim, which says "*delegate potestas non potest delegari*". The doctrine argue that one cannot delegates an entitlement which is delegated in him. See Kischel, *Delegation of Legislative power to Agencies*, at note 39, p. 216.

²²⁹ Cheryl Saunders, *Option for Decentralizing Power: Federalism to Decentralization*, Melbourne Law School, p.5.

²³⁰ The argument is in line with preamble and Article 8 of FDRE Constitution. In the previous case, the constitution begins with we, the Nations, Nationalities and Peoples of Ethiopia and proclaims as it is made on their beliefs. In the latter case, the constitution speaks that sovereign power resides in Nations, Nationalities and Peoples of Ethiopia.

²³¹ HoF, *The Minutes of the Constitutional Assembly (in Amahric)*, at note 167, p.26.

It was further explained here that, upward power delegation promotes centralization and paralyses regional competence. More importantly, the commentator summarized that, in the established constitutional order, generally delegation should be promoted down ward not upward in whatever case.

Finally, the constitutional assembly endorsed Article 50(9) only to include downward power delegation from federal government to regional states with 510 support and 1 abstention by almost unanimous acceptance.²³² In the process of understanding the constitutional position of a subject matter, as the South African Constitutional Court ruled, it is vital to rely on background material of a constitution, “where the background material is clear, is not in dispute, and is relevant to showing why particular provisions were or were not included in the Constitution.”²³³ As a result, the present exercise of upward power delegation made on administration of large-scale agricultural investment land stands against clear intention of the constitutional makers.

The framers intentions also seem to align with the general tenets of decentralization which propagates devolving of decision making power and administrative responsibilities to the lower levels of government structures. Decentralization enhances democracy, good governance and accommodation of diversities. In enhancing democracy and good governance decentralization works, “to distribute public power broadly so as to achieve more effective and responsive government, to broaden access to government services and economic resources, to encourage greater public participation in government, to provide a basis on which often diverse groups can live together peacefully, and to underpin the stability of the state, by persuading groups to remain within it.”²³⁴ In its economic aspect, decentralization “can alienate poverty and produce economic development by improving efficiency, governance and equity.”²³⁵

Federalism also constitutionally devolve political powers between tiers of governments to meet those values of decentralization. In federalism “the existence of the constituent entities and their autonomous powers are constitutionally entrenched.”²³⁶ Therefore, in a constitutionally guaranteed decentralized political system, entrusting regional power in federal competence will

²³² Ibid, p.34.

²³³ Klug, *Interpreting Constitutions: A Comparative Study*, at note 128, p.286.

²³⁴ Klug, *Interpreting Constitutions: A Comparative Study*, at note 128, p.229.

²³⁵ P. Smoke, ‘Decentralization in Africa: Goals, Dimensions, Myths and Challenges’, 2003, pp.9-10, <http://www.interscience.wiley.com>, (accessed 16 May 2016).

²³⁶ J. Erk, ‘Federalism and decentralization in Sub-Saharan Africa: Five Patterns of Evolution’, *Regional and Federal Studies*, Vol.24, No.5, 2014, p.536, <http://www.tandfonline.com>, (accessed 16 May 2016).

create accumulation of power at the centre. Centralizing political power will create an opportunity for abuse of authority.

Ethiopia introduced decentralized form of government by adopting constitutionally guaranteed federal set-up. The FDRE Constitution established a federal system of government.²³⁷ The constitution devolved legislative, executive, judicial and fiscal powers among the federal and regional governments. Furthermore, the constitution said; “adequate political power shall be granted to the lowest units of government.”²³⁸ This can be done to enhance democracy. The FDRE constitution recognized democratic principles of participation and self-rule as a political objective of the federal structure.²³⁹ Therefore, the constitution is committed enough to work towards decentralization.

However, Ethiopian federal system is criticised for exercising tremendous “process of recentralization” in the past two decades.²⁴⁰ The phenomenon of upward power delegation can best exemplify this assertion. The practice by transferring the power of regional state to the federal government will create “a sort of unitary within federalism.”²⁴¹ Consequently, this will create accumulation of power within the competence of the federal government. Therefore, delegating regional powers to the federal government will result in centralizing constitutionally decentralized power. Centralization of power is against the very concepts of democracy, good governance and accommodation of diversities. Hence, upward power delegation by centralizing political powers at the centre, will necessarily endanger the achievements of enhancing democracy, good governance and accommodation of diversities.

The decision against upward power delegation makes sense from the point of view maintaining federal power balance between the central and state governments. The competences of the federal government perceived as *shared rules*, whereas the authorities of constituent units as *self-rule*. These power design is supported with constitutional guarantee. Ronald L. Watts described the notion in the following sentences: -

“Federal political systems are, polities in which there are two (or more) orders of government combining elements of shared rule (collaborative partnership) through common institutions with territorial self-rule (constituent-unit autonomy) for the

²³⁷ FDRE Constitution, at note 2, Articles 1 and 50(1).

²³⁸ FDRE Constitution, at note 2, Article 50(4).

²³⁹ FDRE Constitution, at note 2, Article 88(1).

²⁴⁰ Erk, *Regional and Federal Studies*, at note 236, p.535.

²⁴¹ Erk, *Regional and Federal Studies*, at note 236, p.541.

governments of the constituent units in an intergovernmental constitutional relationship that is not determined by the central government alone. The key here is not the degree of decentralization, but the degree of constitutionally guaranteed autonomy that the constituent units may exercise.”²⁴²

Therefore, federal constitution balances power between the two levels of governments in terms of self-rule and shared rule.

Moreover, “federalism is the constitutional balance between shared rule and self-rule.”²⁴³ It is presumed that, federal constitution made a power balance between the two levels. Nevertheless, the balance is not based on distributing equivalent competence but in identifying subject matters for shared rule and self-rule.

Upward power delegation as redundantly explained puts power constitutionally assigned to regional governments, under the control of the federal government. The phenomenon will put powers listed as self-rule under the shared rule slant. As a result exercising upward power delegation erodes the constitutional powers of regional states. Therefore, transferring power from regional governments to the federal government, will affect the constitutional power balance made on self-rule and shared rule.

²⁴² R. Watts, ‘Typologies of Federalism’, in J. Loughlin, J. Kincaid and W. Sweden (eds.), *Routledge Handbook of Regionalism and Federalism*, 2013, p.20.

²⁴³ T. Fleiner, *Dynamics of Shared Rule in Federations*, 2005, p.4.

Chapter Five

Conclusions and Implications

5.1. Conclusions

The federal government is exercising land administration power over large-scale agriculture. It was claimed that, the regional states entrusted constitutional land administration power in federal competence by means of delegation. The upward power delegation was executed through the signing of memorandum of understanding between heads of regional states and Minister of MoARD, now MoANR. It is not prudent to change the federal compact by simple memorandum of understanding signed between the heads of state governments and the executive organ of the federal government.

The upward power delegation made on administration of large-scale agricultural land has no constitutional basis. To put it in another words, it is unconstitutional. The following reasons are the basis of this deduction; -

The first reason is the absence of clear constitutional provision, which empowers regional states to delegate competence to the federal government. As far as constitutionalism is concerned in federal system, tiers of governments can exercise competences entrusted to them by the constitution. Regional states to delegate power to the central government, must be empowered by the federal constitution to do so. However, the FDRE constitution did not clearly confer upward power delegating competence on regional states.

In the second place, the FDRE constitution regulated issues of delegation between the two tiers of governments. The constitution promoted only power delegation to be made from the federal government to the regional states, in all its words. In one hand, the constitution clearly delegated federal judicial power to regional courts. On the other hand, it empowered the federal government to delegate some of its powers to regional state. However, the constitution did not leave a single indication regarding upward power delegation.

Thirdly, the constitution arranged a mechanism by which regional competences may transfers to the federal government. In the first instance, it is with approval of the HoF. As per Articles 55(6) and 62(8) of the constitution, the HoPR can make legislation on regional subject matters with approval of the HoF. However, the HoF cannot freely rule on the approval, but only if it is convenient to establish and sustain one economic society. In the second instance, there are cases in which the federal government may exercise regional authorities associated with

keeping regional peace and order. The federal government may deploy national defence force, to control regional peace and order problem with the request of the state government. In all those instances, delegation is not recognized as a means to transfer power from regional states to the federal government.

Finally, upward power delegation made on administration of large-scale agricultural land is against the intention of the FDRE constitutional makers. The constitutional drafting commission was initially proposed the inclusion of power delegation from regional states to the federal government. Conversely, the constitutional assembly rejected the proposal. The constitutional assembly highlighted two reasons in rejecting the proposal. On one hand regional states must not be empowered to delegate a power delegated to them from the general public. On the other hands adopting upward power delegation will discourage regional states from developing self-confidence in executing constitutional responsibilities entrusted to them.

Upward power delegation has various deficiencies besides its unconstitutionality. Upward power delegation transfers regional competences to federal government. It centralizes constitutionally decentralized power under the control of the federal government. As a result, it affects the very purposes of decentralization, i.e. democracy, good governance and accommodation of diversities. While the constitution promotes devolving powers to the lowest level of government, upward delegation works towards accumulation of authorities at the central government. On the other hands, the practice of upward power delegation shrinks the power of regional states. Delegating power upward to the federal government may affects regional states functionality. Upward power delegation changes constitutionally federal structure to practically unitary polity.

5.2. Implications

The unconstitutionality and disadvantages of upward power delegation were summarized in the conclusion part of the thesis. The HoF and the regional states' councils have to play crucial role in averting this problem.

As per Article 9 of the FDRE Constitution, “any law, customary practice or a decision of an organ state or a public official which contravene this constitution shall be of no effect.” Upward power delegation is executed with the decisions of executive organs of the federal and the concerned regional states presidents. The act or decision of those organ is *ultra-virus* to the FDRE constitution.

The power to interpret the FDRE constitution is given to the HoF. Constitutional interpretation includes among other things, evaluating the constitutionality of laws or acts of government.²⁴⁴ Furthermore, the umpiring organ is expected to “assess the constitutional validity of state action” in undertaking its regular constitutional mandate.²⁴⁵ Therefore, this study implies that there is a need by the HoF to evaluate and nullify the memorandum of understanding signed between heads of concerned regional states and the MoANR, to transfer administrative power on large-scale agricultural lands. Furthermore, the HoF has to declare the unconstitutionality of laws which empowered federal agencies to administer large-scale agricultural investment lands.

On the other corner, regional councils in all state governments hold the uppermost political power.²⁴⁶ Regional presidents are answerable to the respective regional councils. Regional councils have to question the regional executive organ while doing unconstitutional act. In addition, regional councils have the power to approve agreements signed by their respective heads of states with other counterpart.²⁴⁷ The upward power delegation is made through an

²⁴⁴ Nigussie Afesha, ‘The Practice of Informal Changes to the Ethiopian Constitution in the Course of Application’, *Mizan Law Review*, Vol.10, No.2, 2016, P.378.

²⁴⁵ C. Post, Theories of Constitutional Interpretation, *Faculty Scholarship Series*, paper 209, 1990, p.18, http://www.digitalcommons.law.yale.edu/fss_papers/209, (accessed 24 March 2016).

²⁴⁶ The Revised Constitution of Afar National Regional State, 2001, Article 47(2). The Revised Amhara National Regional State Constitution, 2001, Article 49(2), Proclamation No. 59, Zikre Hig, 7th Year, No.2. The Revised Constitution of Benishalgul Gumuz National Regional State, 2002, Article 49(2). The Revised Constitution of Gambela People National Regional State, 2002, Article 48(1), Proclamation No.27. The Revised Constitution of Harari People Region, 2004, Article 51(1). The Revised Constitution of SNNPR, 2001, Article 51(2), Proclamation No. 35. The Revised Constitution of Somali Region, 2002, Article 49(2). The Revised Constitution of Oromia, 2001, Article 49(2), Proclamation No. 46.

²⁴⁷ The Revised Constitution of Afar, at note 246, Article 47(3)(c). The Revised Constitution of Amhara at note 246, Article 49(3) (3.3). The Revised Constitution of Benishalgul Gumuz, at note 246, Article 49(3) (3.3). The Revised Constitution of Gambela, at note 246, Article 51(3) (3.4). The Revised Constitution of Harari, at note

agreement signed between the executives of State governments and federal government. Regional councils may invoke the aforementioned authority to nullify the memorandum of understanding.

246, Article 51(1). The Revised Constitution of SNNPR, at note 246, Article 51(3)(c). The Revised Constitution of Somali, at note 246, Article 49(3)(c). The Revised Constitution of Oromia, at note 246, Article 49(3)(c).

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