ADDIS ABABA UNIVERSITY
COLLEGE OF LAW AND GOVERNANCE STUDIES
SCHOOL OF GRADUATE STUDIES

SUB NATIONAL CONSTITUTIONAL SPACE IN ETHIOPIA: THE CASE OF OROMIA AND HARARI SUB NATIONAL UNITS

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A Thesis Submitted in Partial Fulfillment of the Requirements for the Masters of Laws (LL.M) Degree in Constitutional and Public Law

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Declaration

I, the undersigned, declare that the research work is my own work, has not been presented for a Degree in any other university and that all sources of material used for the thesis have been duly Acknowledged.

Declared by:

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List of Abbreviations

CCI	Council of Constitutional Inquiry
EPRDF	Ethiopian People’s Revolutionary Democratic Front
FDRE	Federal Democratic Republic of Ethiopia
HNA	Harari National Assembly
HOF	House of Federation
HPR	House of People's Representatives
KZN	KwaZulu/Natal
NC	National constitution
PRA	People Representatives Assembly

Abstract.

The constitutional space left in the Federal constitution determines the role of sub national Constitution in the federation. Keeping this in line, the Federal Democratic Republic of Ethiopia/FDRE/ Constitution provides certain amount constitutional species in areas of Human rights protections, constitutional interpretation and amendment, institutional framework and the establishments of local governments to its sub national units. However, the sub national units are not utilizing the constitutional space left to them by the Federal constitution. In light of this, the Research explores Sub national Constitutional space in Ethiopia: the case of Oromia and Harari sub national units.

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CHAPTER ONE

Introduction

1.1. Background of the Study

Federalism as an organizing principle advocates a multi-tiered government combining elements of shared-rule through common institutions for some purposes and regional self-rule for constituent units for some other purposes, thereby accommodating unity and diversity within a larger political union.[1] Sometimes, the term federalism is been seen to be applied to many successful combinations of unity with diversity, pluralism and cooperation within and among nations. For this reason, the concept of federalism is defined as the division of powers of government between national and sub-national levels, with each level possessing and exercising important powers[2]. One reason that the researcher like to use the term federalism to describe a governmental structure with (at least) two different, significant levels of governments-one national unit and several sub-national units-is to emphasize that federalism is compatible with many different kinds of values and substantive rules. Therefore, the roles of federal system are vital and have a paramount importance for the building of national solidarity and exercising powers.

Ethiopia introduced federal system of government in the 1995 the Federal Democratic Republic of Ethiopian Constitution after being troubled by civil war. The single strategy that the past regimes had was assimilation into Amhara domination. This assimilation strategy has been replaced by multiculturalism following the fall of the Derg regime. From the aftermath of the downfall of the military government/Derg/, the new government embarked on ethnic-based federalism under the 1995 Constitution. Accordingly, the right to self-determination up to

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[1]Assefa Fisseha, Federalism and Accommodation of Diversity in Ethiopia; A comparative study, (Wolf Legal Publisher, Nijmegen, and the Netherlands, 2007), p110.

[2] Martha A Field, "The structures of federalism", Emory University Journal of International law and policy Vol. 8, 1998, p 121.

secession is guaranteed for the nations, nationalities and peoples of Ethiopia. Based on this, nine regional states were established[3].

Moreover, as it is normal in federations, the allotment of state competencies between the federal government and states is protected in the Federal Democratic Republic of Ethiopian /FRDE/constitution, mainly in Articles 51 and 52. Pursuant to Article 52(2) (b), the sub national units[4] have the authority to enact their own constitution. In addition, Article 50(5) specifies the sub national units Council have the power to draft, adopt and amend their respective constitution for a better human rights protection at sub national level. However, the human rights protected in the federal constitution have to be protected by the sub national units**.** But, this does not mean that the sub national units would not need to include a separate human rights catalogue in their constitutions. Nonetheless, sub national units have toiled their constitutions with a reference to the federal bill of rights. The federal human right protections would not affect if the sub national units offer a better protection of human rights. In this regard, Christopher Vander Beken by citing Tsegaye's article[5] observed that;

"the federal bill of rights is a floor rather than a ceiling. It establishes a standard, below which constituent units cannot go, but it does not otherwise limit state initiatives in expanding rights; they can build on that floor".[6]

Thus, the gap on federal constitution will provide an opportunity to the sub national units to make their own constitution in line with their local reality. Having this, the FDRE Constitution leaves certain amount of constitutional space for the sub national units in order to protect human rights in respective unit. On the contrary, all state constitutions of Ethiopia, with some insignificance modifications, have copied or refers the constitutional provisions that recognized under the federal constitution. One may expect this because of the infancy of democracy or the

[3]The constitution of Federal Democratic Republic of Ethiopia Proclamation number,1/1995,Art 47 provides, Afar, Tigray,Amhara,Oromia,Somalia,Benishungul-Gumuz,Southern Nations, Nationalities, and people(SNNP),Gambela and Hareri are the members of the Federal state.

[4]These nine States officially called by various name as National Regional state, Regions or State. Throughout this Thesis, the term sub national unit will be used interchangeably with state or regional state.

[5] Tsegaye Regassa, "Sub-National Constitutions in Ethiopia: Towards Entrenching Constitutionalism at State Level", Mizan Law Review, Vol. 3, 2009.

[6]Christophe Van der Beken, Sub national constitutional Autonomy in Ethiopia: the Road Distinctive Regional constitution, Paper submitted to workshop 2: sub national constitution in Federal and quasi federal state available http/www.jus,uio.no/English/research/new./wz/vaneder becan.pdf. p.12,(Last visited March 20/2016)

influence one dominate political party both in federal and sub national units, and may look forward to the improvement of state constitutions by recognizing additional human and democratic right or protections in the course of constitutional amendment.

Moreover, the trend in federation study reveals that the top /center perspective of the federal constitution as a vantage point[7]. However, it is true that such an approach does not encompass a full-fledged answer to all constitutional questions. In addition, it would undermine our understandings towards constitutionalism due to the ignorance accorded to view from the parts while dealing about the whole.

Thus, the concept understanding of federal systems from the sub-national perspective is the idea of constitutional space, which is defined as the range of discretion (space) available to the component units in a federal system in designing their constitutional arrangements.[8]This definition implies two perspectives. First, the national constitution, through either enumeration of sub-national competencies or limitations on national authority, and the disposition of any residual powers, leaves a sphere of authority in the hands of the sub-national units. Second, the sub-national units have the ability, not always fully utilized, to expand their own constitutional authority within the limits of their spheres.[9] Therefore, sub national units play an enormous role by articulating such powers to their units.

For purposes of this study, I have chosen to examine the utilization of sub national constitutional space in the areas of Human rights protection, constitutional interpretation and amendment procedure, institutional frame work (the adoptions of bicameral and uni-cameral for protection of minorities' rights), elections and the establishments of local governments. These aspects of constitutional design have generally attracted interest from researcher of sub national constitutions, and it is my intent to build on and contribute the studies. In doing so, this thesis does not deal with all types of sub national constitutions, instead, it assessed the sub national constitutions of Oromia and Harari sub national units as case studies. In these regions, there are considerable variations in the geographic and population size. Oromia sub national unit is the

[7]G.AlanTarr,"Sub National Constitutions and Minority Right: perspective on Canadian Provincial Constitutionalism," Rutgers Law Journal, Vol 40,p 768.

[8]G.Alan Tarr, Sub national constitutional space: Agenda for Research, paper delivered the world congress of International Association of constitutional law Athens, Greece, June 11-15/2011, p 5, available at http;//Cam law.rutgers.edu/State/workshop 11Greece 07/workshop 11/Tarr.pdf,(Last visited on April 22,2015).

[9] Ibid

largest with diversified population where as Harari is the smallest in geographical size and population. Therefore, it is important to investigate how the sub national constitutional makers of these units have made the use of their space in order to protect human rights in their component units.

1.2 Statement of the Problem

Ethiopia is a federation operating under the Republican principle.[10]As a result, the ethno nationalities, through their representatives maintain all the sovereign powers. Hence, they are the loci of sovereign authority in this country. The sub national units are shaped in accordance with such understanding and vested with powers that can be viewed by many as overwhelming especially in protections of human rights[11]. Constitutional speaking, the sub national units power expands from the administration of local authority to self-determination, secession included[12]. In light of this, the FDRE constitution left certain amount of constitutional space to the sub national units for the protections of human right in their spheres. These constitutional spaces includes, among other, the power to draft, amend and replace their constitution, the power to legislate the rights that the sub national unit will protect, set goals of their own government, structure the governmental institutions, create offices, establish working language, create and structure local government and establish qualification for voting[13]. In addition, by creating two layers of governmental structure, the FDRE constitution establishes a two- fold law making, each having their own legislative, executive and judicial power and function. Thus, the sub national units have great role in protection of right by articulating of such power for their units.

While making the sub national units to enact their constitution, the federal government did not incorporate all aspects of the national issues within the jurisdiction of the constitution. Hence, it provides sub national units with opportunities for refining or adopting their respective constitutions in considerations of sub national context by taking best advantages out of such constitutional space. On top of this, Oromia and Harari Sub national units enact their own

[10] The FDRE Constitution Art 1, Cited above at note 3.
[11] Assefa Fiseha, Theory versus Practice in the Implementation of Ethiopia's Ethnic Federalism, Ethnic Federalism, The Ethiopian Experience in Comparative perspective ,in David Turton ed, Oxford James Currey, 2007, pp. 131-164.
[12]Art 39 of the FDRE Constitution., Cited above at note 10
[13]Alan Tarr,"Explaining Sub national constitutional space," Penn State Law Review, Vol.115 Number 4, 2011 p.1134.

constitutions via the state council. These units while enacting their constitution with insignificant modification have replicated the federal Bills of rights in their own sub national constitutions.[14] In addition, the method and structural arrangements established for interpreting and settling constitutional disputes is also parallel with the methods employed by the federal government.[15] i.e. both Constitutions like the FRDE Constitution vest the power to interpret and settling constitutional disputes in the hand of other separate organ (constitutional interpretation commission, which is a political organ) rather than vesting in the hand of ordinary courts. Therefore, it is clear from the provisions of both federal and these sub national Constitutions that under the present Ethiopian legal system, courts have no power to determine upon the issue of constitutionality of laws[16].

Moreover, the rules of amendment invariably serve as the means to putting the flaw of the state constitution in to the right track. Owing to this, setting an outstanding constitutional amendment rules will be the primary task of the framers of every state constitution. However, both Oromia and Harari sub national units refer the federal constitutional provisions as the guideline of their constitutional amendments. Accordingly, chapter two and three of the Oromia Constitution, and chapter three of the Harari Constitution cannot be amended outside the conditions specified under art 105 of the Federal Constitution[17].

At the federal level, the federal Constitution represents, protects and preserves the interest of the federal government. As a result, amendments to the human rights provisions of the Constitution may only be allowed when all the Regional State Councils approve the proposed amendment; and when the House of People Representatives/ HoPR/ and the House of Federation/HoF/, in separate sessions, approve the proposed amendment by a two-third majority vote ,which is somehow more rigid. In addition, other provisions of the Constitution may be amended if the HoPR and the House of Federation in a joint session approve the amendment by a two-third majority vote, and when two-third of the State Councils approves the proposed amendment by

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[14]General observation of the Federal Democratic Republic of Ethiopian Constitution and its federating unit's constitutions.

[15]The power of interpreting the Constitution lies with the House of Federation, a political organ with semi-legislative power consisting of representatives of nations, nationalities and peoples of Ethiopia.

[16] The FRDE Constitution Art 62(1), Cited above at note 11, The Revised Constitution of Oromia proclamation No 46/2001 Art 67(1), The Revised Constitution of Harari No 46/2004, Art 73(1).

[17] Ibid, Art 112 and 79 of the Oromia and Harari Constitutions respectively

majority vote.[18] Unlike the federal constitution, State constitutions are considered as the manual of state activities, are flexible, supposed to be easier to amend and are laboratories for human rights experimentations. In such a case, however, both sub national units expect the decision of federal as well as others regional state parliament for their constitutional amendment. This restricted provision of state constitutions will directly violate the autonomy of state and completely blocked the opportunity of the state governments to provide better protection of human rights in respective units.

Further, the standard criteria or the definition for designating nations, a nationality and peoples of Ethiopia provided under Art.39 (5) of the FDRE constitution has influenced the minority perception of regional governments. Under the federal constitutions it is only territorially defined ethnic groups that has minority protection in a dominant nations. Because of this, **dispersed** ethnic minorities in Oromia region are not recognized as bearers of sovereign power. The constitution of this region does not even acknowledge the rights to preserve the distinct identity of minority groups since it is only the majority that is entitled to preserve own distinct identity. In addition, though the Oromo are numerically much larger than the Harari (for which the regional state was set up) they are not allowed to represent in Harari National Assembly. Moreover, there is also a dispersed minority in the region who are not protected in this region.

Therefore, in practice, all ethnic groups remained minorities in one or more other region(s). From this vantage point, scholars argue that the enormous divergence in the numerical sizes of the various ethnic groups of Ethiopia, together with the lack of a majority at the country level, would obviously lead to the assumption that no ethnic or linguistic group can be considered as a majority at the federal level in the country.[19] Moreover, determining the powers and establishment of local government is a matter left for the sub national units. Unlike Oromia, the Harari constitution does not identify the particular social services and economic that the local government is mandated to plan and implement.

Having these problems and since sub national units have residual powers to entertain the above-mentioned problems one may expect the state governments and constitutions to provide better

[18] The Federal Constitution Art 105, Cited above at note 16.
[19] Aberra Degafa "The Scope of Rights of National Minorities under the Constitution of the Federal Democratic Republic of Ethiopia," Series on Ethiopian Constitutional law, 2008, Vol.1, pp. 104-105.

protection to human rights. Therefore, underutilization of such constitutional space by these sub national units undermines the contribution to be extended by sub national units in terms of helping the sustained reinforcement of their constitution. In addition, it hampers the maintenance and consolidation of sustainable peace and order in the units.

1.3 Research Questions

After examining the idea of sub national constitutional space in federations, and the unique features that Ethiopia reveals, subsequent research questions will be raised and addressed.

- ✓ What constitutional spaces are left for the sub national constitutions of the Oromia and the Harari sub national units under FDRE constitution? I.e. the range of discretion and autonomy in constitutional design and development that is available to the sub national units in FDRE constitution.
- ✓ Do the sub national units of Oromia and Harari have fully utilize the constitutional spaces left for them by FDRE constitution? Alternatively, how the sub national constitutional makers of these units have made the use of sub national constitutional space left to them?
- ✓ What are the effects of constitutional initiatives by these sub national units on sub national constitutional development (horizontal federalism, and on political development within their own borders)?

1.4. Justification and Significance of the Study

Recently, there has been extensive focus on rights protection both in the national and international spheres of governance, but less attention has been given to rights protection at the sub national level. Since sub national states constitute one of the essential spheres of federal government, how well rights are protected will depend on a combination of both federal and sub national protections. In doing so, the research has great importance in viewing how the sub national constitutional makers of Oromia and Harari units have made the use of their sub national constitutional space in order to protect human rights in their respective units. Since very few research have been done on these Regional Constitutions, this study will have great contribution in showing ways of avoiding the confusion raised in the units. In addition, it will

provide an evidence for the constitutional drafter of Oromia and Harari sub national units in their overall effort to make and implement their sub national constitution.

1.5. Research Methodology

The main methodology of this research paper is doctrinal analysis. In doing so, both primary and secondary data were employed as a research process to study the various issues involved in the paper. The secondary data were collected from textbooks, journals, scholarly articles and bar reviews. Other legal essential documents such as, the FDRE Constitution, the Constitutions of Regional State of Oromia, Harari, other Regional States in Ethiopia and other laws were analyzed to determine utilization of sub national constitutional space in the regions. In addition, interview was conducted with three different concerned officials in the state councils of Oromia and Harari sub national units, House of Federation, and personal observations were used as the primary sources.

1.6. Organization of the Thesis

The thesis assesses whether the constitutions of Oromia and Harari sub national units have fully utilized their constitutional space provided by the FDRE constitution. In doing so, the thesis is organized in to five chapters. The first chapter is an introductory part that deals with the points as to why and how the research is to be conducted. The second chapter, on the other hand, assesses sub national constitutional space in federations in view of international perspectives. In such a case, the chapter dwelt countries, which provides broad and a narrow constitutional space to their units. The third chapter will explores the sub national constitutional space under FDRE Constitution. The fourth chapter is devoted to the core issues of the study; utilization of sub national constitutional spaces in Oromia and Harari sub national units in areas of Human rights protection, constitutional interpretation and amendment procedure, institutional frame work (the adoptions of bicameral and uni-cameral for protection of minorities' rights), and the establishments of local governments. The last Chapter deals with conclusions and future directions.

CHAPTER TWO

Constitutional Space in Federations: Some Foreign Experiences

2.1 Introduction

In most federations, the rules and principles set by the federal regime could allow the sub national units to address the issues of human rights and governmental structure in the sub national units. However, sub national constitutions by definition substantively depend on the constitution of the national government.[20] Thus, they operate within this legal competency, which is circumscribed by the national constitution. Sub national constitutions are, therefore, the second order of the governmental structure or institutions where their range of substantive content and the sphere of permissible constitutional choice is available largely constrained by the national constitution. In view of this, the chapter is devoted to the discussion of the available constitutional spaces in federations. The central points that would be raised in this part are exactly what range of discretions/spaces/ are available to the component units and the manners of its utilization.

Accordingly, an attempt is made to explore the available constitutional spaces in some federations like South Africa, Switzerland Confederation, Germany and the US. To this effect, sections 2.2 discuses constitutional space in province of the Republic of South African constitution, section 2 .3 and its sub sections explore the Cantonal constitutional space in Swiss confederation. In these countries, the creation of sub national state formation by emphasized on linguistic and nationalities as pillars in the formation of their sub-national states. On the other hand, section 2.4 and its subsequent sub sections, and section 2.5 deals about the experience of German and the US federations (which provides broad space to their units) respectively. Hence, they are useful to deal with Ethiopian experiences.

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[20] Robert F. Williams & G. Alan Tarr, Sub national constitutional space: A view from States, Provinces, Regions, Lander and Cantons, in Federalism, Sub national constitutions and Minority Rights (Michal Burgess and G. Alan Tarr. Eds, 2004), p 5.

2.2 South Africa

South Africa's federalism is a devolutionary federalism[21] and divided into nine provincial structures, each given a degree of political authority. The constitutional system of the country has designed under the Interim Constitution which is one of decentralization of government whereby government consists of three levels of authority, national, provincial and local .Unlike the United State of America, provinces in South Africa are not sovereign states before the promulgation of the national constitution[22]. They were created by the constitution and have only those powers that are specifically conferred up on them under National constitution/NC/. Thus, the constitutional competence of provinces is limited to national constitution delegation authority. Meaning, available constitutional space in national constitution to the provinces circumscribed, not plenary.

The national constitution contains an entire six chapters, concerning the governmental structure and competency of provincial government. Accordingly, there are three provincial constitutional competencies or constitutional spaces available to the provinces. First, according to Art 143(1) (a) provincial constitutions may include any provision that would fall within province's legislative authority. Second, a provincial constitution may establish executive and legislative structure procedure that differs from the default national constitution. Lastly, provincial constitution may provide for the institution, role and authority status of a traditional Monarchy.[23]In light of these competencies, the national constitution is defined provincial legislative powers in schedule four and five of national constitution. Schedule 4 lists the areas of concurrent national and provincial legislative competency. Accordingly, a traditional leadership, trade, tourism, housing and education are concurrent powers. Whereas as, maintenance of roads, registrations of animal, public cleaning service, maintenance park and other similar issues are under provincial legislative competency. In addition, provinces are prohibited from levying any sale, property, earnings, or value-added taxes, custom duties[24] etc. However, they are allowed to a reasonable share of the national tax system. Distribution of the equitable share is determined by

[21] Art 1 of the 1996 of the South Africa provides that the Republic of South Africa is one sovereign democratic state.
[22] Koen Lenaterts, "constitutionalism and the many Faces of Federalism," South Texas Law Review, vol.23, P 1102. See also certification of the constitution of the province of KwaZulu-Natal
[23] The 1996 of South Africa constitution Art 143(1) (a), (b).
[24] Ibid Art,228

national legislation and must be sufficient for the provinces to provide basic services, and perform the functions allocated to them under national law[25].

Moreover, art 160 and 143 of the interim and the national constitutions respectively authorized the provincial legislature to adopt or amend their provincial constitutions. In addition, such provincial constitution has to be consistent with the national constitution and no text of a provincial constitution or constitutional amendment becomes law until the Constitutional Court is certified.[26] Consequently, only two provinces i.e. KwaZulu/Natal, /KZN/ under the interim constitution and West cape under the 1996 national constitution have exercised their constitutional making authority. However, the constitutional court of South Africa refused to certify the draft proposed constitutions of KwaZulu[27]/Natal, /KZN /.

According to the court, KwaZulu-Natal is not an independent state, which has no original legislative or executive powers, and has the only legislative and executive powers that are given by the Interim Constitution. The major flaw in the KwaZulu-Natal constitution was that it claimed to give powers to the KwaZulu-Natal legislature and executive beyond those allowed by the Interim Constitution and by doing so its provisions conflicted with the Interim Constitution. Some of such provisions are those, which enact that the province of KwaZulu-Natal is a self-governing province; regulate the relationship between the province and the National Government, and the establishments of a constitutional court[28].

The court by analyzing such facts concludes that it is clearly beyond the capacity of a provincial legislature to pass the constitutional provisions concerning the status of a province within the Republic**.** To strengthen its idea the court specifically said, "Unlike United States of America, the provinces in South Africa are not a sovereign states. They were created by the constitution and have only those powers that are specifically conferred on them under the constitution.[29]" In addition to this, the interim constitution nowhere confers any power on provinces for the establishment of constitutional court.

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[25] Ibid

[26] Ibid Art 143(1) and Art 144(2)

[27]Certification of the constitution of the province of KwaZulu-Natal, 1996,Case CCT 15/97, September 6, 1996,avialiable at http;//www.law.law.wits.ac.za/judgements/wccert.htm (Last visited on June 29, 2015)

[28] Ibid.

[29] Ibid

Moreover, the court noted certification of provincial Bill of rights, required additional consideration whether the provincial rights has the effect of eliminating or limiting a right protected under national constitution[30].To this end, the national constitution establishes a separate constitutional court to decide only the constitutional matter and issues connected with decisions on constitutional matters . Thus, KwaZulu /Natal province still operates under the default provisions of national constitution. Besides, West Cape Province certified its constitution without having a human right Bill[31]. Therefore, one can easily argue that South African structural framework is tilted heavily for national government and allocates little sub national constitutional space to the provinces. The federation has not been created by emphasizing ethnic diversity but national solidarity and common identity. Therefore, in such federation, broad sub-national constitutional space may be seen as a threat to national unity.

2.3. Switzerland.

2.3.1The silent features of Swiss Federation.

Switzerland is a small country in the centre of Western Europe with a surface area of about 41,290 square kilometers. In 1848, the Swiss federation was created through a constitutional act that was approved by the majority of the cantons and declared binding for all. The creation of this federation involved a political compromise between the two major political forces: the radicals and the conservatives.[32] The former, mainly from urban and Protestant cantons, gave priority to industrialization; the latter, mainly from rural and Roman Catholic regions, feared domination by what was, at that time, a Protestant, liberal majority[33]. For two reasons, federalism was essential. First, it was the political compromise between those wanting a strong central state and those wanting to maintain the status quo. Second, federalism was a durable power-sharing arrangement. It meant the creation of a federal authority, but it also allowed the (now 26) cantons to maintain different cultures, languages, and religions as well as their historical heritage of political autonomy[34].

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[30] Ibid

[31]Jonathan Marshfield, "Authorizing Sub national Constitution in Transitional Federal State; South Africa, Democracy, and KwaZulu Natal constitution",41Vand J.Transnat'Ll,2008,p 17

[32] Nicolas Schmitt, "Swiss Confederation," Constitutional Origins, Structure, and Change in Federal Countries, John Kincaid and G. Alan Tarr.Eds, 2005, (Montreal and Kingston: McGill-Queen's University Press), pp 348-350.

[33] Ibid

[34] Ibid

The basic concept of the Swiss nation-state, influenced by the historical circumstances outlined above, can be explained by reference to the following four characteristics[35]. First, Switzerland is a political nation-state for a culturally segmented society. From the beginning, Switzerland was a multicultural nation-state. It was not based on the principles of a common language, religion, or ethnicity but, rather, on the abstract principle of citizenship. The Constitution of 1848 made it clear that it is the cantons and their peoples who constitute the Swiss federation.
The second characteristic of the Swiss nation-state is nation building from the bottom up, which respects regional and local autonomy. Initially, only a few powers, such as defence and foreign relations, were given to the federation. The cantons retained statehood and considerable political autonomy, based on their own constitutions, and defined their own powers, including taxation. Even today, any proposal for a new federal responsibility must be formally decided through a constitutional amendment, which needs the approval of the majority of the people, counted both nationally and within the cantons. This approach to nation building is characterized by non-centralization. Federalism within this context is a vertical power-sharing device[36]. The third characteristic of the Swiss nation-state is strong political participation by leaders and citizens of the cantons in federal decisions. In connection to this some scholars observed that the "decisive participation" of constituent units in amending the federal constitution is one of the yardsticks of all federal systems[37].

Swiss federalism goes much further. The Swiss cantons participate in very many of the affairs of the federation, whether it be amending the Constitution, enacting new legislation, or conducting federal administration. To be valid, all decisions of Parliament need a majority in both houses. Similarly, all voting on popular initiatives or referenda on constitutional amendments require a majority of the cantons as well as of the people[38]. Thus, most important federal decisions are the subject of a double decision rule, reflecting the democratic principle of "one person one vote" and the federal principle of "one vote for each member state".

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[35] Wolf Linder, "Federalism: The Case of Switzerland," Decentralization and Power Shift, Alexander B. Brillantes, Simeon A. Ilago, Eden B. Santiago, and Bootes P. Esden.Eds ,2003,(UN Development Programme Philippines) ,pp 197-201

[36] Ibid

[37] Ivo D. Duchacek, "Consociational Cradle of Federalism," Publius: The Journal of Federalism Vol 15 ,1985,p 44.

[38] Ibid

Moreover, the Swiss nation federation is characterized by the proportionality of the representation of different political cultures. From the beginning, many federal institutions were designed to provide for the proportional representation of the different language and cultural groups of the cantonal peoples[39]. Thus, the executive branch consists of a collegiate body of seven members who decide collectively on all important government matters. In order to integrate the different language regions, Parliament elects representatives from all of the three important regions of the country[40].

2.3.2 Cantonal Constitutions.

As infers for the above discussions the Swiss federal system is the integrative type that is previously independent entities coming together. Twenty-six Sub national units called Canton compose the Swiss Confederation. They are enumerated in Article 1 of the federal constitution the Constitution obliges these units to adopt written constitution[41]. This means each Canton must have a parliament elected directly by the people, and the Cantonal constitution must respect the principle of separation of power. In addition, Cantonal Constitution can be amended quite easily, the constitution requires Cantonal Constitutions be approved by the people and subjected to revision if a majority of people so required. Recently, many Canton revised their constitution. Accordingly, some Cantonal constitutions provides the appointments of a constitute assembly for elaborating the total revision of Cantonal constitution. In the other Cantons, the revision is the task of Cantonal Parliament[42].

Normally, a change in Cantonal is deliberated on by Cantonal parliament, and the revised parts then submitted to the votes of the people. In every Canton a certain number of the citizens can demand the modification by signing a formal proposal. In this regard the parliament can approve or reject the proposal or sub its own counter draft, but popular vote must take a place in case unless the group that launched the popular initiative withdraws its proposal[43]. Thus, every

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[39] Nicolas Schmitt,Cited above at note 32

[40] Ibid

[41] Art 51 of Federal Constitution of Swiss Confederation of 18 April 1999 Status as of 14 June 2015

[42]Givonni Biaggini,"Federalism,Subnation Constitutional Arrangement,and the protection of minorities in Switzerland"(Federalism,Sub national Constitution,and Minority Right,Edt G.Alan Tarr,Robert F.William and Josef Marko,West port,Connnecticut pub), 2004, p 220

[43] Ibid

revision of a Cantonal Constitution in partial or total must be approved in popular vote. Therefore, it is always the sovereign who decides, and in the Swiss political discourse.

2.3.3 The Fundamental Rights

Canton Constitutions are more or less quite similar in structure and content especially in the area of fundamental rights. Because the new Federal constitution adopted in 1999 lists a comprehensive catalogue fundamental rights(Article 7 through Article 34 of the federal Constitution) ,however, the federal constitution does not explicitly mentioned any requirement regarding the contents of Cantonal Constitution. It is the task of each Canton to decide how it organizes its governmental branch.[44] Accordingly, some Cantonal fundamental right go beyond the fundamental standard .For instance, The Bernese constitution of 1993 guarantees the rights of the individual to consult all administrative documents not only those concerning himself ,unless preponderant public or private interest justify keeping them secret[45]. The right to strike according to Article 20 of the constitution of jura (1977) goes further than the federal constitution. In addition, they also limit power, especially by guaranteeing fundamental rights, and they address the most important duties as well as the tasks respective canton for instance in the field of education, culture affairs, public health and protection.

Both the Cantonal Constitutions and Cantonal law as the whole must respect fundamental rights guaranteed by the federal constitution, especially with regard to minority rights, freedom of religion and freedom of language[46]. Article 70 section 2 of the federal constitution states that the Cantons shall designate their official languages. In order to preserve harmony between the linguistic communities, they shall respect traditional territorial distribution of languages and take in to account the indigenous linguistic minorities. The constitutions the three bilingual Canton, Berne, Fribourge and Valais all include the provision laying down the official at the Cantonal level. Additionally, the Bernese Constitution also defines in Article 6 the official of its district. And also the constitution provides the three French speaking district of Courtelary, Moutier, and La Neuveville shall have a particular status which allow them to preserve their linguistic identity and participate actively in the processes of decision making at the Cantonal level.[47]

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[44] Ibid,p 221

[45] Art 17 of the 1993 The Bernese Constitution

[46] Arts 8, 15 and 18 of Switzerland Constitution, Cited above at note 41.

[47] Givonni Biaggini, Cited above at note 44, p223.

Moreover, Article 21of the constitution of Fribourg provides the uses of German and French as the official languages is to be regulated by statute law in respective of the so called territorial principle. This principle defines the official language at the level of districts and the communes, which has to be used in respect of traditional territorial distribution of language.

2.3.4 Canton Legislatures.

The most important difference between the federal and cantonal legislatures is that cantonal legislatures have only one chamber of parliament. Consistent with the federal principle, most of the cantons are decentralized, which makes for a three-level system in which the lower levels, when compared to the upper level, have substantial autonomy. Because of the degree of cantonal autonomy, the size and other features of the parliaments of the cantons vary considerably. Thus, the number of seats in cantonal parliaments ranges from 46 in Appenzell Inner Rhodes to 200 in Bern and Argovia. As in the federal sphere, so in the cantonal sphere proportional representation is used for election to the cantonal parliament.[48] However, in many cantons the electoral districts are small, with only a few seats to be assigned. On one hand, this protects regional minorities. For instance, in Grisons a high number of electoral districts ensure the proportional representation of the territorially segmented Italian- and Romansch-speaking minorities. On the other hand, in small electoral districts the proportional representation of political parties is more compromised[49].

2.3.4 Local Government.

Local government or Communes have been guaranteed autonomy in the federal Constitution since the revision of 1999.[50] No commune can be merged with another against its political will. Communes have their own political organization and their own policies with regard to the production and distribution of local public goods. Most important, they have a large degree of autonomy with regard to questions of local taxes and financial policy generally. There are some variations in the degree of autonomy, depending on cantonal law. There are two basic models of political organization that apply in the communes, according to their size. In larger communities, the institutional structure is quite similar to that of the cantons: the people elect a communal

[48] Adrian Vatter, Kantonale Demokratien im Vergleich: Entstehungsgründe, Interaktionen und Wirkungen politischer Institutionen in den Schweizer Kantonen (Opladen: Leske and Budrich, 2002), p 121
[49] Ibid
[50] Art 50 of Swiss confederation, Cited above at note 41

parliament and a collegiate body as the executive.[51]Decision-making and legislative processes are complemented by instruments of direct democracy, both referenda and popular initiatives. As in the federal sphere, the collegial body normally represents an oversized coalition of several political parties, which leads to power sharing in the communes. In bigger communes, the members of the council are full-time professionals and have a professional administration at hand[52].

In small communes, the political organization is mainly non-professional. The administration relies partly or entirely on the service of volunteers. The same can be said for the executive body, which is also a collegial council. Its members fulfill their tasks mainly on a part-time basis and, generally, are not paid for this work. In these small communes, a type of "assembly democracy" is practiced. Instead of a parliament, all Swiss citizens of a commune participate in a general assembly. This assembly meets once or twice a year to decide on the budget and on the most important issues[53]

2.4 The Federal Republic of Germany

As opposed to the South African federation, the German federation provides fairly broader space to its component units. The Basic Law of Germany constitutes a federal system and divides power among the federal government and the states (Lander). The general principle governing relations between the federal government and Lander is articulated in Article 30; the exercise of governmental powers and the discharge of governmental functions shall be incumbent on the Lander as far as the Basic Law does not otherwise prescribe or permit.

Accordingly, the Basic Law provides an elaborate system of the division of powers between the federal government and its component units. It distinguishes between legislative powers that are exclusive to the federal government, and concurrent legislative powers that are shared between the federal government and the Lander. These include among others; civil law, criminal law, court organization, commercial law, labor law, public welfare law, state expropriations, land distributions, road maintenance, traffic and highway construction, water management, and waste

[51] The canton of Neuchâtel, where the communal parliament appoints the executive council, is an exception
[52] Wolf Linder, Cited above at note 35
[53] Ibid

disposal.[54] In addition, there are a certain areas such as hunting, protection of nature and landscape management, land distribution, regional planning, managements of water resource, and admission in to the institution of Higher education Lander have the right to regulate in variance of the federal legislation[55].

On matters within the concurrent legislative power, the Lander have power to use their constitutional space so long as the federal government has not exercised its legislative power by enacting laws. They also have the legislative power to pass their own laws. The Basic Law imposes only limited restriction in respect to such laws. It requires the constitutional order of the Lander to conform to the basic principles set forth in Basic law, which provides that Germany is a republican, democratic and social state governed by rule of law.[56]Due to this, many constitutional scholars feel that the Basic Law does not regulate the distribution of functions in a definite way. It prefers, instead, a system of fundamental presumption of jurisdiction in favor of Lander and confers far-reaching powers for federal government, which enabled it to act in the realm of Lander.[57]

In the current constitutional reality, there are relatively few legislative powers that have not been granted to the federal level. Areas generally left to the Lander are the establishment of local government structure, culture, including schools as well as visual or performing arts, and electronic media, public safety, e.g., police, and some aspects of civil service and health care. In addition, unlike the South Africa and Austria constitutions, the Basic Law of Germany gives wider constitutional spaces for Lander in execution of administrative competency. The federal government has extensively used its legislative powers. The administration of federal laws has largely been delegated to the Lander. Lander executes the majority of laws in their own right as states, or as agents of the federal government[58]. According to article 50 of the Basic Law, the Lander also participate in the Bundesrat (Federal Council) for legislation and administration function and in matters concerning the European Union.

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[54] Art 74of the1949 the Basic Law of Germany
[55] Ibid 72(3)
[56] Ibid 28(2)
[57] Werner Heun, The Constitution of Germany, A Contextual Analysis,(Hart Publishing,2011) ,p 58.
[58] Arts 83, 84(1), and 85(1) of the Basic law of Germany, Cited above at note 56.

Bundesrat is a strong second chamber, possessing an absolute veto power over wide areas of federal legislation, and a suspensive veto over the remainder and Lander easily uses this wide constitutional space against the federal government. The Lander also have the ability to conclude treaties with foreign states, albeit with the consent of the federal government.[59] Thus, they can easily use these constitutional spaces as their own rights.

2.4.1 Fundamental Rights.

The Lander constitutions laid special emphasis on guaranteeing individual human rights and civil rights, which directly applicable and binding on all state activities and may be enforced by state courts[60]. Before the promulgation of the Basic law, Lander constitutions were not similar. However, after subsequent harmonization with the Basic law human right sections of Lander constitutions are widely homogenous. Since Lander are bound by the basic rights provisions of the Basic law and all German citizen enjoy them, the importance of Lander basic right is understood as being limited. Some Lander constitutions however, incorporate extensive basic right. Land like North Rhine-Westphalia uses its constitutional space in areas of internal security , economic or social security of Land. Lander bill of rights, however, must not be in contradiction to the Basic Law and must not fall short minimum standard of the basic law[61].

Moreover, as it is normal to the other federations, the Lander parliaments have the power to draft and amend their constitution. In general, a two- third majority of the majority members of the house is needed for amending Lander constitution. In some Lander, in addition a referendum is required. Even the initiative for amendment may be taken by a referendum[62]. The federal government has no role in the Lander constitution adopting or amending process. As mentioned before, the amendment Lander constitutions, which are in conflict with in protection of human right and human rights, democracy, rule of law and social state principle are in admissible.

In addition, All Lander have constitutional courts for their constitutional interpretation. The constitutional courts have exclusively the task of watching over the compatibility of acts

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[59] Klaus Otto Nass, "The Foreign and European Policy of the German Lander," The Journal of Federalism, vol 19, 1989, p.165.

[60]Astrid Lorenz and Werner Reutter, "Sub constitutionalism in a Multilayered System", A Comparative Analysis of Constitutional Politics in the German Lander, perspectives on Federalism,Vol.4,issue 2,2011,p 153.

[61] Art 142, the Basic law of Germany Cited above, at note 58.

[62] Astrid Lorenz and Werner Reutter, Cited above at note 60.

undertaken by the state power of Land with its own Land constitution. The law of each Land, however, cannot be in contradiction with Basic Law, the federal constitutional court can declare any Land law, including provisions of Land constitution, as avoid for breach of the basic law

2.4.2 Local Government.

Germany's local government structure and administration is complex. Districts, towns and municipalities are constitutional elements of the Lander with the power to regulate local government within the Lander. Each Land has the power to determine management arrangements, functional distribution, and electoral laws concerning districts and municipalities[63]. Towns and municipalities have local authorities, while some 'intermediate' districts are administered as both States and local authorities. Both the intermediate districts and the lowest tier municipalities enjoy full powers of self-administration and the power to issue substantive law[64]. The Basic law contains two key features relating to local government:

1. 'Uniformity of living standards throughout the Federal territory[65]'. To achieve this objective, a series of fiscal equalization processes are undertaken annually between the Federal Government and States, among States and between States and their municipalities.

2. Local autonomy of municipalities is guaranteed in Article 28 of the Basic Law. The guarantee of local autonomy prohibits Federal and State legislation from removing the rights of the local authorities to manage their own affairs or from restricting this right to such an extent that the substance of the autonomy is taken away. Thus, local governments in Germany have constitutional bases and play a significant role in the life citizens.

2.5 The United States of America

The federal systems of such country were created by uniting the pre-existing independent States and each of which have their own Constitutions. National government, in this case, may allow them to keep preexisting constitution as incentives for joining the federation[66]. Opposite to

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[63] Jutta Kramer, "Local government and city states in Germany," The place and role of local government in federal systems,(Konrad-Adenauer-Stiftung publisher, Johannesburg ,Republic of South Africa,2005) p 85.
[64] Ibid
[65] Art 106, the Basic law of Germany Cited above at note 61.
[66]Alfred C.Stephan, "Federalism and Democracy: Beyond the U.S Model," Journal of Democracy, Vol 10, No 4,1999

German Federalism, in the United States, the federal government and the states have separate legislative and administrative functions. The federal constitution leaves a significant extent of constitutional space to the States. States are free to structure and arrange their own governing institution, subject only to the federal guarantee of republican form of government.[67]In addition, state governments have the right to exercise residual power. Accordingly, they have wide constitutional space to draft their own bills of rights in their constitutions and exercise the powers that are left to them by federal constitution. Due to this, state constitutions are longer and hold more comprehensive treatments of issues addressed only briefly in federal constitution, such as the process of law making , modes of judicial selection, prohibition on governmental power in relation to the balance budget requirements and debt restrictions. Many state constitutions also deal about education and conservation that are entirely absent from the federal constitution[68]. In addition, by using their wide constitutional space, state court can engage in independent interpretation of state constitution, and state judges may not interpret state constitution to provide less protection for individual rights than is guaranteed by federal court. They are free to provide to their citizens a greater degree of protection than the federal constitution. By utilizing this constitutional space, therefore, state judges can bring about political changes in the same fashion as other state officials have done through drafting and amending state constitution.

2.6 Conclusion.

As it is noticeable from the entire course of this chapter discussion, there are many variations and similarities among the aforementioned federations in terms of both form and scope of legislative power. In comparison with the other federations (the Swiss Confederation, the US and Germany), the Republic of South Africa constitution provides a narrow legislative competency to their units.

The nine provinces of South Africa are governed by provincial governments, which form the second layer of government, between the national government and the local governments. In addition, chapter of the constitution defies their structure. Accordingly, the powers and functions of the provincial governments are circumscribed by the national Constitution. Because of this, the national constitution limit the powers of province to certain concurrent areas like a

[67] Art 4 of the1789 Constitution the United States of America

[68] G. Alan Tarr, "Understanding State constitution, "Temple Law Review, Vol.1169, 1992, p 22.

traditional leadership, trade, tourism, and housing and other similar issues are under provincial legislative competency.

Moreover, the national constitution requires certifications of provincial constitutions are needed for the amendment of provincial constitutions. Therefore, South African Constitutional framework is tilted heavily for national government and allocates little sub national constitutional space to the provinces. The federation has not been created by emphasizing ethnic diversity but national solidarity and common identity. Thus, in such federation, broad sub-national constitutional space may be seen as a threat to national unity.

The ample political autonomy of the constituent units is best illustrated by the fact that the cantons have their own constitutions. Cantonal constitutions are restricted only by requirements prescribed in the federal Constitution to respect principles of democracy and to guarantee fundamental rights and the rule of law. To this end, cantonal constitutions and any changes to them must be approved by the federal Parliament. The cantons have both their own political organization and their own political authorities. Thus, they are guaranteed ample autonomy in legislation, in the establishments of local government, in implementing their own policy preferences in relation to public goods and services, and in financial matters.

Moreover, the United States and German constitutions provide broad space to their units. In the US, the federal and the state governments have separate legislative and administrative functions. In the case of Germany, the basic law provides an extensive list of concurrent powers to the Lander. Accordingly, the Lander has authority to exercise the concurrent legislative power as long as the federal government has not enacted.

CHAPTER THREE

Sub National Constitutional Spaces under the Federal Democratic Republic of Ethiopia/FDRE/ Constitution.

3.1 Introduction.

This chapter deals with whether the space left to the sub national units in the FDRE Constitution can be regarded as the principal guideline to exercise state competencies. In so doing, the chapter has design to look at the constitutions approach of the venture in a close manner. The public or political discourse during the federal bargain and even these days is that, the states are empowered with the most significant powers in the principal motive of ensuring the absolute sovereignty of the nationalities. This thinking is also dominant among the academics and contemporary Ethiopian elites.

However, as far as the researcher is concerned this must be carefully analyzed first from the text of the constitution. Otherwise, it will be a hasty generalization without having the objective parameters of measuring such overriding role of the constituent units in Ethiopia. Accordingly, the chapter evaluates the competencies of sub national units in areas of legislative power, Human rights protections, constitutional interpretation and amendment, institutional framework and the establishments of local governments.

3.2. Sub National Constitutional Space.

The current constitution of Ethiopia was approved by a constituent assembly on 8 December 1994 and came into force in August 1995. The constitution provided the country with a federal structure, as is unambiguously stated in its Article 1. A core feature of the constitution is the acknowledgement and institutional accommodation of ethnic diversity. With its 80+ officially recognized ethnic groups ("nations, nationalities and peoples" in the constitutional vernacular) Ethiopian society is indeed characterized by a considerable level of ethnic diversity[69].

The constitution grants these nations, nationalities and peoples or ethnic groups certain amounts rights subsumed under the concept of "self-determination". Consequently, the constitution

[69] Assefa Fisseha, Cited above at note 1.p 202.

establishes nine sub-national units and one federal city administrations[70] as sub-national governments forming the Ethiopian federation. In one way or another, the creations of sub national governments and the sub national constitutions in Ethiopia contribute a great deal to the developments of federalism and right protection in the federal system.

In most federations, the constitutional allocation of policy-making is defined on the basis of three categories, namely exclusive federal and state powers, concurrent powers and reserve (residual) powers[71]. In federations, which are described as coming together, most of the time, the federal government is empowered with enumerated exclusive powers. But this is not always the case. For instance, Ethiopia which is a federation evolved from a previously unitary regime also adopts such a system of “limiting” the powers of the central government by inscribing a long list of the powers of the same there by leaving the residual for the states.

Under the FDRE Constitution, the study of constitutional allocation of competences over the federal and regional governments does not provide an unequivocal answer to the question whether the sub national units have sufficient competences. A rather mixed impression arises. On the one hand, the power of the sub national units to take policy decisions in a number of fields such as education, health care and the main parts social and economic development seems limited by the power of the federal government to draw federal policy lines[72].

The constitution under Article 51 has a list 21 generally designed jurisdictions exclusively given the federal government. Again the caption of this provision; “the power of federal government” implies that the power of the federal government are only those enumerated under Article 51 but also the provision dealing with powers and function of the House of People Representative[73]/HPR/. Thus, in terms of substance, the federal government is assigned with the wide-ranging powers to legislate with respect to ‘foreign affairs and defence, including the protection of the civilian population, citizenship, freedom of movement, passports, immigration, emigration, extradition, currency, money and coinage, weight and measures and the determination of standards of time the unity of the customs and trading area foreign trade, air

[70]Addis Ababa city.

[71] D.P. Wessels, ‘The Division of Powers in a Federation’ in D.J. Kriek ed., Federalism: The Solution? Pretoria HSRC ,1992 P 251

[72] The Federal Constitution Art 51(2) (3), Cited above at note 18.

[73] Ibid, Art 55

transport; federal rail ways, postal and telecommunications services, industrial property rights, copy rights and publishing statistics regulation of federal employees.[74] Moreover, neither the states nor the so-called nationalities are empowered to participate in the lawmaking process of the centre. Thus, the federal government is entitled with the major policymaking roles and in the most substantial affairs of the country. It is practically difficult for the states to come up with a law in the major areas of socioeconomic sphere unless they allege the residual nature of the said jurisdiction.

On the other hand, Article 52(1) of the FDRE constitution states that 'All powers not given expressly to the federal government alone or concurrently to the federal government and the states are reserved to the states.' This is a clear affirmation of the states authority regarding the residual powers. Curiously, in addition to declaring the place of residual powers, the same provision enumerates, in fact in an open ended manner, seven classes of jurisdictions to the constituent units. The issue is the reason of having such list after the constitution opted for the states enjoyment of all the unremunerated powers.

In light of this principle, the FDRE Constitution gives in certain area a wide amount of constitutional space to the sub national units. These constitutional spaces would thus seem to include, among other, the power to draft a constitution, amend, and replace that constitution, set goals of government, the rights that the constituent unit will protect, structure the governmental institutions of the constituent unit, create offices, establish working language, create and structure local government and establish qualification for voting.[75] In addition, Article 50 of the federal constitution contains a number of provisions pertaining to the institutional structure of the sub national units and that, therefore, constitute an obligatory border for them i.e. to establish the constitutional spaces for the sub national units to design their institutional structure.

Moreover, the sub-national legislatures' power to 'draft, enact and amend their own constitution is recognized in the federal constitution. Its supreme legislative authority is also similarly stated. The same goes as far as the judicial and executive power is concerned which reflects sovereignty at the local level. This enables the sub national units to manage their politico-legal regime in their own fashion.

[74] Art 55 of the FDRE Constitution,Cited above at note 73.

[75] G.Alan Tarr, Cited above at note 13, p 1134

With regard to human rights, Art 13(1) of the FDRE constitution made sub-national governments as custodians of the human rights chapter i.e. imposing and respecting the rights in their territory. The fact that sub-national governments are nearer than the federal government to local peoples distinguishes them and as such to be deemed more responsive to the needs and demands of the local population. This has more to do with the idea of 'local solutions to local problems' as a merit marking sub-national units as better protectors of rights in a federal polity.[76]

As it is mentioned in the above discussions, the regional constitutions cannot violate human rights protected in the federal constitution by offering a lower degree of protection. The human rights included in the federal constitution offer a minimum guarantee that has to be upheld by the regional constitutions[77]. Therefore, through their legislative competencies on protection of human right or by critically observing the residual power, sub-national units can create adequate protection of rights' without, in fact, violating the federal minimum standard.

Moreover, by taking the objective, subjective and the combination of both criteria of defining minorities, Ethiopia is a land of minorities[78]. As it is mentioned before, no ethnic group that claims to be in a majority position at the federal /national level. However, the Constitution of the Federal Democratic Republic of Ethiopia tries to create majority ethnic groups at the regional / sub national level/ by making ethnicity incongruent with the territorial demarcation of the constituent units of the federation[79]. The constitutional mechanism available to protect ethnic groups, often minorities, can be seen into two broad forms. First, it could exercise through using the federal constitution, which broadly recognizes different rights in general terms. Second, it could further assert through the regional constitutions, which are supposed to engulf distinct measures particular to their respective status quo. Therefore, there are two levels or double security

The Federal Constitution recognized minority rights implicitly as given to all Nations, Nationalities and Peoples of Ethiopia, having cultural, linguistic, and self-determination rights as

[76] Endalkachew Geremew, "The Role of Sub national Constitution in Balancing Participating Rights and Autonomy of Ethnic minority: An Appraisal of the Revised SNNPR Constitution," Some Observation on sub national constitution in Ethiopia; Ethiopian Constitutional Law Series, Vol.VI, 2011, PP 165-166.

[77] Christophe Van der Beken,Cited above at note 6

[78] Aberra Degafa,Cited above, at note at note 19

[79] Haileyesus Taye Chekole,"The issue of Minority Right in the Ethiopian Federation",ECMI Working Paper,2o12,pp 6-8,avialiable at Mercury.ethi.ch/…/working-paper-59-Final pdf.

long as they are indigenous to the areas[80]. The Constitution also explicitly recognizes minority representation in the House of Peoples Representatives under article 54 (3), which reserves at least 20 seats for minority Nationalities. In addition, dispersed ethnic group do not have any Constitutional protection both at the federal or sub national constitutional level. Hence, the sub national legislative organs could impose ceilings in the form greater right under their constitutions as long as the federal floor is satisfied.

Further, the constitutional division of powers in Ethiopia is restricted to the regional states and the national government. Determining the powers of local governments is a matter left to the regional states. The scope and nature of powers that local governments enjoy are not constitutionally formulated under the FDRE constitution[81]. The constitution does not enumerate the specific powers that have to be transferred to local governments. The only requirement is that the regional states must transfer "adequate powers" to the lowest units of government to enable the people to participate directly in the administration of such unit's.[82] Thus, the Constitution imposes an obligation on the regional state to transfer adequate powers to the lowest units for the establishment of not a mere administrative local authority, but an autonomous local government[83]. Therefore, sub national units have significant discretionary power to determine the organization, institutional structure, powers and responsibilities of sub-regional or local government.

3.3 Conclusion.

In Ethiopia, the study of the constitutional allocation of competences over the federal and regional governments does not provide an unequivocal answer to the question whether the Ethiopian regional states have sufficient competences. A rather mixed impression arises. On the one hand, the power of the regional states to take policy decisions social and economic development seems limited by the power of the federal government to draw federal policy lines. On the other hand, the regional states have wide competences to form their own territorial,

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[80]The Federal constitution Art, 39(5), Cited above at note 73
[81] Class Lecture in State Constitution and Local governments, by Dr Getachew Assefa, 2014/15.
[82] Ibid ,See also Art 50(4) of the FDRE Constitution,Cited above at note 80
[83]Zemelak Ayitenew Ayele and Yonatan Tesfaye Fessha, "The Constitutional Status of Local Government in Federal Systems: The Case of Ethiopia", Perspectives on Federalism, Vol. 6, issue 2,2014,pp 96-97

administrative and institutional organizations. The regions also have the power to enact their own constitution, to set up a police force and they themselves determine the organization of the local administration. Still these constitutional spaces enable the sub national units to exercise their rights in the areas of Human rights protections, constitutional interpretation and amendment, institutional framework and the establishments of local governments.

CHAPTER FOUR

Sub National Constitutions of the Oromia and Harari Sub National Units

4.1 Introduction

Sub national constitutions are a symbol of political autonomy and self-determination of the concerned state community. It is a realization of self-rule and achievement of nationhood in the federal polity as a symbol of democratic government. This symbolic role of sub national constitutions is a reminder of the desire of state communities to govern themselves and their ability to do so as a sovereign entity.[84]In addition, sub national constitutions can play a potential role for experimenting progressive legal principles at state level, if fruitful, that could be extended at national level. State communities have the opportunity to experiment with and build new democratic systems to meet the different needs of the present and the future.[85] At state level, diversity, specific interest of the locality and minority rights issue that require innovative solution is entertained. It is practically unrealistic for the federal constitution to provide complete solution and protection for all problems.

As stated before federal constitution provides only a ground framework or minimum standard for protection of the rights. The ceiling is left for state constitutions to regulate it innovatively, especially in areas of human rights protection by taking advantage of new developments in the concerned community and in the international arena. It is for this reason that Justice Brennan claims "*…the strength of Federal system is its double source of protection.'*'[86]

As it is mentioned in preceding chapter, the FDRE Constitution leaves a certain amount of constitutional space for the sub national units. Accordingly, by utilizing these constitutional spaces, the sub national units can include their own human right catalogue (which should not deviate, but can build on the protection offered by the federal constitution). They can also design

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[84] Charley Saunders, "Australian State Constitution", Rutgers Journal Law, Vol 28, 1999-2000, p 1001. According to Saunders, the sub national Constitutions have symbolic significance because they are the image of the country, practical significance as they provides a frame legislation of the state government and potential significant not only for the members of the respective state communities, but for the national community as well. See also State constitution and Local government Class Lecture, Cited above at note, 81.

[85] G.Alan Tarr ,Cited above at note 9.

[86]William J.Brennan,"The Bill of Rights and the States: The Revival of State constitutions as Guardians of the Individual Right," New York University Law Review, Vol 61, No 4, 1986, P 1015.

the structure of the political institutions, decide on organization, institutions, power and responsibilities of local government and determine the procedure for constitutional amendment/revision.

In view of that, this chapter has designed to investigate how the sub national constitutional makers of the Oromia and Harari sub national units have made the use of their sub national constitutional space in order to protect human rights in their respective units. Accordingly, the chapter will analysis the utilization of sub national constitutional space; in the areas of Human rights protection, constitutional interpretation and amendment procedure, institutional frame work (the adoptions of bicameral and uni-cameral for protection of minorities' rights) and the establishments of local governments ,and the capacity of the sub national units to put in to practice will be discuss.

4.2 The Utilized Constitutional Space in the Sub National Constitution of Oromia and Harari Sub national units.

4.2.1 The preambles and General Provisions.

Based upon the aforementioned constitutional provision, the Oromia and Harari sub national units have adopted their constitution. As from 2001 on words, both constitutions were significantly revised. Accordingly, the constitutions mention the same objectives inducing the revision of their original constitutions. One is the achievement of good governance by strengthening accountability, transparency, efficiency, the separation of powers, and checks and balances. The other objective of adapting the regional constitutions is that the Constitutions serve as basic law to the objective reality of the regional states.[87] However, these constitutions apart from saying the People of Oromo or Harari have almost similar structure and substance with that of the federal constitution.

The preambles of the constitutions with a similar expression provides that in previous governmental systems the Oromo and Harari people have been the victim of human right violation, economical, social, political and cultural chaos. Moreover, the Harari Constitution holds, "the Harari people, cognizant of the need to establish and lead the state administration

[87]Tsegaye Regassa, Cited above at note 5 p.53.See also the preambles of the revised Oromia and Harari state constitutions.

together with the surrounding Oromo people and people from the other regions were sharing the operation and disparagement then prevalent." After referring this historical setting, they stated the main objective of the federal constitution was a setting up on a federal system respecting both individual and group (nations, nationalities and peoples') rights.

Next to preamble, on chapter one under the title of "general provision", both constitutions have follow the same constitutional structure laid out by the federal constitution. Accordingly, Chapter one of their constitution focused on the regional state and pertain to the nomenclature of the region, the regional state boundaries, the state flag and emblem, the state anthem, regional language policy, the capital city of the region and gender[88].

In spite of substantial similarity in their General provisions, the Harari constitution is a bit better in exercising its constitutional spaces in utilization of language policy. For instance, article six of Harari constitution provides that the working languages of the region are Harari and Afaan Oromo. Accordingly, Oromo people dwelling in Harari region could enjoy the right to make use of their own language. In addition, the Harari constitution gives little constitutional space for the applicability of Amharic language. As a result, Amharic language is apply in case where only there is a discrepancy between the Harari and Oromo languages for the interpretation of Harari constitutions.[89]

As opposed to the Harari constitution, the Oromia's constitution stipulates under article 5 that the working language of the region is Afaan Oromo. It is clearly articulated in the federal constitution that regions are entitled to decide their own working language,[90] which is broad opportunity for the sub national units to exercise their rights in multicultural settings. From this vantage point, taking in to the consideration that Oromia covers a very large area of the land in comparison with other sub national units as well as the various ethnic groups residing in the region, it would be better to consider the cultural rights of minorities.

[88]Christopher Van der Beken, Cited above at note 77 p 6, See also Art 1-8 of both the Oromia and Harari Constitutions.

[89] Art 80 of the Revised Harari constitution, Cited above at note 17.

[90]Art 5 of the FDRE constitution, Cited above at note 82.

4.2.2 Fundamental Principles.

The Oromia and Harari Sub national constitutions contain five fundamental principles. On the fundamental principles of the constitutions, one would be forced to say that they are a verbatim copy of the federal constitution. One wonders why no innovation is observed, in fact starting from chapter one to two save the nomenclatures part they do not seem a mere coincidence for the similarity in the sequence of the provisions and there organizations, as it is a right venture to frame the basic aspiration and values distinct to the people of the region. Hence, the principles of popular sovereignty (though they choose the term '*power of the people*'), supremacy of the constitutions, sanctity of human rights, secularism, and transparency and accountability of government are recognized in their chapter two[91]. Unlike the federal and Harari constitutions, the Oromia sub national constitution entrenches these principles along with the fundamental human rights under its constitutional amendment clause in Art 112.

4.2.3 Human/Constitutional Rights.

One of the other important purposes of a constitution is recognizing and guaranteeing basic rights and freedoms. This is so because, most of the time, a constitution is the supreme law of the land and its amendment procedure are rigid than the ordinary legislations.[92] Basic rights and freedoms will be better protected if they attained constitutional status.

One may think that why we should have Sub national Constitutions bill of rights if rights are protected in the federal constitution[93]. In this regard, there are two lines of arguments. Some argue that there is no need to have them. However, the majorities argue that it is advisable to have bill of rights at state constitutions level. First, the inclusion for the second time in sub national constitution furnishes double protection for citizens. Second, there would be a possibility of sub national constitution come up with a refined and better list of rights and freedoms, it can be genuinely concluded that they promote better protection of rights and freedom.[94]Moreover, state are taken to laboratories: they facilitate experimentation in ventures,

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[91]Class Lecture in State Constitution and Local governments, Cited above at note 84. See also Art 8-11 of Oromia and Harari constitutions

[92]Wondwossen Wakene,"Purpose of Sub National Constitution: the Ethiopian Experiment," Ethiopian Constitutional Law Series, Vol.VI, 2011, p 5.

[93] Ibid, See also Class Lecture in State Constitution and Local governments, Cited above at note 91

[94] Ibid.

would be one of the securities double in the "double security" scheme against tyranny-the second sovereign looking out the liberty of its society.

As it is mentioned in the above discussions, sub national units have a capacity to expand the human rights provisions that included in the federal constitution. However, in the regional constitutions of the Oromia and Harari sub national units, the bill of rights is, in the same way as in the federal constitution, included in Chapter 3. A cursory overview of these regional bills of rights shows that there are large similarities with the bill of rights included in the federal constitution. The constitutions avoid inventorying, better, novel, special and more munificent lists of rights and freedom. Both constitutions repeat committing in the same old mistakes of the federal constitution whereby transplanting in all its vagueness and loopholes.

For instance, like the FDRE constitution, the sub national units of Oromia and Harari constitutions provide that, everyone has the right to be protected from cruel, inhuman and degrading treatments.[95] Different scholars argue that this provision does not make explicit reference to torture and its prohibition under sub national constitutions. It is evident is that the practice draws even more suffering than the other forms of cruel, inhuman and degrading treatments which, among others, include; the intentional infliction of severe physical or mental pain, obtaining other parties information through confession, intimidation, consent of public official or other person acting in official capacity.[96] Similarly, Article 17(2) of the Constitutions provides that "no person may be subject to arbitrary arrest." The provision does not prohibit an *arrest*. Rather, it prohibits an *arbitrary* arrest. If an arrest is arbitrary, it is "incompatible with the principles of justice or with the dignity of the human person." Thus, lawful arrest (e.g., arresting a person according to an arrest warrant or while committing a crime) is not an arbitrary arrest and it does not violate right to liberty.

Moreover, the both constitutions provide the right of arrested persons to remain silent, to be promptly informed, in a language she/he understands, of the reasons for their arrest etc[97]. They also exclude evidence obtained through confession or admission obtained through coercion. However, evidence obtained through other illegal methods, or involving procedural irregularities

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[95] Art 18 of the Revised constitutions of Oromia and Harari sub national units ,Cited above at note 91

[96] Yonas Birmeta, "Bill of Rights in Sub national constitutions in Ethiopia," Some Observation on sub national constitution in Ethiopia: Ethiopian constitutional Law Series vol. IV, 2011, p39.

[97] Art 19 of the revised constitutions of Oromia and Harari sub national units respectively, Cited above at note 95.

such as failure to inform the arrested person of his right to remain silent, not involving coercion is not required to be discarded under the Constitutions. In addition, the Oromia and Harari constitutions state that, Persons in custody have the right to treatment that respects their human dignity. They also have the right not to be held incommunicado and hence to be visited by their spouses or partners, close relatives, friends, religious councilors, medical doctors or their legal counsel[98]. This constitutional provision also means that arrested persons may not be (or at least do not have the right to be) visited by others who are not listed in the provision such as foreign diplomats or the media.

Therefore, rather than copying the provisions of the federal constitution, it would have been if they took the provisions of the federal constitution as preliminary and include other provisions not included in the federal constitution. For example, the Oromia and Harari sub national units made an interesting human right protections concerning freedom of movement. Both constitutions provide a wider implication to freedom of movement by balancing the right to liberty of movement and freedom to choose the residence with the right to work and obtain property in their own unit.[99]This implies that state governments cannot stop citizen's movement around from other regions, working or making property in their region. The rationale behind the protections of such right is that citizens of the country depend on this right to carry out their daily life activities.

Moreover, Article 108 and 76 of the Oromia and Harari constitutions respectively provide a similar list of non-derogable. The emergency clause however, is a bit longer than the federal constitution. In addition to the ones rendered federally as non-derogable, both sub national units provide rights such as the right to life, physical integrity, and the right of detained and convicted person in a place of detention and prisons, and freedom of thought, conscience and belief as non-derogable rights. However, like the FDRE Constitution both, constitutions declare the right of self-determination including secession as non-derogable rights by limiting the rights to assembly, demonstration and petition[100]. Therefore, it may be possible but difficult to think of secession in the absence of the rights to assembly, demonstration and petition. Moreover, secession can be opted for only when there is a violation of human rights and those violations cannot effectively

[98] Ibid, Art 21

[99] Ibid, Art 32.

[100] Compare lists of Non-derogable in the revised constitutions of Oromia and Harar sub national units and the FRDE Constitution.

be redressed in remaining with the Federal union. However, the right is unconditional in the words of the federal constitution.

In addition, art 39 of the constitutions provides that only Oromo and Harari ethnic groups are allowed to establish the right to self-determination including secession and the other ethnic groups living in their units are not guaranteed to exercise their right to secede from the regions. In other words, the other ethnic group cannot establish their own sub national unit as per art 47(2) of the FDRE constitution.[101]

4.2.4 Constitutional Interpretations

A better, more extensive human rights protection can realized through a more expansive interpretation of the sub national human rights provisions by the bodies empowered to interpret the regional constitution. To achieve this, both the Oromia and Harari sub national units adopted constitutional interpretation commission (which is a political organ) for their constitutional adjudication.

Under these regional Constitutions, judicial organs do not have any role in interpreting and settling Constitutional disputes arising out of any matter. Because, Pursuant to Article 67 and 73 of the Oromia and Harari Constitutions respectively, Regional's Constitutional Interpretation Commissions are established for the sake of interpreting and settling constitutional disputes at regional's level. However, in both case the commissions are not well organized and entertain any constitutionality issue raised at regional level, whether from Proclamations (primary legislation by the regional parliament) or enabling legislations (subordinate enactments of the regional executive organ, like regulations and directives). In addition, the Oromia regional law, establishing the regional Constitutional Interpretation Commission, stipulates in its Article 19(3) that fundamental rights and freedoms enshrined in the constitution shall be interpreted in conformity to the decision of house of federation in similar matters.[102]

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[101] Yared Legesse, "Secession under the Federal and Sub National constitution of Ethiopia; Navigating the Distance between the text and the structure," Some Observation on sub national constitution in Ethiopia: Ethiopian constitutional law Series Vol. IV, 2011, P 120. Only the SNNPRS and the Somali sub national constitutions under art 39 provides that Nations, Nationalities, People of the State have the right to establish their own State at any time.

[102] Oromia Constitutional Interpretation Commission proclamation NO 167/2011.

In Oromia, the interpretation Commission consists of a representative nominated from each woreda council, Unlike Oromia, in Harar, the interpretation commission consists of members Harari representative in the House of Federation and House People Representatives, Harari National Assembly, People Representative and the former President of the regional state ex parte as members of the constitutional interpretation without having a vote[103]. Yet, an odds that these regional bodies(Constitutional Interpretation Commissions), are going to interpret the regional constitutional provisions on human rights in a more expansive way than courts. Therefore, by using their constitutional space the Oromia and Harari sub national units have the right to adopt another form of constitutional interpretation. In such a case, it is indispensable to refer Articles 62, 83 and 84 of the FDRE Constitution[104].

Pursuant to Article 62 and 83 of the FDRE Constitution, the authority to interpret the FDRE constitution is vested in the second chamber, the House of Federation/HOF/. The HoF is composed of representatives of nations, nationalities and peoples of the federation. HoF is not only empowered to interpret the constitution but also empowered to decide the constitutional disputes under the Constitution. In addition, the constitution gives the power for Council of Constitutional Inquiry/CCI/ to investigate constitutional disputes and submits it to the HoF for final decision.[105]

There are two reasons behind vesting the power of constitutional interpretation on the HoF under the current Ethiopian federation. First, the Constitution is considered as covenant made based on the consent and free will of the peoples living in the federation. Covenant as it is, the argument goes, it must be interpreted directly by those who represent, and elected by, the party to it.[106]Secondly, the framers were well aware of the fact that empowering the judiciary or a constitutional court brings unnecessary judicial adventurism or what some scholars prefer to call it as judicial activism, in which the judges would in the process of interpreting the vague clauses of the Constitution put their own preference and policy choices in the first place. Thus, the framers argued that this might result in hijacking the very document that contains the compact

[103] Art 73(3) of The Revised Harari constitution ,Cited above at note 100
[104] Class Lecture .Cited above at note 94.
[105] Art 84 of the FDRE constitution. Cited above at note 100.
[106]Getachew Assefa, "All about words; Discovering the intention of the makers of Ethiopians on the scope and meaning of constitutional interpretation," Journal of Ethiopian Law, Vol 24, No 2, 2010, p.160.

between the nationalities to fit the judges own personal philosophies.[107] Based on these two reasons, the framers believe that it is sound to vest the power to interpret constitutional disputes in the second chamber of the parliament under the Ethiopian federation. The writer supports neither the first nor the second arguments.

In addition, however, none of the aforementioned constitutional provisions or arguments imposes an obligation on Oromia and Harari sub national units to interpret their constitutions following the same models of the FDRE constitution. This is so because, a part from the state legislature as the formal sources of the states' Constitutions, their formal sources are unclear under the Ethiopian federation[108]. Question like who drafted, based on what procedures and who deliberated up on the states' Constitutions before they were presented for adoption to the regional parliament is unclear[109]. But what is clear is that the states' Constitutions were not enacted through public participation at large, rather they were enacted under the guise of the regional ruling parties in respective states and adopted by the parliaments of the regions. This holds true for the Oromia and Harari State Constitutions. Thus, one could claim that the issue is left for the decision of each respective federating unit.

For example, when one observes other laws, they are enacted by the regular legislative organ and interpreted by the regular courts. When we look at the state constitutions, as it is mentioned in the above discussions, the legislative organ of each federating unit enacts them. It is an obligation imposed by the FDRE Constitution. Thus, there will be no reason for them not to be interpreted by regular courts for they are provided in the legislative organ[110]. In addition, unlike the constitutional interpretation commissions, courts are well organized and expected to settle controversies after considering the facts and their relations to relevant laws. Therefore, from the forgoing discussion, one can easily understand that both Oromia and Harari sub national units constitution are simply copying the mechanism adopted at the federal level.

[107] Assefa Fisseha, Cited above at note 69
[108] Tsegaye Regassa, Cited above at note 87,p32
[109] Ibid
[110] Class Lecture , Cited above at note 104

4.2.5 Constitutional Amendment: Adoption in Line with the Rules of Federal Constitution.

The state constitution may entrench some constitutional issues to protect itself from the problem of double amendment. Since the local reality of each sub national units has its own unique feature, thus the issues that will be entrenched by the state constitution may vary from state to state. In such a case, both constitutions refer the federal constitution provision as the guideline to their constitutional amendments. Art 112(1) of the Oromia Constitution provides that the Provisions of chapters two and three of its constitution cannot be amended outside the conditions specified under art 105 of the Federal Constitution. In the same vein, the Harari Constitution unveils that the provisions of chapter three of its constitution shall not be amended in a manner other than that provided under Art 105 of the Federal Constitution.[111]Accordingly, the amendment on human rights provisions in both Constitutions, and chapter two of the Oromia constitution will possible only when all state councils by a majority vote and House of People Representatives, by a two-thirds majority vote and the house of the federation, by a two-thirds majority vote, approves the proposed amendment.[112]

From the cumulative readings of Arts 112 and 76 of the Oromia and Harari sub national units,and art 105 of FDRE Constitution we can induced that for amending human right (in both case) or chapter two of Oromia state constitution and vis versa the majority vote of the other eight states council is the mandatory requirement. This worthless and self-restrictive provision of Oromia and Harari Sub national units' hiders the contribution to be extended by sub national units in terms of helping the sustained reinforcement of their constitution. In addition, it hampers the maintenance and consolidation of sustainable peace and order in the units. The existence of this provision makes exposed the Ethiopia state Constitutions; including Oromia and Harari sub national units to criticisms.

Among these critics provided by constitutional writers,[113] First the inclusions of this self restricted provision add nothing for better protection of human right rather it creates the challenge on it by parlaying the power of states to amend their own constitutions so as to provide better protection of human rights. Second, it is clearly contradicts with the autonomy of the states

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[111] Art 79 of the Revised Harari constitution ,Cited above at note 103

[112] Art 105of the FDRE Constitution, Cited above at note 105

[113] Tsegaye Regassa, Cited above at note 109

that is the very purpose of having state constitutions. In a sense that, to amend any of the above-mentioned provisions of Oromia and Harari state constitutions requires the decision of federal or other states parliament. Thus, the autonomy of the state that wants to amend its constitution will put in question. Meaning, to amend both constitutions, all states will involve the votes of the others' state councils and integrative vote of the two federal houses. To the contrary, the members of the other voters states councils are not elected by the people who is governed via would be amended the provisions of state constitutions.

Therefore, this self restricted provision be completely locking the constitutional space of state constitutions which have been left the federal constitution so as to provide better protection of human rights via amendment. Since the constitutions of sub national state is plainer than its federal counter part, it will be appropriate to goes with the development of human right through incorporate the more developed and up to date human right but if the state provide this self restricted provision it is difficult do so.

4.2.6 The Regional's Parliament; for the Protections of Minority Rights

In the previous section, we have observed that the sub national councils of the Oromia and Harari sub national units have granted the highest authority to enact their own constitutions. Accordingly, Oromia and the Harari sub national units, respectively, established their own legislative, judicial and executive branch of government. In both cases, legislative powers are vested in the regional councils, executive powers in the Council of the regional Government, and judicial powers in the regional courts.

The legislative organ of Oromia the regional parliament *Caffee* is the supreme political organ of the region that comprises representatives of the people of the region as a whole from different electoral districts[114]. An individual citizen of Ethiopia and resident of the region are legible to be elected provided he speaks the working language of the region. However, the constitution provides discrimination on the basics of sex, color, **language**, **ethnic**, religion, political affiliation, property and others are prohibited[115]. However, owing to the First-past-the-post electoral system in Ethiopia as a whole, in Oromia ethnic minority groups rarely succeed in

[114] Preamble of the revised constitution of Oromia, Cited above at note 100
[115] Ibid, art 38 (1)(b)

having representatives in the region[116]. The constitution gives no attention to the representation of minority group in the region and it shows the Oromia region is a complete identification for the Oromo People.[117] In addition, the regional parliament *Caffee* is unicameral.

The Oromia Constitution when it excludes the minorities by stating the sovereign of Oromo people is complying with the definition of nation, nationality and people as per art 39(5) of the FDRE constitution. Accordingly, nation, nationality and people means 'a group of people who have or share large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological makeup and who inhabit an identifiable, predominantly contiguous territory. Owing to this, the Oromia constitution confers the right to territorial self-determination only to nations, nationalities, peoples of Ethiopia so that ethnic minorities in the region are not entitled to the status of nation, nationalities, and peoples because they do not meet the requirement of inhabiting "identifiable predominantly contiguous territory." In addition, from practical point of view it may be difficult to recognize and grant the right to territorial autonomy to the dispersed minorities as there could be as many [118] ethnic groups living in this region.

However, unlike the constitution, Proclamation No 116/2006 provides representation for minorities who live in the first and the second Cities of Oromia. As a result, if the numbers of Oromo people who live in these Cities are less than the other ethnic groups, 50 percent of the seats in the city council should be reserved to Oromo people. Additionally, 20 percent of the seats in the city council of the first and the second grade cities are reserved for the surrounding Kebeles[119]. Therefore, about 70 percent of the seats are reserved for Oromo's in the city council. Of course, this proclamation intends to promote the right of endogenous groups without totally neglecting the rights of exogenous groups. Thus, if we plainly follow the constitution of the region other than Oromo's no ethnic group that has legitimate claim to have a seat in the City Council**.** This indicates that the proclamation gives better opportunity for the other ethnic group as it at least recognizes the existence of other ethnic groups.

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[116] Art 54 (2) of FDRE Constitution, Cited above at note 112

[117] Art 8 of the revised constitution of Oromia Cited above at note 115, See also the Preamble.

[118] The extracted annex from the 2007 population census of Ethiopia which indicates almost all ethnic groups in Ethiopia resides in Oromia

[119] Proc. No. 116/2006, Exercise of self-determination in the cities Arts.2-7, See also, Tokoma Daba, The Legal and Practical Protection of the Rights of Minorities in Self Administering Nations of Ethiopia: The Case of Oromia, (Addis Ababa University Unpublished),p 91.

Coming back to Harari sub national unit, the regional parliament, Harari people Council (HPC), is bicameral and composed of 36 members. It categorized in to People's Representatives Assembly/PRA/ and Harari National Assembly/HNA/.

As it is mentioned before, the Harari constitution in its preamble holds that, the Harari People, cognizant of the need to establish and lead the state administration and lead the state administration together with the surrounding Oromo People and the people from the other region that were sharing the operation and disparagement then prevalent. In bid to bring this to the ground, the Constitution, under Article 48 and the following establishes a bicameral legislature each wing having its own powers and function. However, the Harari National council is reserved fully to the Harari, the Council of People Representatives stands for other People living the region.[120] To this end, however, art. 50 of the constitution indicates that only Harari origins living in Harari and other areas of the country are entitled to be elected as members of National Assembly in order to preserve the rights of the Harari People. It is a rare example of a non-territorial institution in a country that is characterized by a territorial strategy of ethnic accommodation.[121]On top of this, the members of this Assembly nominate the president of the region.

Moreover, the People Representative Assembly has 22 members are elected according to special a mode of election. The constitution provides a guaranteed representation of Harari by stating that four members must be elected from Jagol, which is predominantly inhabited by Harari, and the remaining 18 members are elected outside the electoral district of Jagol(which is predominantly inhabited by Oromos' and Amharas).[122]

Thus, there could be a possibility for the Harari ethnic group to be represented in both councils. However, the other ethnic group cannot become members of HNA since HNA is exclusively reserved for Harari ethnic group. In addition, the two ethnic groups, the Harari and Oromo, dominate the regional parliament. The other ethnic group rarely represented in regional parliament.

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[120] Christopher Van der Bekken, Cited above at note, 88.p, 10.

[121]Christopher Van der Bekken, Unity in diversity Federalism as a mechanism to accommodate Ethnic diversity the case of Ethiopia, Law and politics in Africa,2014,248. Vol 10 P 248

[122]Art 50 of Harari constitution. Cited above at note 111, See also Ibid, P 249.

Moreover, all over the regions in Ethiopia, dispersed minorities are not given guaranteed representation in the regional parliament. Even though it seems the constitution of Amhara and Southern Nations, Nationalities and People/SNNP/ of Ethiopia has positive attitude towards ethnic diversity nothing make them different from that of Oromia and Harari sub national units constitutions since the non-endogenous (despised ethnic minority groups) are not accorded adequate protection to their group specific rights and guaranteed representation. Similarly, the FDRE Constitution does not also provide guidelines to dispersed ethnic minority groups because of this no arrangement be made at the regional's level.

Therefore, to realize a more comprehensive protection of minority rights some writers suggest the need to supplement the territorial approach with a non-territorial approach.[123] In such a case, autonomy is not granted to a certain territorial entity, but to ethnic groups as such. This implies a distribution of competences between the two administrative branches. The non-territorial authorities, in which only the members of one ethnic group are represented, can receive powers that are narrowly linked specific identity of this group: power in the fields of language, culture and education.

4.2.7 Establishments of Local Governments

As it is mentioned in the above discussions, determining the powers of local government is a matter left to the sub national units. The scope and the nature of power that local government enjoys are not constitutional formulated. The FDRE constitution does not enumerate the specific powers that have to be transferred to local governments. The only requirement as indicated earlier, is that the sub national units must transfer "adequate powers" to local-level governments[124].

The Oromia sub national unit is organized in to regional, zonal, worada and kebele levels with the possibility of the regional council creating other levels of organ. Zonal administrations are structured as an executive subdivision or like branch offices of the regional government without any legislative power or function.[125] Uniformly, the zonal administration consisted of a team of

[123] Christophe Van den Beken, "Ethiopian Constitutions and the Accommodation of Ethnic Diversity: The Limits of the Territorial Approach," Ethiopian Constitutional Law Series ,Vol.2 p 294.
[124] Art 54(3) of the FDRE Constitution, Cited above at note 116
[125] Art 71.of the Revised Oromia constitution ,Cited above at note 117

heads of line departments and a chief and vice chief administrators of a zone who are appointed by the State Council upon recommendation by the State President. Some of the powers and functions of the zonal administration are to coordinate wereda administrations; support, follow and co-ordinate all departments and institutions in the zone; responsible for law, order, peace and security in the zone and reports overall zonal working activities to the State President.[126]

Wereda structure consists of wereda council, wereda administrative council and wereda judiciary.[127] Wereda council is the legislative body of the wereda structure, which is established by the wereda people for five years term through direct popular vote. Constitutionally, members of the Wereda Council are responsible for the people. Some of its constitutional powers and functions include approving the Wereda's economic development, social services and administrative activities draft plans and programmes; appointing Wereda administrator from member of the majority party in the council, approving the appointment of vice Wereda Administrator and other appointments upon submission by the Wereda Administrator and ensuring the collection of land use fee (tax), agricultural income tax and other service taxes as determined by the law.[128] However, most of these functions, largely, are duties coming from the top officials at the zonal and regional level to be implemented in the woreda area rather than having its real power to make decisions on its own to protect the interest and benefit of its electorate.

The lowest and smallest administrative structure of the regional state is a Kebele administration, which has relatively very close contact with the local people. A Kebele administration has a kebele council, a kebele administrative council and social court. Constitutionally, the kebele council is the highest political authority in the kebele and the kebele people elect it for five years term[129]. It has a power to organize the kebele administration council and appoint the kebele administrator, but only upon the recommendation of the majority party. Major functions of the kebele council are limited to implementing the plan and regulations of the wereda council and the wereda administrative council, ensuring law and order in the Kebele and organizing the kebele administration.

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[126]Ibid, Art 73
[127] Ibid, Art 76
[128] Ibid, Art 82
[129] Ibid ,Art 91

On the other hand, Harari sub national unit is organized in to regional and kebele levels. However, Harari is quite different in terms of the treatment of its kebele structure. The constitution does not identify the particular social services and economic development that each kebele is mandated to plan and implement but it provides kebele have its own council, executive, and judicial bodies. [130]

Therefore, in the aforementioned countries local governments are entrusted with a large number of complex tasks, covering important parts of the welfare system and public services such as social services, health care and education, as well as housing, planning and building issues, and environmental protection. In addition, Local governments within the boundaries of a state need increasing flexibility to meet economic, social and environmental goals in their particular geographical and cultural setting. Therefore, achieve this objective, it is important to give an autonomous status to the local governments.

4.3 Rationale for Non-utilizations of Constitutional Space.

As it has been broadly discussed in the above discussions, both constitutions have similar structure and substance with the federal constitution, and each other. Nevertheless, in an interview held with members of the sub national councils of Oromia and Harari regional states[131], both parties claim that they have properly utilized constitutional spaces left by the federal constitution. To substantiate their argument, both parties talk about the exercise of self-administration, protection of the rights of ethnic groups through enacting their own constitutions, rights to develop their culture in their own region, and political relations they are widely implementing.

Besides, they claim that the provisions given by the federal constitution to human right protections persuaded them to incorporate the provisions of the federal constitution with their own sub national constitutions. They also state that the sub national units' legislative, executive, and judicial organs of the government shall have a responsibility to respect the federal constitution. Additionally, they added that, prior to the promulgation of the FDRE constitution, they did not have their own constitutions, and hence, they enacted their constitutions following

[130] Art 75 of the Harari constitution ,Cited above at note 113

[131] An interview with Hashim Amed and Alemayehu Gadessa Members of State council in Harari and Oromia sub national units respectively.

the example of the federal constitution as role model. Due to this, they incorporated the provisions of the federal constitution bill of rights to fulfill the needs of the federal government. Thus, as they claim, this does not indicate that they have failed to use constitutional space left by the federal government.

Regarding this, Ato Aschalewu Tekle,[132] the member of the House of Federation has explained that respecting and implementing the provisions of the federal constitution is not only the responsibility of the federal government, but also the regions should have equal responsibility to implement and enforce the federal constitution. In doing so, the federal constitution has properly set the powers of regional governments, and the regions have the right to enact their own constitutions, different from the federal constitution, by recognizing the supreme role of the federal constitution. Moreover, there is no homogeneity clause in the FDRE constitution, which mandated the sub national units to have similar constitutional clauses as the federal one.

However, one can easily understand the fact that they are the copy of the federal government and both Oromia and Harari sub national units are not willing to use the constitutional spaces left by the federal constitution because they support the federal government itself. To supplement this argument, the Oromia and the Harari constitutions, after being adopted by their regional council in 1995, have only been revised once in twenty years period. This constitutional revision, among others, includes issues like transparency, responsibility, self-determination including secession and little enhancement in their constitution. In addition to this, as it is mentioned in the above, the only way that their human rights constitutional provisions can be amended is only when the provisions of the federal constitutions is amended. This undeniably indicates that they have strong political stand towards the federal government. Hence, they want to use the provisions of the federal constitution as alternative mechanisms.

In Ethiopia, the existence of a single party dominance in all sub national units as well as the federation is fated by many as the main cause for non-utilization of constitutional space. Since Ethiopian People Revolutionary Democratic Front/EPRDF/ exercise hegemonic control in all sub national units through its member and affiliated parties, inclusion of power in the hands of the

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[132]An Interview with Ato Aschalewu Tekle, Democratic Unity and Governmental Relations Directorate Director at House of Federation.

federal government is evident[133]. Through this, the federal government enjoys the absolute right to do or undo everything in federation. In addition, all sub national units in our country are the supporters of the federal government and there is the existence of one political party in the regions. The Oromia and the Harari sub national units, since they are supporters of this system cannot easily utilize the constitutional space left by the federal government.

In addition, the Ethiopian People's Revolutionary Democratic Front /EPRDF/ is challenged with the question of political legitimacy that resulted in the concentration of all political powers at the central official's levels through a range of tactics rather than creating a decentralized system and open deliberation among the public at large or to the lowest level of governments. Hence, under the prevailing conditions in Ethiopia, one cannot talk about federalist decentralization of power. The centralization trend, which resulted from the absence of proper legitimacy of the power holders, exacerbates the rather coercive trend of the power division[134]. Since the central power holders have not trust on their regional counterparts, they always employ various ways of controlling the activities of the latter even in contradiction with the constitutionally entrenched autonomy.

Generally, their failure to use the space left by the federal constitution is attributed to political factors ranging from the prevailing political ideas of the era to the nature of the party system and to the level of dominance of one party throughout the country. Therefore, the existence of multi-party system in the country creates the awareness towards the societies and this provides an opportunity for the sub national units to use their space.

4.4 Conclusion

Constitutional experimentation has its own advantage. It enables sub national units to approach local issues in a responsive manner. In addition, it saves the federation from uncharted national constitutional experimentation by containing the effects of experimentation to a single sub national unit. However, as inference from the foregoing discussions, one easily identify that the sub national constitutions of Oromia and Harari due to the existence of the same political party

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[133] Merera Gudina, Ethiopia: Competing Ethnic Nationalism and the Quest for Democracy,1960-2000, 2003, p 87. Shaker Publishing.

[134] Kalkidan Kassaye,Center-State Relations in the Ethiopian Federal Set up:Towards Coercive Fedelasim? A view from practice,(Addis Ababa University Unpublished) p 105.

at the federal and state level ,both regions are not used their constitutional space, and made little for horizontal constitutional development. Moreover, they are the direct replicas of the federal constitution despite minor modifications.

CHAPTER FIVE.

Conclusions and Future Directions

Now it is more than two decades that the Ethiopian federal system has been put into practical reality. The 1995 constitution, which is the turning point from the traditionally dominant centralization trend of nation building, has officially endorsed the ethnic federal re-structuring in the country by declaring the establishment of a federal and democratic republic and nine sub national units. The Constitution, after adopting a federal governmental configuration characterized by a coordinate relationship between the center and the sub national units, tries to emphasize on the equality of sub national units under the guise of Nations, Nationalities and Peoples supremacy. As a result, the two tiers of government are constitutionally empowered to act exclusively on their affairs that fall under their respective jurisdiction. To this end, the Federal constitution lists the exclusive powers of the federal government and sub national units. In addition, it provides sub national units with the power, under Article 52, of reserved or residual authority that is not given expressly to the Federal Government alone or concurrently to the Federal Government and the units.

On top of this, the FDRE constitution left certain amount of constitutional spaces to the sub national units to define their own goals and establish their own governmental institutions and process. These constitutional spaces include, among other, the power to self rule, draft a constitution, amend, and replace that constitution, set goals of government, define the rights that the constituent unit will protect, structure the governmental institutions of the constituent unit, create offices, establish an working language, create and structure local government, and establish qualification for voting. To achieve this, Oromia and Harari sub national units enacted their own constitutions. However, these units while enacting their constitutions have replicated those constitutional provisions of the FDRE constitution in their sub national constitutions.

Moreover, once the scope of the sub national constitutional space is determined, the manner of its utilization matters. For example, both Oromia and Harari sub national units have common jurisdiction on human rights. Nevertheless, due existence of one dominant political party in power, both at federal and state level, they simply adopt the provision of federal constitution.

Moreover, the Ethiopian People's Revolutionary Democratic Front /EPRDF/ is challenged with the question of political legitimacy that resulted in the concentration of all political powers at the central official's levels through a range of tactics rather than creating a decentralized system and open deliberation among the public at large or to the lowest level of governments. Hence, they failed to make use of the space allotted to them.

Therefore, as it is noticeable from the entire course of the research, it is possible to witness a number of problems in the usage and practice of the constitutions of the sub national units of Oromia and Harari. In doing so, the researcher would direct both constitutions shall cancel their rule of amendment and come up with a clear set on amendment by leaving aside the Federal constitution. In addition, the essence of multicultural federalism tells us not only about the accommodation of cultural, linguistic or ethnic diversity, but also about the possibility of creating an accommodative system for political diversity. In Ethiopia, there is no competing political party except the ruling ones. If one political party is on power, the possibility of diversity on sub national units would be minimal. This in turn hampers the required opportunity for public participation in any aspect of constitutional issues and opens debate on the options available rather than adhering to a single political ideology. Therefore, an appropriate ground for political diversity and a clear stature for dynamic politics should be considered as vital for use of the constitutional space. To this end, the federal government in general Oromia and Harari sub national units in particular should encourage the diversified political system.

Moreover, granting extensive constitutional space to sub national units, including in the field of rights protection, may also be crucial for minorities, who might find it easier to gain recognition of their rights at the sub national constitutional level. The practice in the sub national units of Oromia and Harari recognizes the existence of dispersed ethnic minorities, but it needs to get constitutional base at least in non-territorial matters in area of language and culture. Therefore, the Harari sub national unit constitution should provide other ethnic groups to utilize their language by amending its constitution. On the other hand, the Oromia sub national constitution should render the same right for despised minorities residing in the region. In additional, both sub national units should strive to give awareness on their respective constitutions for entertaining diversified ideas and recognition of rights by its population, which, in turn, brings about popular demand in using the constitutional space.

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