

Sub-national Constitutional Autonomy in Ethiopia: On the Road to Distinctive Regional Constitutions

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1. Introduction

With its focus on sub-national or regional constitutional autonomy in Ethiopia, this paper entertains a topic that has hardly received any attention in the scholarship on Ethiopian constitutional law. Although all nine regions of the Ethiopian federation have adopted their own constitution, the prevailing argument is that these constitutions are merely copies of the federal constitution and can therefore rightly be ignored. Yet, although this argument might have held some truth for the regional constitutions that were adopted in the immediate aftermath of the coming into force of the federal constitution in 1995, this is no longer valid today. As from 2001 onwards, all regional constitutions were revised and since one of the major rationales behind this constitutional revision process was to design regional constitutions that were better adapted to regional realities, the regional constitutions now exhibit significant differences. This paper intends to compare all nine regional constitutions, identify the areas where significant divergences can be observed and explain the regional characteristics inducing these differences. The paper starts with a brief overview of the federal constitution, since the latter offers the basis for the regional constitutions. The regional constitutions largely follow the structure of the federal constitution and the federal constitution also determines the space for the regions to draft, adopt and amend their constitutions. Previewing the conclusion, it can already be pointed out that the constitutional space reserved for the regions is significant: the regions can include their own human rights catalogue (which should not deviate from, but can build on the protection offered by the federal constitution), they can design the structure of the regional political institutions, decide

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on the organization, institutions, powers and responsibilities of local government, constitutionalize regional policy objectives and determine the procedure for constitutional amendment/revision. By providing an overview of how Ethiopia's regions have used this constitutional autonomy, the paper will contribute to the existing knowledge on comparative sub-national constitutional law.

2. The Federal Constitution: Constitutional Basis for Regional Constitutions

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: “*This Constitution establishes a **Federal** and Democratic State structure. Accordingly, the Ethiopian state shall be known as the **Federal Democratic Republic of Ethiopia***” (my emphasis). 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. The constitutional acknowledgement of ethnic diversity is apparent from the outset since the preamble of the constitution starts with the proviso “We, the Nations, Nationalities and Peoples of Ethiopia”. The constitution grants these nations, nationalities and peoples or ethnic groups extensive rights subsumed under the concept of “self-determination”. Self-determination under the Ethiopian constitution includes language rights and cultural rights, political representation rights as well as territorial autonomy (up to and including the right to secession).¹ The constitution emanates the idea that fulfilling the right to territorial autonomy is the best way to fulfil the other components of the right to self-determination as well. In other words, the establishment of “their” territory will enable Ethiopia's ethnic groups to exercise their language rights, cultural rights and political representation rights. This idea constitutes the background to the constitutional establishment of nine regional states: the State of Tigray, the State of Afar, the State of Amhara, the State of Oromia, the State of Somali, the state of Benishangul-Gumuz, the State of the Southern Nations, Nationalities and Peoples, the State of the Gambella peoples, and the State of the Harari people.² The names of the first five states/regions refer to the ethnic group, which is dominant (numerically and politically) in that region i.e. the Tigray, Afar, Amhara, Oromo and Somali people. These five groups have been empowered by the establishment of “their” region within which they can exercise the different

¹ Article 39(1-3) federal constitution.

² Article 47(1) federal constitution.

components of the right to self-determination. The remaining four regions do not have a single dominant group. The name Benishangul-Gumuz refers to the Benishangul (also called Berta or Jebelawi) and Gumuz ethnic groups, yet both groups together constitute less than half of the regional population. The State of the Gambella peoples is similarly characterized by the absence of an ethnic majority group. The largest groups in the region are the Nuer (46.65 per cent of the regional population) and Anywaa (21.17 per cent of the regional population). Although the nomenclature of the State of the Harari people indicates that this region has been established for the Harari people, the latter merely constitute nine per cent of the regional population. The State of the Southern Nations, Nationalities and Peoples (hereafter Southern region), finally, is ethnically extremely diverse with 56 officially recognized nations, nationalities and peoples.³ The above overview of the ethnic composition of the regions demonstrates that four of the nine regions are characterized by a significant degree of ethnic pluralism.⁴ Ethnicity has therefore not been the sole criterion to determine the establishment of the regions. This is confirmed by Article 46(2) of the constitution, which stipulates that: “(regional) *States shall be delimited on the basis of the settlement patterns, language, identity and consent of the people concerned.*” However, this should not raise doubts as to the multi-national or ethnic nature of Ethiopia’s federation. Six ethnic groups have been empowered by the establishment of “their” region. Yet, the constitution unequivocally states that **all** ethnic groups (i.e. the 80+ officially recognized ones) have the unconditional right to set up their own regional state.⁵

As is customary in federations, the distribution of state competencies between the federal government and the regions is enshrined in the Ethiopian constitution, mainly in Articles 51 and 52. According to Article 52(2b), the regional states have the power to enact a state constitution. This power is also provided by Article 50(5), which stipulates that the State Council (i.e. the regional parliament) has the power to draft, adopt and amend the regional state constitution. Yet, the supremacy of the federal constitution, as proclaimed in its Article 9(1), implies that the regional constitutions have to comply with the provisions of the federal

³ The data about population number and ethnic diversity can be found in the latest population and housing census of Ethiopia: *Summary and Statistical Report of the 2007 Population and Housing Census* (2008, FDRE Population Census Commission).

⁴ Please note that all regions – even the ones dominated by one group – are characterized by ethnic diversity. The opposite would require the application of unconstitutional means such as forced resettlement and inhibitions to the free movement of citizens.

⁵ Article 47(2) federal constitution.

constitution. The discretion of the regional states to design regional constitutional provisions (i.e. their “constitutional space”⁶) is thus determined by the federal constitution.

3. General Features and Aspirations of the Regional Constitutions

Based upon the aforementioned provisions of the federal constitution, all regions quickly adopted their constitutions. The Oromia, Tigray, Southern, Somali, Harar and Amhara regional constitutions were adopted in 1995; the Benishangul-Gumuz and Gambella regional constitutions were adopted in 1996 and the Afar region adopted its constitution in 1998.

As from 2001 onwards, all regional constitutions were significantly revised and it is these revised versions that are analyzed and compared in this paper. The four core regions of the federation adopted their revised constitution around the same time at the end of 2001: the Oromia region adopted its revised constitution on 27 October 2001, the Amhara region on 5 November 2001, the Southern region on 12 November 2001 and the Tigray region on 15 November 2001. This was followed by the Afar region, which adopted its revised constitution on 5 July 2002 and the Benishangul-Gumuz and Gambella regions, which adopted their revised constitutions on 2 and 17 December 2002 respectively. The Somali region also adopted its revised constitution in 2002. The Harar region was the last to revise its regional constitution in 2004.

Although all regional constitutions have a similar structure, they vary quite significantly in length. The Oromia regional constitution has a total of 113 articles, organized in 12 chapters. The Afar regional constitution includes 111 articles, organized in 11 chapters. Since the Afar constitution does not provide for the local government level of the Zone – as will be discussed in section 7 – the corresponding chapter of the Oromia constitution pertaining to the Zone is not included in the Afar constitution. The Somali regional constitution has 110 articles, equally organized in 11 chapters. The same is true for the Tigray regional constitution. The Amhara regional constitution contains 120 articles, organized in 12 chapters. The additional chapter incorporated in the Amhara constitution pertains to the organization, powers and duties of the Nationality Administrations, i.e. ethnic-based local governments in the region that cannot be found in the Afar, Somali, Oromia and Tigray regional constitutions. With its 80 articles, organized in nine chapters, the Harar regional constitution is the shortest of all regional constitutions. The difference in chapters and length can be explained by the fact that

⁶ G. Alan Tarr, “Explaining Sub-national Constitutional Space”, *Penn State Law Review* Vol. 115(4) 2011, (1133) 1134.

the Harar constitution, different from all other regional constitutions, does not provide for the local government level of the district/*Wereda* (see section 7) and by the absence of a separate chapter on policy objectives. The Benishangul-Gumuz regional constitution has 121 articles organized in 12 chapters. The Gambella regional constitution contains 125 articles and 13 chapters, including one specific chapter on the structure of the regional state. The Southern constitution, finally, is the longest of all regional constitutions with 128 articles spread over 12 chapters. All revised regional constitutions were adopted by the respective State Councils and the drafting was carried out either by standing committees of the Council or by committees appointed by the regional Chief Executive (the regional president).⁷ Since all State Councils at the time of adoption of the revised constitutions were controlled by the same political party, it is fair to argue that the rationale behind the constitutional revision reflected the objectives of the ruling party. This argument is supported by the preambles of the constitutions, which point out similar grounds for the constitutional revision.⁸

All regional constitutions start with a preamble, which expresses that the regional constitution is the emanation of the will of the ethnic group(s) empowered by the establishment of the region. The preambles furthermore reflect upon the historical background to the adoption of the regional constitution and express the constitutional aspirations.

The preambles take the reader back to the previous – pre-1991 – political regimes⁹ and point to the multifarious problems characterizing these regimes. The particular issues mentioned in this regard are human rights violations, ineffective economic and social policies, and social marginalization. Some of the regional constitutions (e.g. the Oromia and Somali constitutions) state that the members of the constitutionally empowered ethnic group were relegated to

⁷ Tsegaye Regassa, “Sub-National Constitutions in Ethiopia: Towards Entrenching Constitutionalism at State Level”, *Mizan Law Review* Vol. 3(1) 2009, (33) 52.

⁸ The political party dominating all State Councils then (as well as at the time of writing) was the EPRDF (Ethiopian Peoples’ Revolutionary Democratic Front). The EPRDF was (and still is) composed of four parties: the TPLF (Tigray People’s Liberation Front), the ANDM (Amhara National Democratic Movement), the OPDO (Oromo People’s Democratic Organisation) and the SEPDM (South Ethiopian Peoples Democratic Movement). At the time of adoption of the revised regional constitutions, the EPRDF controlled the large majority of seats in the House of People’s Representatives (the first chamber of the federal parliament). The dominance of the EPRDF over the House was furthermore strengthened through its affiliated parties. These parties are not a formal part of the EPRDF coalition, but have been established under EPRDF impetus and are under its supervision. The same picture arose at regional level. The four EPRDF constituent parties held an overwhelming majority of the seats of the regional parliaments in four regions, i.e. in the Tigray, Amhara, Oromia and Southern regions respectively. The same situation characterized the remaining five regions, where the EPRDF affiliated parties controlled the State Council: see C. Van der Beken *Unity in Diversity – Federalism as a Mechanism to Accommodate Ethnic Diversity: The Case of Ethiopia*, Zuerich/Muenster, Lit Verlag, 2012, 135-136.

⁹ Emperor Haile Selassie ruled Ethiopia from 1930 until his deposition by a military committee in 1974. The new regime, which adopted a Marxist-Leninist ideology, was in turn removed from power in May 1991 by a coalition of rebel/liberation forces led by the EPRDF.

second class citizen status. This includes a reference to the past assimilationist policies, which the introduction of multinational federalism has strongly discarded.

After referring to this historical background, the regional constitutions point out that the federal constitution's main objective was the setting up of a federal system, respecting both individual and group (nations, nationalities and peoples') rights. Ensuring the rule of law and respecting human rights are also values underlying the regional constitutions. The constitutions acknowledging the ethnic diversity of the regional polity, such as the Gambella, Benishangul-Gumuz and Southern regional constitutions¹⁰ furthermore consider the objective of unity in diversity by emphasizing that the different nations, nationalities and peoples residing in the region have built up common interests and outlooks.

As pointed out above, all regional constitutions mention the same objectives inducing the revision of the original constitutions. One is the achievement of good governance by strengthening accountability, transparency, efficiency, the separation of powers, and checks and balances. Another objective is adapting the regional constitutions to the objective reality of the regional states they are serving as basic law.

The values and objectives articulated in the preambles are reflected in a number of fundamental constitutional provisions, which will be discussed in the next section.

4. General Provisions and Fundamental Principles

Next to the preamble, all regional constitutions start with a chapter on "general provisions". With this, the regional constitutions follow the structure of the federal constitution, which includes a Chapter 1 with a similar title. Chapter 1 of the federal constitution includes seven articles dealing respectively with the nomenclature of the state, Ethiopian territorial jurisdiction, the Ethiopian flag, the National Anthem, language policy, Ethiopian nationality and gender.

In the regional constitutions, the provisions of Chapter 1 are obviously 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.

¹⁰ Some regional constitutions such as the Oromia and Somali constitutions are permeated by the idea that the establishment of the region has empowered one ethnic group only i.e. the group to which the regional name refers.

With regards to the provisions on state boundaries, I argue that such provisions should only be included in the regional constitutions as far as these provisions reflect an agreement between the concerned regional states or are the result of a federal decision. It is not the mandate of a regional state to unilaterally determine its boundaries, lest it will lead to inter-regional boundary tensions and conflicts. Indeed, Article 48 of the federal constitution stipulates that all regional border disputes shall be settled by agreement of the concerned states or, when the states fail to reach agreement, by the House of the Federation (the federal 2nd chamber).

Flags and emblems allow the ethnic groups empowered by the establishment of a regional state to express their identity. Most regional constitutions state that the details pertaining to the flag and emblem will be determined by (ordinary) law, but Article 3 of the Oromia constitution limits the discretion of the ordinary law-maker in this regard. It determines that the sign of “Oda” will figure in the middle of the Oromia regional flag. The “Oda” symbol refers to the tree that plays a central role in the *Gada* system – the traditional Oromo governance system – as the place where the Gada leaders gather. The symbol is therefore a significant expression of Oromo identity.

Using the power bestowed upon them by Article 5(3) of the federal constitution,¹¹ all regions have enshrined in their constitutions provisions on language, specifying which language will be used as regional working language. In this regard, five of the nine regional constitutions have designated the language of the regionally empowered ethnic group as their regional working language i.e. Somali in the Somali region,¹² Afarigna in the Afar region,¹³ Afaan Oromo in the Oromia region,¹⁴ Tigrigna in the Tigray region¹⁵ and Amharic in the Amhara region.¹⁶ Harar is the only regional state that has designated two languages as working language i.e. Harari and Afaan Oromo. The three remaining regions are – as mentioned in section 2 – characterized by the absence of a single empowered ethnic group. They have therefore decided to avoid contentious debates on which languages to be selected as regional working languages and have pragmatically opted for the continued use of Amharic.¹⁷

¹¹ Article 5(3) federal constitution: “Members of the Federation (i.e. the regions) may by law determine their respective working languages.”

¹² Article 6 Somali constitution.

¹³ Article 5 Afar constitution.

¹⁴ Article 5 Oromia constitution.

¹⁵ Article 5 Tigray constitution.

¹⁶ Article 5 Amhara constitution.

¹⁷ Article 6 Benishangul-Gumuz constitution, Article 6 Gambella constitution and Article 5 Southern constitution.

Chapter 2 of the federal constitution proclaims the fundamental principles of the constitution. These are the principles that all sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia (Article 8),¹⁸ the supremacy of the federal constitution (Article 9), the commitment to human rights (Article 10), the separation of state and religion (Article 11), and the principle of good governance (Article 12).

All regional constitutions also contain five fundamental principles. The first principle specifies the holder of the sovereign power at regional level. As mentioned above, the preamble of the regional constitutions already expressed that the regional constitutions are not necessarily assumed to be the emanation of the will of the nations, nationalities and peoples residing in the regions. They are rather the emanation of the will of the nations, nationalities and peoples empowered by the establishment of the region, who therefore hold sovereign power in the region. The regional constitutions furthermore proclaim the supremacy of the regional constitution, which means that the regional constitution is the supreme law of the region. The principle of constitutionalism is also included in all regional constitutions. Yet, this does not affect the supremacy of the federal constitution – as is acknowledged by all regional constitutions.¹⁹ As a third fundamental principle, all regional constitutions proclaim their commitment to the protection of fundamental rights and freedoms.²⁰ The next section will show that this commitment is expressed by all regional constitutions through the inclusion of a comprehensive list of human rights. The principle of separation of state and religion is also included in all regional constitutions.²¹ None of the regional states is thus allowed to adopt a state religion. This is a notable principle, especially in the regional states where the population almost unanimously embraces one religion (i.e. Islam in Afar and Somali regions and Orthodox Christianity in the Tigray region). The fifth and last principle included in all regional constitutions is the commitment to good governance.

¹⁸ This constitutes the background to the wide-ranging right to self-determination (including secession) granted to all nations, nationalities and peoples enshrined in Article 39.

¹⁹ Article 10 Somali constitution, Article 9 Afar constitution, Article 9 Oromia constitution, Article 9 Tigray constitution, Article 9 Amhara constitution, Article 9 Harar constitution, Article 10 Benishangul-Gumuz constitution, Article 10 Gambella constitution and Article 9 Southern constitution.

²⁰ Article 11 Somali constitution, Article 10 Oromia constitution, Article 10 Afar constitution, Article 10 Tigray constitution, Article 10 Amhara constitution, Article 10 Harar constitution, Article 11 Benishangul-Gumuz constitution, Article 11 Gambella constitution and Article 10 Southern constitution.

²¹ Article 12 Somali constitution, Article 11 Oromia constitution, Article 11 Afar constitution, Article 11 Tigray constitution, Article 11 Amhara constitution, Article 11 Harar constitution, Article 12 Benishangul-Gumuz constitution, Article 12 Gambella constitution and Article 11 Southern constitution.

5. Human Rights

The preamble of the federal constitution expresses a strong commitment to human rights. Whereas the human rights provisions of the federal constitution are most conspicuous for their inclusion of group rights – most notably the right to self-determination – the preamble equally emphasizes the importance of individual rights. The attention given to human rights by the Ethiopian federal constitution is furthermore reflected by Article 10, which proclaims the respect of human rights as one of the fundamental principles of the constitution. The logical consequence of this is that Chapter 3 of the constitution, spread over 31 Articles, contains an extensive list of human rights, including – according to the traditional taxonomy – first, second and third-generation human rights. The constitution leaves no doubt that this federal bill of rights is binding for both federal and regional state government organs where it stipulates in its Article 13(1) that “*All Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this Chapter*” (i.e. Chapter 3 on fundamental rights and freedoms). The binding nature of the federal bill of rights vis-à-vis the regional states could have justified a regional constitutional silence on human rights. Since the human rights protected by the federal constitution have to be adhered to by the regional government organs, there is no need to include a separate human rights catalogue in the regional constitutions. The regional constitutions could have sufficed with a reference to the federal bill of rights. Yet, doing so would have prevented the materialization of one of the advantages of regional constitutions: the possibility for a better human rights protection at regional level. Obviously, the supremacy of the federal constitution implies that 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. However, the supremacy of the federal constitution and its human rights provisions would not be affected by regional constitutions offering a better protection of human rights.²² In this regard, with reference to the United States, it is 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.*”²³ They can either do that by enshrining human rights that are not included in the federal constitution, by restricting the possibilities for human rights

²² Tsegaye Regassa, “Sub-National Constitutions in Ethiopia: Towards Entrenching Constitutionalism at State Level”, *Mizan Law Review* Vol. 3(1) 2009, (33) 39.

²³ G. Alan Tarr, “Subnational Constitutions and Minority Rights: A Perspective on Canadian Provincial Constitutionalism”, *Rutgers Law Journal* Vol. 40 2009, (767) 792.

limitations and derogations or by giving a more protective interpretation to human rights provisions.

This section will therefore assess whether the regional constitutions not only adhere to, but also expand on the human rights provisions included in the federal constitution. In all regional constitutions, the bill of rights is, in the same way as in the federal constitution, included in Chapter 3. A cursory overview of the regional bills of rights shows that there are large similarities with the bill of rights included in the federal constitution. This means that all three generations of human rights (i.e. civil and political rights; social, economic and cultural rights as well as the so-called solidarity rights) are protected by the regional constitutions. The human rights catalogue included in the federal and regional constitutions starts with traditional civil and political rights, which listing – and its wording – is strongly inspired by the International Covenant on Civil and Political Rights (ICCPR). One area where the regional constitutions offer a better protection than the federal constitution pertains to freedom of movement (Article 32 federal constitution). Freedom of movement as it is included in the federal constitution is identical to its counterpart protected by Article 12 of the ICCPR: “*Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*” The regional constitutions, on their part, give a wider meaning to freedom of movement by complementing the right to liberty of movement and freedom to choose the residence with the right to work and to acquire property in the respective region.²⁴ From the vantage point of ethnic minority protection, this is an important addition. It implies that regional government institutions cannot prevent citizens migrating from other regions from working or acquiring property in their region. Although the equality principle would also prohibit such discrimination, the substance given to freedom of movement by the regional constitutions expresses the commitment of the regional constitutional drafters to this principle. Apart from the Afar and Somali constitutions, all regional constitutions list, immediately after the provision on freedom of movement, the right of every Ethiopian resident to be elected to or employed by any public office in the region.²⁵ This is once more a reflection of the regional constitutional drafters’ commitment to an equal treatment of all Ethiopian citizens residing in their regions.

²⁴ Article 32 Oromia constitution, Article 33 Somali constitution, Article 32 Afar constitution, Article 32 Tigray constitution, Article 32 Amhara constitution, Article 32 Harar constitution, Article 33 Benishangul-Gumuz constitution, Article 33 Gambella constitution and Article 32 Southern constitution.

²⁵ Article 33 Oromia constitution, Article 33 Tigray constitution, Article 33 Amhara constitution, Article 33 Harar constitution, Article 34 Benishangul-Gumuz constitution, Article 34 Gambella constitution and Article 33 Southern constitution.

The only requirement formulated by the regional constitutions is the ability to speak the working language of the region. The Tigray constitution is even a bit more lenient in this regard, since it stipulates that the ability to speak the regional working language, Tigrigna, is not mandatory in cases where the nature of the work does not require it.²⁶

Confirming the Ethiopian state's commitment expressed by its ratification of the International Covenant on Economic, Social and Cultural rights (ICESCR), the federal constitution has enshrined this category of rights in its Article 41. A provision on economic, social and cultural rights can be found in all regional constitutions as well.²⁷ Seven out of the nine regional constitutions contain provisions on social, economic and cultural rights that are almost identical to those found in Article 41 of the federal constitution. The constitutions of the Afar and Somali regions have made use of their constitutional space and constitutionalized – under the heading of social, economic and cultural rights – additional regional state obligations, which reflect and express specific regional socio-economic features and policy preferences. Article 41(4) of the Somali constitution reflects the predominant socio-economic activity of the regional population – pastoralism – when it repeats the federal constitutional obligation for the state to allocate ever increasing resources to providing the people with public health and education, but by adding that particular attention should be given to the pastoralists. A similar attention to pastoralists is included in the Afar constitution.²⁸

Most human rights are not granted absolutely and can be limited by the government if certain conditions are fulfilled. These conditions are set out in so-called limitation or claw-back clauses. The Ethiopian constitutions do not include a general limitation clause applicable to all protected rights, but provide limitation clauses in relation to some human rights only.²⁹ It is noted that the limitation clauses of the federal constitution are verbatim transplanted into all regional constitutions. Hence, the regional constitutions have not used the opportunity to limit the limitations – and thus offer a stronger human rights protection – by curtailing the legitimate grounds for human rights limitations.

²⁶ Article 33 Tigray constitution.

²⁷ Article 41 Oromia constitution, Article 41 Tigray constitution, Article 41 Harar constitution, Article 41 Amhara constitution, Article 41 Benishangul-Gumuz constitution, Article 42 Gambella constitution and Article 41 Southern constitution.

²⁸ Article 39 Afar constitution.

²⁹ Adem Kassie Abebe, "Limiting Limitations of Human Rights under the FDRE and Regional Constitutions", in Yonas Birmeta (ed.) *Some Observations on Sub-National Constitutions in Ethiopia*, Addis Ababa, Ethiopian Constitutional Law Series Vol. IV, 2011, (60) 63.

International law does not only sanction human rights limitations under expressly stated conditions, it also allows governments to suspend human rights in times of emergency. Whereas limitations are applied permanently, suspensions or derogations are imposed for the duration of the emergency period only.³⁰ The possibility for the Ethiopian government to suspend human rights protected in the constitution during a state of emergency is provided by Article 93 of the federal constitution. Yet, some human rights are considered to be so fundamental that their suspension is prohibited, even in an emergency context. To be specific, Article 93(4c) of the constitution states that in the exercise of its emergency powers the Council of Ministers cannot suspend or limit Articles 1 (pertaining to the nomenclature of the Ethiopian state), Article 18 (prohibition against inhuman treatment), 25 (right to equality) and sub-Articles 1 and 2 of Article 39 (the right to self-determination). The provisions on state of emergency included in the regional constitutions (authorizing a regional state of emergency) are modelled on the corresponding provisions of the federal constitution, yet several regional constitutions have significantly widened the number of human rights protected from derogation or suspension in the context of emergency. Here, we are confronted with an instance where the regional constitutions have built on the human rights foundations laid by the federal constitution.³¹

A better, more extensive human rights protection can also be realized through a more expansive interpretation of the regional human rights provisions by the bodies empowered to interpret the regional constitution. The regional constitutions are interpreted by regional bodies set up specifically for this purpose (apart from the Council of Nationalities in the Southern region, which has additional competencies³²). Yet, the odds that these regional bodies, called Constitutional Interpretation Commissions, are going to interpret the regional constitutional provisions on human rights in a more expansive way than the interpretation given to similar provisions in the federal constitution by the House of the Federation³³ are not high – that is if all regions were to follow the example of the Oromia region. 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

³⁰ Yonas Birmeta, “Bill of Rights in Sub-national Constitutions in Ethiopia”, in Yonas Birmeta (ed.) *Some Observations on Sub-National Constitutions in Ethiopia*, Addis Ababa, Ethiopian Constitutional Law Series Vol. IV, 2011, (22) 56.

³¹ Tsegaye Regassa, “Sub-National Constitutions in Ethiopia: Towards Entrenching Constitutionalism at State Level”, *Mizan Law Review* Vol. 3(1) 2009, (33) 54.

³² The Council of Nationalities is a regional council representing all nations, nationalities and peoples of the Southern region.

³³ The House of the Federation is the 2nd chamber at federal level and is mandated to interpret the federal constitution.

interpreted in a manner **conforming to ...decisions of the House of the Federation on similar matters**³⁴ (my emphasis).

The foregoing demonstrates that the regional constitutions in Ethiopia exhibit only a few instances where human rights provisions offer a more expansive protection than the human rights protection available in the federal constitution. Yet, the constitutional autonomy of the regions also implies the power to amend/revise the text of the regional constitution. This revision takes place according to a specific procedure set out in every regional constitution. Therefore, changing political, economic and social environments in the regions could induce the latter to include additional human rights provisions in their constitutions. Yet, the regions themselves have blocked this avenue towards a more wide-ranging human rights protection. All regional constitutions include the statement that the provisions of Chapters 2 and 3 of the regional constitution (Chapter 3 being the chapter on human rights) can only be amended if the provisions of Chapters 2 and 3 of the federal constitution are amended.³⁵

6. Regional Institutional Framework

Article 50 of the federal constitution contains a number of statements that pertain to the institutional structure of the regions and that therefore constitute a mandatory frame for them i.e. that determine the constitutional space for the regions to design their institutional structure. Article 50(2) stipulates that the states shall have legislative, executive and judicial powers. The power of legislation on matters falling under (regional) State jurisdiction is allotted to the State Council.³⁶ The State Council is the highest organ of regional state authority, which is responsible to the people of the state.³⁷ This provision appears to prescribe a parliamentary system of government at regional level. The highest organ of executive power at regional level is the State administration.³⁸ Article 50(7) stipulates that regional state judicial powers are vested in the regional courts. This federal framework leaves considerable discretionary power for the regional states to decide on the structure, composition, powers and responsibilities of their institutions. Yet, regional constitutional space is significantly

³⁴ Oromia Proclamation No. 167/2011, “A Proclamation enacted to establish Oromia Constitutional Interpretation Commission and determine its Powers and Duties”, *Megeleta Oromia* 18 July 2011.

³⁵ Article 112(1) Oromia constitution, Article 109(1) Somali constitution, Article 110(1) Afar constitution, Article 107(1) Tigray constitution, Article 118(1) Amhara constitution, Article 79(1) Harar constitution, Article 119(1) Benishangul-Gumuz constitution, Article 123(1) Gambella constitution and Article 125(2) Southern constitution.

³⁶ Article 50(5) federal constitution.

³⁷ Article 50(3) federal constitution.

³⁸ Article 50(6) federal constitution.

narrowed as far as the regional judiciary is concerned. In its Articles 78, 79, 80 and 81, the federal constitution contains provisions related to the structure of the regional judiciary and pertaining to the appointment, removal and jurisdiction of regional judges/courts. Since the federal constitution is supreme, the regions have to adhere to these provisions, seriously affecting their constitutional space.

Within the federal frame, all regional constitutions have inserted provisions elaborating on their institutional structure. From the outset, it can be mentioned that seven out of the nine regional constitutions provide for a similar institutional structure. The Harar and Southern regional constitutions are the exceptions to this pattern and demonstrate specific features.

All regional constitutions start with repeating the pertinent provisions of the federal constitution. The legislative body of the regional state is the regional State Council. The regional State Council is the highest authority of the regional state and is accountable to the people whom it represents.³⁹ The regional constitutions confirm the impression that the federal constitution prescribes a parliamentary system of government at regional level by stating that the regional Administrative Council, the highest regional executive, shall be responsible to the State Council, i.e. the regional parliament.⁴⁰

In eight of the nine regions, the members of the State Council are directly elected for a term of five years on the basis of universal suffrage and by free, fair and secret ballot.⁴¹ The only exception to this pattern is the State Council in the Harar region where part of the Council's membership is elected on the basis of suffrage limited to the Harari people. The Harari State Council is composed of two chambers: The People's Representative Assembly (PRA) and the Harari National Assembly (HNA). The 22 seats of the PRA and the 14 seats reserved for the HNA together constitute the 36 seats of the regional State Council.⁴² The membership of the HNA is limited to people with Harari identity.

³⁹ Article 46(1) Oromia constitution, Article 46(1) Somali constitution, Article 44(1) Afar constitution, Article 46(1) Tigray constitution, Article 46(1) Amhara constitution, Article 46(1) Harar constitution, Article 46(1) Benishangul-Gumuz constitution, Article 49(1) Gambella constitution and Article 46(1) Southern constitution.

⁴⁰ Article 46(2) Oromia constitution, Article 46(2) Somali constitution, Article 44(2) Afar constitution, Article 46(2) Tigray constitution, Article 46(2) Amhara constitution, Article 46(2) Harar constitution, Article 46(2) Benishangul-Gumuz constitution, Article 49(2) Gambella constitution and Article 46(2) Southern constitution.

⁴¹ Article 48(1) Oromia constitution, Article 48(1) Somali constitution, Article 46(1) Afar constitution, Article 48(1) Tigray constitution, Article 48(1) Amhara constitution, Article 48(1) Benishangul-Gumuz constitution, Article 51(1) Gambella constitution and Article 50(1) Southern constitution.

⁴² Article 48 and 49 Harar constitution.

The major powers of the State Council are law-making and exercising parliamentary oversight. The State Council has the power of legislation on all matters falling under regional state jurisdiction. The parliamentary system of government, hinted at in other provisions, is clearly expressed by the election of the Chief Executive by and from among the members of the State Council. The Chief Executive selects potential members of the regional Executive Council and submits his/her list with nominees for approval to the State Council.⁴³ The selection and appointment of members of the regional Executive Council therefore shows clear parallels with the process followed for the selection and appointment of the Prime Minister and other ministers at federal level.⁴⁴ Such parallelism between the federal and regional constitutions is common in federations. In other words, when the federal constitution provides for a parliamentary or presidential system of government, such system is commonly replicated in the regional constitutions.⁴⁵ The only exception to this pattern in Ethiopia is the selection of the regional Chief Executive in the Harar region. The regional constitutional ambition of guaranteeing the interests of the Harari people in “their” region, has led to the constitutional arrangement that the candidate for the position of regional Chief Executive has to be selected by the Harari National Assembly, i.e. the assembly exclusively elected by and composed of Harari members.⁴⁶ It is subsequently the State Council that will approve or reject this nomination. The difference between the federal level and the regional level is that the positions of Head of State and Head of Government at federal level are separated between the President and Prime Minister whereas at regional level the Chief Executive is both head of state and head of government. Since the legitimacy of the regional Chief Executive and other members of the regional Executive Council is based on their selection and/or approval by the State Council, they are also accountable to it – as is common in parliamentary systems. The regional constitutions therefore contain a number of tools through which the State Council can exercise oversight over the executive. For instance, all regional constitutions provide that the State Council has the power to call and question the regional Chief Executive and other regional officials and that it has the duty to investigate the performance of the regional

⁴³ Article 49(3e) Oromia constitution, Article 49(3e) Somali constitution, Article 47(3e) Afar constitution, Article 49(3e) Tigray constitution, Article 49(3.5) Amhara constitution, Article 51(2h) Harar constitution, Article 49(3.5) Benishangul-Gumuz constitution, Article 52(3.6) Gambella constitution and Article 51(3d) Southern constitution.

⁴⁴ The federal Prime Minister is elected by and from among the members of the federal House of People’s Representatives. The Prime Minister will subsequently draw up a list with nominees for ministerial positions and submit this list for approval to the House of People’s Representatives.

⁴⁵ John Dinan, “Patterns of Subnational Constitutionalism in Federal Countries”, *Rutgers Law Journal* Vol. 39 2008, (837) 853-856.

⁴⁶ Article 63(1) Harar constitution.

Executive Council.⁴⁷ Another tool enabling the State Council to exercise parliamentary oversight is the power to approve the regional state budget.⁴⁸

As mentioned above, the Harar and Southern regional constitutions demonstrate specific features with regards to the regional institutional structure. These specific features are mainly related to the organization of the State Council. It was already mentioned that the Harar State Council is composed of two chambers: The People's Representative Assembly (PRA) and the Harari National Assembly (HNA). The revised Southern constitution of 2001 provides for a second council at regional level: the Council of Nationalities. The Council of Nationalities is the representative body of the Nations, Nationalities and Peoples of the region.⁴⁹ Each Nation, Nationality and People shall be represented by at least one member and by one additional representative for each one million of its population.⁵⁰ The current membership of the Council of Nationalities is composed of 61 members, representing 56 different ethnic groups.⁵¹

The Afar constitution – again reflecting the Afar region's specific features – furthermore allows for the establishment of Councils of Elders at the various administrative levels.⁵² The establishment of elders' and clan leaders' Councils is also provided for by the Somali constitution.⁵³

Due to the precedence of the federal constitution, all regional constitutions have adopted the provisions of the federal constitution concerning the structure of the regional judiciary and pertaining to the appointment, removal and jurisdiction of regional judges/courts. As mentioned in section 5, all regional constitutions (except for the Southern constitution) have allocated the power of constitutional interpretation to a Constitutional Interpretation Commission.

⁴⁷ Article 49(3q) Oromia constitution, Article 49(3p) Somali constitution, Article 47(3q) Afar constitution, Article 49(3q) Tigray constitution, Article 49(3.17) Amhara constitution, Article 51(2q) Harar constitution, Article 49(3.17) Benishangul-Gumuz constitution, Article 52(3.17) Gambella constitution and Article 51(3o) Southern constitution.

⁴⁸ Article 49(3j) Oromia constitution, Article 49(3i) Somali constitution, Article 47(3l) Afar constitution, Article 49(3j) Tigray constitution, Article 49(3.11) Amhara constitution, Article 51(2m) Harar constitution, Article 49(3.11) Benishangul-Gumuz constitution, Article 52(3.11) Gambella constitution and Article 51(3i) Southern constitution.

⁴⁹ Article 58(1) Southern constitution.

⁵⁰ Article 58(2) Southern constitution.

⁵¹ See the website of the Southern regional government: <http://www.snnprs.gov.et/nations.html> (last accessed 7 February 2014).

⁵² Article 63 Afar constitution.

⁵³ Article 56 Somali constitution.

7. Local Government

Ethiopia's regions have significant discretionary power to determine the organization, institutional structure, powers and responsibilities of sub-regional or local government. Article 50(4) of the federal constitution stipulates that "*State (i.e. sub-regional) government shall be established at State and other administrative levels that they (i.e. the regions) find necessary.*" The only constitutional mandate is that "*Adequate power shall be granted to the lowest units of government to enable the people to participate directly in the administration of such units.*" This constitutional mandate prohibits a centralized local government structure. The regions have made considerable use of their discretion in this regard and all regional constitutions contain provisions related to local government. Before we take a look at these provisions, it has to be pointed out that not all levels of local government are included in the regional constitutions. Urban local governments (cities) for instance, are not entrenched in the constitutions, but operate on the basis of ordinary regional laws/proclamations. The same is true for the local government administration of the Zone in the Afar, Somali and Tigray regions. The Oromia and Southern regional constitutions do entrench the Zone, but the Zones in both regions vary significantly as far as structure, objectives, powers and responsibilities are concerned. The Zone in the Oromia region is merely an executive organ.⁵⁴ The Zonal administrators are appointed by the regional Executive Council upon the recommendation of the regional Chief Executive/President.⁵⁵ The Zones are deconcentrated bodies of the regional government, carrying out regional activities at local level. The Zones in the Southern region on the other hand do have their own Council composed of locally elected members. The Southern Zones are not merely designed for administrative purposes, but constitute fora where the ethnic groups of the region can exercise the different aspects of their right to self-determination; they are ethnic-based local governments. As mentioned in section 2, the Southern region is ethnically extremely diverse. It can be recalled that the Ethiopian constitution emanates the idea that fulfilling the right to territorial autonomy is the best way to fulfil the other components of the right to self-determination as well. Yet, political and expediency reasons have until now prevented the establishment of new ethnic-based regions. Regions that are ethnically diverse, such as the Southern region, have therefore attempted to fulfil the right to self-determination of their various ethnic groups through the establishment of ethnic-based sub-regional/local governments. This constitutes the background to the design

⁵⁴ Article 71(1) Oromia constitution.

⁵⁵ Article 72(1) Oromia constitution.

of the Zones in the Southern regional constitution and explains why the Southern Zones have powers such as determining the Zonal/local working language and protecting the history of the ethnic group(s) empowered by the establishment of the Zone. The Zone furthermore enables the concerned ethnic group(s) to exercise a certain degree of self-rule through the power of the Zonal Council to approve the Zonal budget and through its power to select and appoint its Chief Administrator and other members of the Zone Administrative Council. Similar ethnic-based local governments, called Nationality Administrations/Nationality Zones are entrenched in the Amhara, Benishangul-Gumuz and Gambella regional constitutions.

All regional constitutions – except the Harar constitution which only mentions the *Kebele* – additionally provide for the administrative level of the *Wereda* (district) and the *Kebele*. The *Kebele* are subordinate to the *Wereda*, which in turn are subordinate to the Zones/Nationality Administrations. The provisions related to the institutional structure, powers and responsibilities of the *Wereda* and *Kebele* are near to uniform in all regional constitutions. The districts have a district council (assembly) and an executive body, the Administrative Council. The members of the district council are directly elected by the population from the different *Kebele* in the district. The district council has important competences such as the approval of the budget of the district and the approval of plans in the area of social services and economic development. Executive power is exercised by the Administrative Council, headed by the Chief Administrator. The Chief Administrator is elected by and from among the members of the district council and is accountable to this council and to the regional president (or – if the district is situated in a Nationality Administration or Zone – to the Chief Administrator of the latter). The district Chief Administrator selects the other members of the Administrative Council, whose appointment must be approved by the district council. The *Kebele* has a similar institutional structure.

8. Policy Principles and Objectives

In its Chapter 10, the federal constitution formulates policy principles and objectives that have to be adhered to by any government organ, both federal and regional, in the exercise of their powers and responsibilities.⁵⁶ Due to the supremacy of the federal constitution, these objectives are binding for the regional state organs; yet, this does not prevent them from complementing these with other objectives, reflecting specific elements of the regional polity or expressing specific policy choices. Reflecting the specific features of the regional

⁵⁶ Article 85 federal constitution.

population, the Afar constitution mentions the promotion of the living standards of the pastoralists as one of the economic objectives of the regional government.⁵⁷ A similar economic objective is included in the Somali constitution.⁵⁸ Both constitutions also mention the fight against desertification as a regional environmental policy objective.

9. Miscellaneous Provisions

Under this heading, the regional constitutions detail the procedure that has to be followed in case of a regional state of emergency and they discuss the position and powers of the Auditor General. It is also here that we can find the constitutional amendment or revision procedure. Although there are some notable differences between the various regional constitutions with regards to the state of emergency procedure,⁵⁹ the major variations can be observed with regards to the constitutional amendment procedure. All regional constitutions have designed different procedures although some procedures, such as the Tigray and Oromia or the Amhara and Gambella ones are very similar.⁶⁰

10. Assessing the Use of Regional Constitutional Space

As the preceding analysis has demonstrated, the constitutional space left for the regions by the federal constitution is significant. At the same time, it has been observed that this space has not been fully occupied by the regional constitutions. This is particularly true in the area of human rights, where the regional constitutions have largely copied the provisions of the federal constitution. Admittedly, it might not be fair to have elevated expectations in this regard considering that the existence of regional constitutions is a very recent and understudied experience in Ethiopia. Yet, the procedure for constitutional amendment/revision enshrined in all state constitutions, effectively making the inclusion of more protective human rights provisions dependent upon the amendment of the federal constitution, constitutes a

⁵⁷ Article 102(2) Afar constitution.

⁵⁸ Article 101(2) Somali constitution.

⁵⁹ Whereas the Southern constitution stipulates that the decree of state of emergency has to be approved by a two-thirds majority vote in the State Council, the Benishangul-Gumuz constitution merely requires an ordinary majority. Furthermore, the Afar and Tigray constitutions provide that the renewal of the decree of state of emergency may not be allowed more than three times.

⁶⁰ In the Tigray and Oromia regions, a revision/amendment of the regional constitution can be initiated by the State Council, by the State government, by the *Wereda* Councils or by the *Kebele* Councils. The actual revision requires the consent of a certain number of *Wereda* Councils and a three-quarter majority vote in the State Council. In the Amhara and Gambella regions, a revision of the regional constitution can additionally be initiated by the Nationality Councils. Furthermore, the revision also requires the consent of – a certain number of – the Nationality Councils.

wholly unnecessary self-restraint. Neither does the provision of the Oromia law binding the regional Constitutional Interpretation Commission in its interpretation of regional constitutional provisions on human rights to the interpretation given by the House of the Federation augur well for a more expansive regional protection of human rights. Some of the regions have on the other hand made considerable use of their discretion to design political institutions rooted in the regional context and serving particular regional objectives. The examples of the bi-cameral State Council in the Harar region and the Council of Nationalities in the Southern region illustrate this point. Other examples are the clan leaders and elders councils referred to in the Somali and Afar constitutions. The regional constitutions also demonstrate notable differences in the area of local government. This is mainly the case for the administrative level immediately below the regional government: the Zone. Although Zones are operating in all regions except Harar (due to the small territory of this region), they are not entrenched in the regional constitutions of Tigray, Afar and Somali. The remaining five regional constitutions do entrench the Zone, but the Zone in the Oromia region is a deconcentrated administration merely set up for administrative purposes, whereas the Zones/Nationality Administrations in the Gambella, Benishangul-Gumuz, Amhara and Southern regions are decentralized ethnic-based local governments. These ethnic-based local governments are designed to enable the various ethnic groups in the region to exercise their right to self-determination. Although four regions have thus used their constitutional space to accommodate intra-regional ethnic pluralism by designing ethnic-based local governments, the uniformity of this approach has inherent weaknesses. The ethnic-based local governments in all four regions emanate the idea – also reflected in the federal constitution – that ethnic groups can best exercise their group rights within their own territory. Yet, such idea disregards the fact that not all ethnic groups are living concentrated in one area. The territorial dispersal of ethnic groups is one of the reasons why at the time of writing no Nationality Administration had been established in the Benishangul-Gumuz region, more than 10 years after the coming into force of the regional constitution enshrining them. This reminds us of the well-accepted truth that although constitutional drafters can be inspired by arrangements included in other constitutions, they should not simply transplant them into a different context.

Conclusion

The above analysis has shown that regional constitutions are definitely more than simple copies of the federal constitution. Obviously, the federal constitution sets the frame, but this

frame is wide enough for the regions to add their own arrangements. In some areas, such as human rights, the regions have underutilized their autonomy and the probability of a better regional human rights protection is rather bleak. Yet, the regions have made use of their discretion to design specific political institutions and local government administrations. In the design of local government administrations, the regional constitution-makers have largely copied from each other and this has, in some instances, led to arrangements ill-adapted to the regions they are expected to serve. Of course, our judgment should not be too harsh since Ethiopia's regions have only existed for barely 20 years and have only recently started to exercise their constitutional autonomy. It is the hope of this author that as the Ethiopian federal system matures, the regions will increasingly make use of their constitutional autonomy to design constitutional arrangements that are well-equipped to achieve the objectives set out in the preambles of the federal and regional constitutions.