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The protection of human rights in federal systems

the case of Ethiopia

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Abstract

The Protection of Human Rights in Federal Systems - The Case of Ethiopia

This paper sketches some of the legal parameters of unity and diversity within federal contexts, focussing on the Ethiopian Constitution.
In federal systems the protection of human rights is a federal competence in so far as it is a subject-matter dealt with in the federal Constitution. Theoretically there are two fundamentally differing remits possible within which federal government can deal with human rights issues: one in which the federal bill of rights is applicable and enforceable by federal authorities only if it concerns federal acts or omissions which affect citizens' human rights; and another in which federal government is also competent to enforce the federal bill of rights as against state authorities which infringe the federal bill of rights when state authorities act within the scope of state competence.
At the state level there may also be state bills of rights, which may provide additional protection to human rights.
The picture is further complicated by the fact that there exist human rights treaties, which have to be observed both by federal and state authorities (and all other public authorities for that matter).
But even if one is dealing with one single fundamental right, practice elsewhere shows that still their meaning may differ within the relevant legal system as a reflection of diversity in regional or local community standards.
The proposed paper analyses this state of affairs and tries to apply the resultant analysis to Ethiopia. To this end it analyses the hierarchy of norms as reflected by the Constitution, and the possibilities of courts to apply human rights norms.

28 July 2000

The Protection of Human Rights in Federal Systems - The Case of Ethiopia

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28 July 2000

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The Protection of Human Rights in Federal Systems - The Case of Ethiopia

Introduction

The essence of federalism is that the political system is non-unitary. Respect for diversity is inherent in federal systems, although at the same time the fact of pertaining to one political system brings unity in this diversity. The very notion of human rights and freedoms,[1] on the other hand, seems to suggest that there is a limit to whatever diversity may legitimately exist. However, the practice of protecting human rights in all parts of the world reveals that there may be local differences in the extent to and manner in which such rights are protected.

This tension between unity and diversity and the role of human rights protection is the topic of this paper. It sketches some of the legal issues of constitutional law it raises. The problem is particularly acute in the Ethiopian context, where the right to respect of the cultural identity of groups is at the background both of the system of federalism and to human rights as codified in the Constitution.

The Constitution of 1994 established a federal state structure for Ethiopia (Article 1). This structure is further elaborated upon in chapter four of the Constitution ("State Structure"). It suggests that the federal arrangement is based on criteria of what may be called "ethnic" identity (Art. 46 (2) and 47 (2)) - although it nowhere explicitly states that the regional states are actually homogenous with ethnic boundaries (which would be a counterfactual assertion anyway). The chapter of the Constitution on the state's structure is preceded by a chapter on "Fundamental Rights and Freedoms", which enunciates a bill of no less than 31 such rights. In it, the right of every nation, nationality and people to self-determination and to maintain and develop its identity is recognized as a fundamental right (Article 39). The Constitution stipulates that the fundamental rights and freedoms must be interpreted in conformity with the Universal Declaration of Human Rights, International Covenants on Human Rights and other human rights instruments to which Ethiopia is a party. As far as human rights protection is concerned, we have, therefore, not only to deal with the two levels of the federation and the states but also with a third level: that of the international norms which are to be applied in the national (federal and state) legal order. This paper sketches the relationship between these three levels.

First the issues of the protection of constitutional rights within federal systems is discussed. The basic issue is whether the federal nature of the system may lead to situations of differentiated levels of protection: is it so that due to the distinction of the powers and responsibilities between the federation and the states, the protection which citizens enjoy differs with the respective powers or entities (federal or state) involved? In other words, can a particular right be given a higher (or, for that matter, lower) level of protection within a state than at the federal level, due to the particular manner in which that right is conceived of at the level of that state?

The abstract issue is sketched by comparing succinctly answers that are given for the Federal Republic of Germany and for the United States.[2] By singling out the relevant provisions

[1]The expressions "human rights" and "fundamental rights" are used in this paper in a broad sense to connotate the fundamental rights of individual and groups of citizens as explicitly recognized in constitutional and international instruments, whether they be referred to in relevant instruments as "human", "civil", "political", "democratic" or other rights. The term "fundamental rights" in this paper is used as synonym of human rights and does not refer to any particular class of human rights as defined.

[2]The choice of these countries is arbitrary. For practical reasons and for the sake of simplicity - and some

of the Ethiopian Constitution, possible answers are outlined for Ethiopia.

After a sketch of the relation between the relevant norms at federal and state level, we analyse the manner in which courts can or cannot legally review federal and state measures as against the various federal and state fundamental rights.

Next an attempt is made to identify the influence which relevant international human rights instruments may have in Ethiopia. Here the fact that Ethiopia is a federal system, is not decisive. Decisive is the status given to international law by the national constitutional system. Nevertheless, the issue of various levels of human rights protection is relevant here as well. Questions which arise are: whether international human rights treaties limit the amount of diversity which can exist within Ethiopia; what additional function could international human rights instruments offer over and above the rights enshrined in the Ethiopian Constitution?

I. The Federation and the States.

A. Hierarchy of Norms.

1. The nature of federalism and its implications for the hierarchy of norms.

In relation federal systems the constitution asserts its supremacy over other laws and over state law in general. This is quite logical, because the very federal nature of the system is determined by the constitution; without the constitutional supremacy there would be endless unclarity over the nature and content of the division of powers between central government and other entities. "This Constitution [...] shall be the supreme Law of the land [...]" is how the Constitution of the United States puts it (Article VI); and these words are echoed in Article 9 (1) of the FDRE Constitution: "The Constitution is the supreme law of the land. [...]". The Constitution of the Federal Republic of Germany is more evasive. In some respects it seems to more restrictively assert the supremacy of the Constitution, in other respects it is broader. It states quite unspecifically that "legislation is subject to the constitutional order" (Art. 20 (3)), but reinforces this with the provision that "[a]ll Germans have the right to resist any person seeking to abolish this constitutional order, should no other remedy be possible". On the other hand it has the sweeping assertion that all federal law takes precedence over state law: "*Bundesrecht bricht Landesrecht*", which means literally: "federal law ruptures state law" (Article 31). What the latter provision covers, is a broader supremacy than that of the constitution only. The supremacy of the *constitution* over state law is broadened to the supremacy of *federal law* over state law. This broader supremacy is actually also contained in the American supremacy clause ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof,

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extent of simplification is unavoidable in comparative research - I have chosen two federal systems, an older one and a modern one. It would have been fairer also to take a federal country from Asia as a comparator. India would have been a good choice, but reasons of time and space have prevented me from pursuing this line. As a matter of fact, this author claims that the limitation to self-proclaimed federal systems is arbitrary as well; the points raised in this paper also exist - and can also be sketched by reference to - some political systems which consider themselves non-federal, but are constitutionally composite legal order, such as the unitary states with decentralized authorities like the Netherlands. Also a composite legal order as that of the European Union knows the problems addressed in this paper as a fairly acute one (cf. L. F.M. Besselink, Entrapped by the Maximum Standard. Pluralism, Subsidiarity and the Legal Analysis of the EC Protection of Fundamental Rights. In: *Common Market Law Review*, vol 35 (1998), no. 3, pp 629-680), while even the Council of Europe provides a good example of the problems addressed.

[etc.] shall be the supreme Law of the land [...]"). The Ethiopian Constitution in Article 9 (1), second sentence, has the same intent: "Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect."

So we have two forms of supremacy: the supremacy of the federal constitution, and the supremacy of federal law. This supremacy of federal constitutions and federal law is uniformly asserted by federal constitutions. But what does this supremacy actually mean in a federal system? We first try to answer this question with regard to the broader supremacy of federal law over state law. Next we turn our attention to the supremacy of the federal constitution.

2. Supremacy of federal law

In a unitary system the very unity of the political system means that any lower ranking norm issued by any authority whatever, will have to give way to any superior norm of central government. This is the essence of unitary systems. But federal systems cannot operate absolutely and unconditionally on this principle without imperiling the very federal nature of the system. By claiming that any and all federal law has to be applied with precedence over any state law, the federal legislature and authorities could quite simply undo the whole of federalism by passing legislation which infringes on state powers. Federal authorities can only act within the scope of the powers which the constitution has attributed to the federal level and cannot impinge on the powers which the constitution attributes or has left to the states. The federal principle is that federal and state authorities each act within the scope of their own powers. As long as this is the case, these powers will in principle not clash. The consequence of this line of argument must be that the conflict rule which proclaims broadly the supremacy of federal law over state law has hardly any role to play. This conclusion has been drawn, for instance in the German doctrine. If the relationship between federal and state law is primarily governed by the division of powers between them, conflicts can usually be decided in terms of determining who acted *intra* or *ultra vires* and no further conflict rule is necessary.[3]

But this is true only on the assumption that the powers of the federation and the states are neatly divided, and that these powers concern separate spheres of competence for federation and states respectively. This assumption is not generally correct.

Firstly there exist in many federal systems concurrent and cooperative powers. With regard to these, the supremacy principle can indeed apply: powers exerted federal authorities are of superior rank. Consequently, in case of conflict the decisions of federal authorities taken within the legitimate exercise of their powers, overrule contrary decisions which state authorities have taken on the basis of their concurrent (or cooperative) powers. Here the operation of the supremacy principle is relatively clear and unproblematic.

Much more difficult is a second situation, which must be distinguished from the one just mentioned. It may happen that the exercise of state powers leads to a situation in which the state measure counteracts federal measures and renders federal measures inoperative or ineffective, even though the state measure and the federal measure are, when looked at separately, each within the scope of their respective powers. This may happen in the sphere of concrete governmental policies. Thus federal policies may be aiming at certain forms of income distribution, whereas state fiscal measures may end up frustrating the federal policy. In answering the question whether and to what extent the supremacy principle applies to this type of conflict, again regard should be had to the federal nature of the system. Quite obviously in

[3]E.g. Horst Dreier, Grundgesetz Kommentar, Mohr Siebeck 1998, Band II, Artikel 31, Rn. 18 ff., pp. 612 ff..

unitary systems the decentralized entities will have to subordinate the exercise of power to that by central government authorities. But this cannot be the overall principle in federal systems when the conflicting measures are taken within the scope of the powers which the constitution has attributed to states and federation respectively. Of course, the extent to which the supremacy of the federation will have a role to play in solving the deadlock will much depend on political considerations and may well be decisive in negotiating a solution.

Legally, however, this need not be the end of the story. Apart from the powers which are given to authorities by *attributive* provisions, constitutions also contain *regulative* principles which do not concern the division of powers as such but the manner in which powers are to be exercised. Such regulative norms may offer a way out of the type of conflict sketched. Typically, regulative norms and principles are the constitutional provisions on functions (as distinct from powers) of the various federal and state authorities in specific federal systems, provisions on national policy principles and objectives, and last but not least the fundamental rights provisions.

When we - for the purposes of this paper - focus our attention on these fundamental rights provisions, a question we encounter is, what the reach is of constitutional fundamental rights principles: does the federal constitutional bill of rights unreservedly apply also to states? And, if there is a bills of rights in a state constitution, what is the relationship of such state bills of rights to the federal bill of rights? These questions - which, as we shall see, have at various times received various answers in various federal systems - are specifications of the general question as to the meaning of the supremacy of the federal constitution.

3. Supremacy of the federal constitution and the supremacy of federal fundamental rights

The meaning of the constitution as "supreme law of the land" is not as obvious in federal systems as in unitary systems. This is the more the case when also the component states of a federation have their own constitutions - as is usually the case. One might think that as concerns fundamental rights this does not pose great difficulties. The very fundamental nature of those rights might suggest that they apply unreservedly throughout the political system, both at federal and state level. Yet, American constitutional history teaches that this is not self-evident.

United States

In the United States most fundamental rights were at first mainly (but not solely) contained in the first ten Amendments to the Constitution added in 1791, to which others were added after the civil war (amendments XIII to XV). The problem of the first ten amendments was that their language did not over explicitly show that they were also supposed to be applicable to states. To the contrary, the First Amendment - for instance - in using the expression "Congress shall make no law ...[etc.]" suggests that it is supposed to provide protection against federal measures only. The seventh Amendment, however, is explicitly addressed to "any Court of the United States", whereas other bill of rights provisions speak in general terms. That the bill of rights contained in the first ten amendments applied only to the national government and not to the states, was the position taken by the US Supreme Court in pre-civil war times in the famous Barron v. Baltimore decision, [4] but was also at the background of the restrictive interpretation of the XIVth Amendment in the Slaughter-House Cases.[5] Although the wording of this amendment

[4]Barron v. The Mayor and City Council of Baltimore, 7 Pet. 243, 8 L.Ed. 672 (1833).

[5]Amendment XIV, Section 1: "[...] No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United Sates; nor shall any State deprive any person of life, liberty, or

clearly addressed the states, the Supreme Court in those cases emphasized that it was not the intention of the XIVth Amendment to transfer the protection of all civil rights from the states to the federal government and US Supreme Court, or to give additional protection to state citizens against state government: "[W]e do not see in those [post civil war] amendments any purpose to destroy the main features of the general system [of federalism]." They were merely construed as providing extra protection against state action against the Afro-American former slaves. At that time the XIVth Amendment was not construed as a general extension of the application of the rights contained in the first ten amendments to the states. This position, however, was reversed in subsequent judgments. Basically, the Supreme Court has read into the XIVth Amendment, especially the "due process" clause, the rights contained essentially in the first ten amendments, and thus understands the XIVth Amendment as providing federal security against violation by the states of the fundamental rights of the citizen.

The story of this reversal and its details are recounted in any text- and casebook on US constitutional law, to which it suffices to refer. The point of this piece of American history is that it shows that supremacy clauses notwithstanding, the overruling effect of a federal bill of rights over state laws has not been self-evident. And still the technique of reading into the XIVth Amendment those rights is not absolutely settled in as much as there has been difference of opinion among Supreme Court judges as to what precisely is protected under this amendment: are they the rights contained in the first ten amendments as such, or merely "fundamental rights" as a standard of "natural law", as they have also found expression in the first ten amendments. Although other considerations have come into this discussion - such as the arbitrariness of the natural rights approach - the latter approach seems to leave the federal nature of the system more intact than the former.

Germany

If we turn for a moment to the Federal Republic of Germany, the issue seems simpler there, at least with regard to fundamental rights. Although we mentioned the uncertainty as to the range of the principle of federal supremacy, with regard to fundamental rights the German Constitution is much clearer. Article 1 (3) stipulates that fundamental rights of the Constitution contained in Articles 1 to 18 of the Constitution "are binding on legislature, executive, and judiciary as directly enforceable law." This is understood as being immediately incumbent both on the states' organs as well as on the federation's.[6] This direct effect means that a citizen can always rely on the federal constitution's rights also against state authorities. In some German states (*Länder*), the state constitutions do not contain a bill or rights,[7] but due to Article 1 (3) of the federal constitution this cannot diminish the protection of citizens as against state authorities. And where the states do have bills of rights, these cannot diminish the right of citizens to rely on the federal fundamental rights also against state action.

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property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

[6]The precise manner in which the federal bill of rights can be said to bind the states is still a matter of subtle dispute. The question is whether the provisions can properly be said to be part of state law, which could have consequences for the competence of state constitutional courts.

[7]The constitutions of the states Hamburg, Niedersachsen and Schleswig-Holstein.

Ethiopia

The FDRE Constitution takes a position which at first sight seems comparable to the German one. If Article 9 (1), second sentence - "any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect" - does not dispel all doubts as to the applicability of the Constitution's bill of rights to the regions, these seem to be taken away by the first provision in the chapter on fundamental rights and freedoms, Article 13 (1):

> "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."

This provision may in itself not be absolutely clear as far as the duty "*to respect*" the provisions of this chapter is concerned. As long as it is not clear if the bill of rights of this chapter actually apply to state authorities' action as well, respecting the federal fundamental rights provisions may have little consequence for how state authorities are to behave towards their citizens. To this extent, Article 13 (1) begs the question of whether the federal bill of rights is applicable to the exercise of state powers within their own sphere of competence, or only to federal authorities.

One might object that a hypothetical reading which reads the duty to "respect" of Article 13 (1) as not implying the applicability of those rights to state action, would result in a vacuous provision. But this is not quite so. The states also have concurrent powers, or exercise executive powers which originally are federal powers but which have been devolved upon state authorities under Article 50 (9) of the Constitution. The duty to respect federal rights may apply to the exercise of these concurrent, cooperative or devolved powers. The duty to respect could, moreover, mean that states' representatives which are members of the House of Federation, must in the exercise of their functions be deemed not only to be bound by state laws and constitutions, but also by the federal bill of rights.

A further argument to the effect that the bill of rights of chapter four does not in its entirety and directly apply to state action, could be based on Article 55 (16). This provision concerns the power of the House of People's Representatives and the House of Federation in joint session "to take appropriate measures when State authorities are unable to arrest violations of human rights within their jurisdiction. It shall, on the basis of the joint decision of the House, give directives to the concerned State authorities." The argument might be put forward that this provision speaks of "violations of human rights" only, whereas the Ethiopian Constitution in chapter four labels only the rights in Part One as "human rights", and distinguishes these from other the fundamental rights in Part Two, which it labels as "democratic rights". The "human rights" provisions include the right to life, liberty and security of the person, the prohibition of inhuman treatment, the rights of persons arrested, accused, in custody or convicted to prison sentence, or criminally tried, the right to honour and reputation, equality, privacy and freedom of religion, belief and conscience; the "democratic rights" encompass the freedom of thought, opinion, expression, assembly, demonstration, petition, movement, rights of nationality, marital, personal and family rights, rights of women, children, nations, nationalities and peoples, the right of access to justice, to vote and to be elected, to property, the rights of labour, economic, social and cultural rights, the right to development and a clean an healthy environment. Hence, the Ethiopian Constitution does not use the term "human rights" in the loose and broad way we have

done in this paper.[8] The reference in Article 55 (16) to "human rights" only, suggests that perhaps only these fundamental rights contained in part one of chapter four apply to state powers. Hence, the duty to "respect" under Article 13 (1) does not unreservedly mean that the fundamental rights of chapter four apply integrally to state powers.

Another possible interpretation is that "human rights" in Article 55 (16) refers to a different category: the core of fundamental rights pertaining to the human being quite apart from the specific formulations catalogued in chapter four. This may perhaps be the meaning of the term "human rights" in Article 10 of the Constitution (which is contained in chapter 3 of the Constitution on "Fundamental Principles of the Constitution"):

> "1. Human rights and freedoms, emanating from the nature of mankind are inalienable and inviolable.
> 2. Human and democratic rights of citizens and peoples shall be respected."

This provision gives rise to its own questions: are the human and democratic rights referred in Article 10 the very same as are spelt out in detail in chapter four? If so, what is the point of this provision along Article 13 (1)? Perhaps Article 55 (16) refers to the "inalienable and inviolable" human rights intended in Article 10 (1). But perhaps it does not; perhaps Article 10 is simply a prelude, distinguishing the rights which is systematically reflected in the two parts into which chapter four is subdivided. On either reading, it remains doubtful whether the duty to "respect" of Article 13 (1) entails the application of the bill of rights of chapter four to state powers.

However this may be, doubts as to the applicability of chapter four to state powers seem to me to be dispelled by the duty not only to "respect" but also actively "*to enforce*" the provisions of the chapter on fundamental rights. Although also this duty to enforce the federal bill rights can theoretically be interpreted as restricted to tasks which states fulfill in carrying out cooperative or concurrent powers, or powers devolved upon them under Article 50 (9). But is unclear what "enforcement" in this context adds to "respect". More likely is the interpretation of "enforcement" as referring to the duty of states to abide with and maintain the rights contained in chapter four of the federal Constitution in all their actions.

If the latter interpretation is correct, this leads to a position which is similar to the one in the Federal Republic of Germany: the federal rights also apply directly to state powers.

4. The state bills of rights

Under circumstances as they are sketched for Germany and Ethiopia, one may wonder what the legal meaning can be of state bills of rights. Of course, state bills of rights retain a programmatic and political function. Legally, the room for differentiation is limited due to the applicability of federal rights as superior rights. Nevertheless, differentiation at the normative level is not necessarily rendered legally impossible, nor in all cases meaningless.

In the abstract at least three situations can be distinguished in the relationship between the federal and a state bill of rights:

a) the state bill of rights contains the same rights as the federal bill of rights; this may be the case when a state constitution simply repeats the federal rights, or when it refers to them as part of the state constitution;

b) the state bill of rights provides less protection to citizens than the federal rights do; at

[8]See footnote .

the level of norms, this may the consequence either of a narrower scope of the right itself, or due to the state right allowing more restrictions than the federal rights do;
c) the state bill of rights provides more protection to citizens than the federal rights do; again, this may be either because a right is broader formulated than a similar federal right (or a state constitution may recognize a right as fundament which is not a fundamental right under the federal constitution), or it allows authorities fewer possibilities for restricting the exercise of a right than the federal provisions do with regard to a similar federal right.

Situation a

The situation under a) is the least problematic. There is no divergence from the federal bill of rights, so possible conflict ensues. Legally, the only practical consequence of the state bill of rights is that a state court - assuming that under state law it is competent to hear cases issues concerning the state constitution - may be able to use it to adjudicate relevant behaviour.

Situation b

Situation b) is more complicated. Two lines of reasoning are possible, of which the first is the simplest: due to the supremacy of the federal constitution, the provisions of the state constitution which provide less protection are overruled by the federal provisions.[9] Here hierarchy is decisive. The state provisions cannot be applied, but instead the federal provisions apply - whether the state provisions are also legally void or not, may be left undecided.

A second approach is quite different. This second view is more pluralistic than hierarchical. It can be encountered in some of the German constitutional doctrine.[10] It argues that the states have the power to determine for themselves which fundamental rights to include in their constitutions. This can be based on various grounds, such as the principle of subsidiarity or some other clue in the federal constitution.[11] But the best reason is based on the applicability of the federal fundamental rights to state action: all the more because of the applicability of the federal rights to state action in countries like Germany and Ethiopia, can there be little reason to forbid states to include only some, no or less fundamental rights in their state constitution.

Although on this second view, state rights may provide less protection than federal rights, this makes no difference to the citizen: the citizen can always claim the protection to be derived from the better federal standard.

Situation c

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[9] In German literature this is the view taken by most authors, e.g.. Konrad Hesse, Grundzüge des Verfassungsrechts, Heidelberg 1991, p. 34; Ekkehart Stein, Staatsrecht, Tübingen 1991, p. 337; other authors are mentioned by Dreier, op.cit., p. 627, fn. 143.

[10] Very explicit Albert Bleckmann, Staatsrecht II - Die Grundrechte, 1989, 431-432; also Dreier, op.cit.p. 627.

[11] For Ethiopia, for instance, Article 52 (1) stipulates that all powers which are not given expressly to the Federal Government alone, or concurrently to the Federal Government and the States, are reserved to the States. Moreover, Article 50 (2), sub b, leaves it to the States to enact and execute the State constitution. This State constitution must - of course - be aimed at establishing a democratic order based on the rule of law and protecting and defending the federal Constitution, as Article 50 (2 sub a) provides. But it does not prescribe in this (or any other) respect what fundamental rights it is to include or not.

The state rights which give more protection to citizens than comparable federal rights do, can - if at all - only apply to matters within state competence. Otherwise these rights would constitute an obstacle to the effectiveness of federal laws and federal measures within states - which would be contrary to any federal constitution.[12] In countries where the federal rights also apply to state affairs (e.g. Germany, Ethiopia), the federal rights are in such cases only a minimum standard over and above which a relevant state right can provide additional protection.

This in effect, means that if the better state standard applies, it in a sense "overrules" the relevant federal right. This is the reason why it is theoretically possible to hold that this is contrary to the supremacy of the federal constitution over state law. In support of this view, the argument can be adduced that fundamental rights can be considered as containing in themselves a balancing of the rights of public authorities to act in the public interest and the rights of (individual or groups of) citizens. This argument, however, is not convincing. It would imply that the human rights standard defined at the federal level is absolute in the sense that it forbids a more favourable treatment of citizens at the state level. This does not make sense, because how could a federal norm force a state to refrain in practice from certain action which is detrimental to citizens? There is no good reason to think that a state cannot grant its citizens a protection against state action which is not provided in the federal bill of rights. The fact that in this way the human rights protection may differ from state to state, dependent on the various state bills of rights, is a consequence of the very concept of federalism which allows for various constitutional arrangements in the various states.

Sometimes a special difficulty has been raised in this context. It has been pointed out that under certain circumstances it is extremely difficult to say which of two fundamental rights standards provides better protection. The example put forward is usually that of a collision of the rights of one citizen with that of another citizen.[13] In such cases the right of one party is balanced against that of the other party. The result is that the right which is more favourable to one citizen may be disadvantageous to that of another citizen.

This has always seemed to me to be a confused and misguided argument. Firstly, it cannot be used in the context of protection of citizens against governmental action, i.e. in purely "vertical" relationships.[14] But also when fundamental rights are supposed to be applicable in relations between citizens *inter se* (i.e. in "horizontal" relationships) - as *prima facie* seems to be the case with the fundamental rights in the Ethiopian Constitution[15] - the argument is fallacious.

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[12]This is true also when in the framework of cooperative arrangements (executive federalism) the state rights cannot stand in the way of governmental action of states which is bound by the federal measures which are carried out by state authorities and these federal measures do not leave any discretion to state authorities.

[13]In the context of German constitutional law Dreier, 627-628, who partly relies on Böckenförde, fn. 148; in the context of the European Community fundamental rights standard versus that of Member States J.H. Weiler, Fundamental Rights and Fundamental Boundaries, in: *The European Union and Human Rights*, N. Neuwahl and A. Rosas eds., The Hague et alibi 1995, 55 ff..; in the context of Article 53 (formerly 60) ECHR, Alkema, The enigmatic no-pretext clause: Article 60 of the European Convention on Human Rights. In: Essays on the Law of Treaties; a Collection of Essays in Honour of Bert Vierdag, Jan Klabbers and René Lefeber, The Hague, pp. 41-55.

[14]This is granted by Dreier and Alkema, but not by Weiler.

[15]Article 9 (2): All citizens, organs of state, political organizations, other associations and their officials have the duty to ensure the observance of the Constitution and to obey it.

The competence to balance the right of one citizen against that of another inherently presumes the power to restrict the right of a citizen in order to protect the rights of another. The competence of balancing a right of one citizen against another is therefore nothing else but a power to restrict a certain fundamental right of a citizen. There is no reason to consider this right legitimately to restrict a right in a "horizontal" context, to be any different from the competence to restrict the exercise of a right in vertical (i.e. government-citizen) relationships. This being so, there is simply no reason to assume that on the normative level it is impossible to say that one right as formulated provides better protection than another. At the level of the result of applying a norm in actual fact, it is always so that in some cases the right acquires better protection under some circumstances than in others; here there is no difference between vertical or horizontal contexts in which fundamental rights are applied.

The conclusion must be that there is scope for diversity in human rights standards also in federal systems like the Ethiopian, in which federal rights apply also to state matters. States might have fewer or less protective rights contained in their constitutions, but this is not to the disadvantage of citizens, because these can rely on federal standards. Also, state bills of rights may well provide better protection than the federal bill of rights; there is room for such better protection when it concerns matters within the scope of state powers.[16]

5. Differentiation in the protection of human rights in the application of federal rights

Does all this mean that human rights norms are uniform and apply uniformly, except in the case where matters are within the (discretionary) powers of a state and in that state there is a more protective human rights standard? The practice in various systems shows that this is not the case.

The paradigmatic case in the United States is Miller v. California.[17] This case concerned the exclusion of obscenity from protection under the First Amendment, the question being what constitutes 'obscenity'. "This is an area in which there are few eternal verities", Chief Justice Burger stated in the opinion delivered by him for the Court. According to the Court, one of the relevant criteria which a jury is to assess is whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest. This had already been established in earlier case law. Miller v. California is interesting because it elaborates on the issue of "contemporary community standards". It also places it in the framework of federalism.

> "Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive." These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether "the average person, applying contemporary community standards" would consider certain materials "prurient," it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual

[16]But see footnote .

[17]413 U.S. 15.

> ultimate fact finders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a national "community standard" would be an exercise in futility. [...] It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.[...] People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity."

The other legal system in which a similar diversity is allowed, is that of the European Convention on Human Rights. The international supervisory European Court of Human Rights has allowed to states party to the Convention a "margin of appreciation" in deciding the necessity of restricting the exercise of certain rights under the Convention.[18] Whereas this Court on the one hand is firm that the freedom of expression also applies to expressions "that offend, shock and disturb the state or any section of the population",[19] and allows few or no restrictions on this ground as far as expressions are concerned which might somehow or other be considered "political", it does allow a wider margin of appreciation when it concerns restrictions for "the protection of morals" (although for "political speech" concerning morals there is again no wide margin of appreciation[20]). The reasons for allowing a margin of appreciation is the absence of a "European" consensus in the relevant matters and the distance of the European Court from local circumstances.

> "[P]erceptions as to what would be an appropriate response by society to speech which does not or is not claimed to enjoy the protection of Article 10 of the Convention may differ greatly from one Contracting State to another. The competent national authorities are better placed than the European Court to assess the matter and should therefore enjoy a wide margin of appreciation in this respect."[21]

The approach of the Supreme Court and the European Court of Human Rights leaves scope for normative diversity: regionally or locally the applicable norms may differ. However, it should be clear that in both instances the diversity resides not merely in the abstract norm. Nevertheless, the importance of their approach is that it is neither merely a matter of sheer factual application, different cases having different results. The approach is somewhere halfway between the abstract norm and its application to the facts and circumstances of concrete cases; neither merely a difference resulting from the difference in facts, nor a difference in the applicable fundamental right.

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[18]This necessity criterion is contained in Articles 8 to 11, which concern the rights to private and family life, freedom of thought, conscience and religion, freedom of expression, and of assembly and association.

[19]*Handyside v. United Kingdom*, EcrtHR A 24 (1976), para. 49.

[20]For instance, *Open Door and Dublin Well Woman v. Ireland*, ECrtHR A 246 (1992), which concerned providing information to women on the availability to obtain abortions which are illegal in Ireland, legally abroad.

[21]This is the recurrent formulation as it occurs in many judgments, e.g. *Tolstoy Miloslavsky v. the United Kingdom*, ECrtHR 13 July 1995, para. 48.

B. Judicial Powers

We have already touched on the possibilities of courts to apply various human rights standards in passing. In this section we briefly focus our attention on a number of select questions of judicial review involved in the adjudication of various human rights claims. Main questions concerning federal and state (constitutional) courts' power to adjudicate allegations of human rights infringements are the following: what are their respective powers with regard to a) infringement of federal bill of rights, b) infringements of state bills of rights; can a citizen seize a competent federal court for alleged infringement of federal rights by state authorities; are state courts bound by the interpretation of a federal court of highest instance?

1. Federal jurisdiction: the House of Federation and the Council of Constitutional Inquiry

These questions have special importance in Ethiopia in view of the fact that constitutional adjudication has (at least in part) been reserved to the House of Federation upon investigation and submission of relevant recommendations by the Council of Constitutional Inquiry. The matter of the extent to which constitutional adjudication is reserved to these bodies, is of importance for the scope left to federal and state courts for protecting fundamental rights. The main problem as to the House of Federation's and the Council of Constitutional Inquiry's competence is created by the wording of Articles 83 (1), 84 (1 and 2) and 62 (1) and concerns the extent to which these bodies have the exclusive power to decide constitutional issues.

Whereas the English wording of Article 83 (1) provides that "all" constitutional disputes shall be decided by the House of Federation, the authoritative Amharic version leaves out "all".[22] Article 84 (1) is also in the English version unspecific and speaks only of the power of the Council of Constitutional Inquiry "to investigate constitutional disputes". Article 62 (1) states broadly that the House of Federation "has the power to interpret the Constitution". Taken literally, this would seem obvious, given that Article 9 (2) states that "[a]ll citizens, organs of state, political organizations, other associations and their officials have the duty to ensure the observance of the Constitution and to obey it."

Although the observance of the Constitution may in many cases not require "interpretation", in many other cases it will indeed; and it is hard conceive that public organs and their officials can observe and obey the Constitution if they are not allowed to interpret it at all. As Article 62 (1) will not be intended to state the obvious, it is probably intended to mean that the House of Federation has the power to interpret the Constitution *authoritatively*, that is to say: it is the ultimate interpreter and its interpretations will be decisive and binding. This does not outrule every and any powers of interpretation of the Constitution by others.

The wording of Article 84 (2), then, seems to be more conclusive as to the issues which should be decided by the Council of Constitutional Inquiry and House of Federation:

> Where *any Federal or State law is contested* as being unconstitutional and such a dispute is submitted to it by any court or interested party, the Council shall consider the matter and submit it to the House of the Federation for a final decision.

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This provision suggests a much more limited exclusive jurisdiction of the Council and the House of Federation: only the power to give an authoritative interpretation of the Constitution with a

[22]I owe this knowledge to my colleagues of the Law Faculty of the Ethiopian Civil Service College.

view to establishing the (in-)constitutionality of federal and state legislation is reserved to the Council and House of Federation. This limited jurisdiction, we take to be the correct interpretation of the relevant provisions of the Constitution. An argument in support of this reading of Article 84 (2) - apart from Article 9 (2), quoted above - is found when we read this provision in conjunction with Article 79 (1)

> "Judicial powers, both at Federal and State levels, are vested in the courts."

The authoritative Amharic text of the Constitution again sheds light on this provision, in as much as it suggests that judicial powers are solely vested in courts.[23] This implies that exceptions to this the powers of the judiciary are to be constructed restrictively.

This restrictive interpretation of the exclusive power of the Council of Constitutional Inquiry and House of Federation also means that courts should be assumed to have the power to apply the Constitution whenever the meaning of the Constitution is beyond doubt and does not require "interpretation". This may be because of the obviousness of the case, of because the matter has been settled previously by the Council of Constitutional Inquiry and House of Federation. In such cases recourse to these last mentioned institutions is unnecessary.

Whatever uncertainty might theoretically be left on the powers of normal courts to interpret the Constitution and decide constitutional issues (and I do not think there is much doubt), as to the interpretation of human rights contained in the federal Constitution, the correctness of the conclusion that not only the House of Federation and the Council of Constitution Inquiry competent, is confirmed beyond doubt by Article 13 (1):

> "*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."

The interpretation that also normal courts can review federal human rights claims is shared in a statement by the spokesperson of the present government, which contains the following statement:

> "[T]he Judiciary in Ethiopia constitutes a constitutional organ which acts as a countervailing power to the Executive and the Legislature. The court is playing an important role in keeping a responsible system of government in proper working order and protecting the rights of the people.
>
> PROTECTION OF RIGHTS AND FREEDOMS
> Article 13 to 42 of the Constitution of the Federal Democratic Republic of Ethiopia pertain to fundamental rights. The fundamental rights have been grouped under several headings. The Constitution guarantees rights and freedom, inter alia equality before the law, equal protection of laws, freedom of speech and expression, freedom of religion, belief and opinion, freedom of assembly and association, freedom of person, freedom against jeopardy and ex post fact laws, the right to property.
> *In this regard, the Judiciary have the power and duty to ensure effective and speedy enforcement of the rights of individuals. To ensure the fundamental rights effectively and speedily* the courts

[23]See also the manner in which Fasil Nahum, Constitution for a Nation of Nations, Asmara 1997, p. 101, quotes this provision. He does so in quotation marks. However, he does so in the context of the *ius de non evocando* contained in Article 78 (4).

> in Ethiopia have yet to develop full capacity. [...] Given the independence of the Judiciary, which is enshrined in the Constitution, the unreserved efforts to fully build the capacity of the Judiciary and the commitment, sincerity and good intention of those on the bench, individuals surely have remedies in the case of infringement of their rights."[24]

2. The human rights issues decided by the Council of Constitutional Inquiry and House of Federation

The Council of Constitutional Inquiry can investigate the constitutionality of federal and state laws when any court or interested party has referred the matter to it (Article 84 (2)). This covers federal or state legislation which is disputed for its alleged infringement of the federal bill of rights. Usually, this issue will be raised incidentally, in the sense that it is not the fact of passing the relevant legislation which gives rise to the dispute, but some application of it, which is either brought before any court, or without there being a court case, affects an "interested party" - which will typically be a citizen who claims that his fundamental rights have been infringed upon by some public authority (or by another citizen or (official of an) association in the sense of Article 9 (2)). It is unclear to what extent an "interested party"must have exhausted available normal judicial proceedings, or can immediately seize the Council of Constitutional Inquiry as soon as the dispute arises out of court. The phrase "any court" suggests that any court can at any stage stay the proceedings and refer the matter to the Council of Constitutional Inquiry.[25]

Outside the constitutionality of legislation, there is the possibility of (discretionary) executive action infringing the federal fundamental rights of citizens which does not involve the constitutionality of legislation on which such action is based. Many actions can be thought of, e.g. in the sphere of the investigation or prosecution of (suspected) criminal behaviour. It is unclear whether citizens can bring such cases directly to the Council of Constitutional Inquiry or the House of Federation under Article 84 (1).

The question arises whether the exclusive power of the Council of Constitutional Inquiry and House of Federation to rule on the constitutionality of *legislation* means for the competence of these institutions to decide the constitutionality of *executive* action.

Theoretically, the construction of the powers under Articles 83, 84 and 62 (1) as relating to the exclusive power to review the constitutionality of legislation might imply that the Council of Constitutional Inquiry and House of Federation have no competence to review the

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[24]Background Information. FDRE Office of the Government Spokesperson 30/12/98; source Internet site http://www.ethiospokes.net/backgrnd/.

[25]Comparable arrangements exist in Germany under Article 100 of the Constitution: "(1) Where a court considers that a statute on whose validity the court's decision depends is unconstitutional, the proceedings have to be stayed, and a decision has to be obtained from the State court with jurisdiction over constitutional disputes where the constitution of a State is held to be violated, or from the Federal Constitutional Court where this Constitution is held to be violated. This also applies where this Constitution is held to be violated by State law or where a State statute is held to be incompatible with a federal statute"; and in the European Community under Article 234 (formerly 177) EC Treaty: "The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon."

constitutionality of action which is not of a legislative nature; "exclusive" meaning not merely that these no other institutions can review laws, but the Council of Constitutional Inquiry and House of Federation may only review laws but not executive action.

This, I submit, is probably not correct. The construction which I propose, is that the broadly described power to "interpret" the constitution,[26] respectively to investigate "issues of constitutional interpretation"[27] and investigate or decide "constitutional disputes"[28] is vested in Council of Constitutional Inquiry and House of Federation in a non-exclusive manner, whereas the power respectively to investigate and decide on the disputes concerning the constitutionality of legislation has been vested exclusively in these institutions. That is to say: courts can interpret the Constitution and decide issues of constitutionality, but not disputes concerning the constitutionality of legislation.

The reason for saying that the competence of the House of Federation and Council of Constitutional Inquiry is not limited to reviewing the constitutionality of legislation, is that the Constitution explicitly charges the House of Federation with the task of deciding some constitutional disputes which are unlikely to be brought in normal courts. Thus the House of Federation is to "decide on issues relating to the rights of Nations, Nationalities and Peoples to self-determination, including the right to secession" (Article 62 (3)), "[i]t shall strive to find solutions to disputes or misunderstandings that may arise between States" (Article 62 (6)), "[i]t shall order Federal intervention if any State, in violation of this Constitution, endangers the constitutional order" (Article 62 (9)). These functions are of crucial constitutional importance in a federation and can be considered to involve essentially issues of constitutional arbitration involving the interpretation of the Constitution and deciding on constitutional disputes. To the extent that such tasks of the House of Federation involve the constitutional interpretation, the House will have to seize the Council of Constitutional Inquiry, which will investigate the constitutional issues involved and make recommendations to the House of Federation. This is not self-evident from the text of the Constitution, but follows from Article 7 sub a of the Rules of Procedure of the Council of Constitutional Inquiry.[29]

The upshot of all this is that, by implication, a human rights complaint based on chapter three of the Constitution concerning executive action can be heard and decided by the House of Federation upon investigation. If interested parties can direct themselves in such cases to the Council of Constitutional Inquiry, this provides an extra form of possible redress. In cases which have been brought to court, there are several possibilities. Either it might be so that also in these cases courts may optionally refer the case to the Council of Constitutional Inquiry. Or otherwise it means that the House of Federation and Council of Constitutional Inquiry function factually as an appeal instance with regard to court judgments on non-legislative acts allegedly infringing federal human rights provisions. This constitutes an exception to the rule of Article 80 (1) which

[26] Article 62 (1).

[27] Article 84 (3).

[28] Article 83 (1), 84 (1).

[29] This provides that a petition for constitutional interpretation may be submitted to the Council of Constitutional Inquiry by the House of Federation. This provision makes sense if it refers to cases relating to other functions than the ones brought to it by courts or interested parties. I owe this information on the Rules of Procedure of the House of Federation to my colleague Assefa Fiseha.

provides that "[t]he Federal Supreme Court shall have the highest and final judicial power over Federal matters" - just as the whole arrangement on issues concerning the federal Constitution which are within the power of the Council of Constitutional Inquiry and House of Federation is an exception to this rule.

3. Competence of federal courts and state courts with regard to claims under the federal bill of rights

The powers with regard to the federal human rights of federal courts is mostly answered by the above. These courts are competent with regard to non-legislative acts of federal authorities and others who are bound to observe the federal Constitution (see Article 9 (2)). As we concluded in a previous section, the federal bill of rights also applies to state authorities. So federal courts should also be able to hear cases concerning state authorities' alleged infringement of federal rights. However, it is not absolutely clear whether the mere claim that a right under the federal constitution is concerned, means that the matter is a "federal matter" which makes federal courts competent.

This issue raises two practical questions; one regarding the court which is to hear the case in first instance; the other which court is the court of highest instance. If a complaint of infringement of a federal human right is a federal matter, a Federal Court of First Instance is competent (in the absence of a separate federal court, the State High Court shall act as Federal Court of First Instance, Article 80 (4)); if such a complaint is a state matter, the state court normally competent to hear the case is competent. As to the court of highest instance: if the complaint of infringement of a federal human right is a federal matter, "[t]he Federal Supreme Court shall have the highest and final judicial power over Federal matters" - without prejudice to recourse to the Council of Constitutional Inquiry and the House of Federation as described in the previous section of this paper. If the complaint of infringement of federal rights by a state authority is a state matter, "[t]he State Supreme Court shall have the highest and final judicial power" (Article 80 (2)). In state matters, nevertheless, the Federal Supreme Court has the constitutional authority to review in cassation any "basic error of law" of any court (Article 80 (3 sub a)) - even that of a State Supreme Court.[30] Such cases of "basic error of law" do not only concern fundamental issues of civil or criminal law, but in the words of Fasil Nahum "such authority is to ensure the protection of the constitution and the whole legal regime it unfolds for safeguarding fundamental rights and freedoms".[31] Again, this is without prejudice to recourse to the Council of Constitutional Inquiry and House of Federation as described. This may mean that when a federal human right is allegedly infringed by a state authority, the case may have to be considered by no less than five institutions: the state court of first instance, the state high court in appeal or the state supreme court as the case may be, (exceptionally) the federal supreme court in cassation, the Council of Constitutional Inquiry, and finally the House of Federation. But this is a worst case scenario.

4. Competence to deal with claims under state bills of rights

In the federal states, state courts - if they have any competence at all to decide state constitutional issues - can decide on alleged infringements of any state bills of rights there may

[30]Fasil Nahum, Constitution for a Nation of Nations, Asmara 1997, p. 101.

[31]Ibidem, p. 102.

be. Clearly, federal courts - and for that matter institutions such as the Council of Constitutional Inquiry and House of Federation - are not competent to apply state bills of rights, although they might derive arguments for the interpretation of federal law and the federal constitution from provisions in state constitutions, including state bills of rights.[32]

When a state bill of rights is identical on relevant points with the federal constitution, few problems arise. The main question that can arise is whether state courts are then bound by the interpretations given by federal courts and institutions of the relevant federal human rights provisions. This question is difficult to answer. Strictly speaking there is no reason why they should be so bound. The whole point of a state constitution in a federal system is that it has a value of its own. From this point of view there is no reason to suppose that a *federal* interpretation of a *federal* provision can bind *state* courts in interpreting *state* provisions. On the other hand, there are certain provisions in a federal constitution which can be considered so fundamental that they are also held to apply to state matters: state law as interpreted and applied by state courts must be "homogenous" (as the Germans put it) with certain fundamental principles of the Constitution. This type of reasoning might lead one to conclude that very fundamental issues concerning identical human rights provisions may be made to depend on an authoritative federal interpretation. This, I submit, could only be the case in exceptional circumstances.[33]

When a state bill of rights provides less protection than a federal bill of rights, the reliance on state bills of rights does not change the competence of courts; however, the federal bill of rights may more likely to be invoked in such cases. The latter has been dealt with in the previous section of this paper. Problems of matters shifting from the competence of one court to another in systems with a double judiciary - federal and state - is somewhat alleviated in case of state courts fulfilling the function of federal courts as under Article 80 (4 and 5) of the FDRE Constitution, but as we saw in the previous section not entirely solved.

When a state bill of rights provides better protection than the federal fundamental rights do, the matter remains entirely within the scope of state powers, as described in section I.A.4 above. Again, federal institutions (courts or otherwise) do not have the power to interpret state constitutions. This is only different when a state constitution infringes the federal constitution. As pointed out above, this is not too easily to be assumed in federal systems when states wish to grant more protection to citizen - would it be too easily assumed, this might imperil of the federal nature of the system, which inherently presumes diversity which may even extend to the protection of human rights.

II. International Human Rights Instruments and National Law

A. Hierarchy of Norms

The protection of human rights has in the present-day era been greatly fostered by the fact that since World War II is has become a major issue on the agenda in international relations. The

[32]The German Federal Constitutional Court has done so several times.

[33]Compare Article 100 (3) of the German Constitution, although this refers to an interpretation of the *federal* constitution: "Where the constitutional court of a State, in interpreting this Constitution, intends to deviate from a decision of the Federal Constitutional Court or of the constitutional court of another State, it obtains a decision from the Federal Constitutional Court."

United Nations Assembly's Universal Declaration of Human Rights of 1948 has been a catalyst. It has served as an example for many, if not most, bills of rights in national constitutions. The most important landmarks are the UN Covenants on Economic, Social and Cultural Rights,[34] and on Civil and Political Rights[35] of 1966, the latter with its Optional Protocol concerning the right for individuals to file complaints to the Human Rights Committee,[36] and a Second Protocol on the Abolition of the Death Penalty,[37] the International Convention on the Elimination of all Forms of Racial Discrimination (CERD),[38] the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[39] the Convention on the Political Rights of Women,[40] the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[41] with its new optional protocol[42] and the Convention on the Rights of the Child.[43] These treaties are supplemented by more specific treaties which aim at the protection of fundamental rights, of which we mention here those which have been concluded in the

[34]U.N.T.S. No. 14531, vol. 993 (1976), p. 3; Ethiopia acceded on 11 June 1993. Ethiopia's initial report to the international supervisory, in this case the UN Economic and Social Council under the state reporting procedure was due 30 June 1995.

[35]U.N.T.S. No. 14668, vol 999 (1976), p. 171; Ethiopia acceded on 11 June 1993.Ethiopia's initial report was due 10 September 1994; its second report on 10 September 1999.

[36]U.N.T.S. No. 14668, vol 999 (1976), p. 302, entered into force on 3 January 1976; Ethiopia has not acceded to this Protocol.

[37]G.A. res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989), entered into force July 11, 1991; Ethiopia is not a party.

[38]7 March 1966; 60 UNTS 195; Ethiopia acceded on 23 June 1976.

[39]UN General Assembly RES 39/46, Annex); Ethiopia acceded on 14 March 1994; Ethiopia's initial and second reports were due 12 April 1995 and 1999 respectively.

[40]Opened for signature and ratification by General Assembly resolution 640(VII) of 20 December 1952. Entry into force 7 July 1954, in accordance with article VI. Ethiopia has been a party since 31 May 1953 (signature) and ratified on 21 January 1969.

[41]U.N.T.S. No. 20378, vol. 1249 (1981), p. 13. Ethiopia signed on 8 July 1980 and ratified on 9 September 1981. Reservations and Declarations: Paragraph 1 of article 29:"Socialist Ethiopia does not consider itself bound by paragraph 1 of Article 29 of the Convention" ("Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court"). Ethiopia's fourth and fifth periodic report were due 22 April 1994 and 1998 respectively.

[42]A Draft was E/CN.6/1999/WG/L.2; adopted on 12 March 1999 the forty-third session of the Commission on the Status of Women; it has been adopted by General Assembly resolution A/54/4 on 6 October 1999; and opened for signature on 10 December 1999; Ethiopia is not a party.

[43]UN GA Doc A/RES/44/25 (12 December 1989), Annex. Ethiopia acceded on 14 May 1991. Ethiopia's second report has been submitted and will be considered in the Committee's September/October 2001 session.

framework of the ILO, for example the Minimum Age Convention (No.138),[44] Convention (No.100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value,[45] Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries[46]. These universal human rights treaties are parallelled by several regional treaties. Of these we mention as particularly relevant to Ethiopia the extra-ordinary African Charter on Human and Peoples' Rights,[47] which should be considered together with the Rules of Procedure of the African Commission on Human and Peoples' Rights[48] and the Protocol on the Establishment of an African Court on Human and Peoples' Rights,[49] and the African Charter on the Rights and Welfare of the Child.[50]

1. Monism and dualism; the hierarchical rank of treaties

The views on the hierarchical rank of treaties, especially human rights treaties, have of old differed. I briefly and schematically summarize the most important ones. On the classic view treaties as an instrument of public international law bind only the subjects of public international law, and are hence binding in international relations only, and not within the domestic national legal order. On this view, there is no hierarchy between international and national law. The opposite view assumes that there is a hierarchy of norms and asserts that international law takes a hierarchically superior rank above national law.[51] In case of conflict, a treaty norm would take precedence over a national legal norm.

In practice, public international law leaves it to national constitutional law to regulate the consequences of public international law within the national legal system, although it is acknowledged that special treaty regimes may oblige state parties to grant the norms contained in that treaty a certain status within national law.[52] It goes without saying that treaty obligations which a state has entered into will have to be complied with, no matter what status a national

[44]Convention No. 138, 1973; Ethiopia ratified on 27 May 1999.

[45]Adopted on 29 June 1951 by the General Conference of the International Labour Organisation at its thirty-fourth session; entry into force 23 May 1953, in accordance with Article 6; Ethiopia ratified.

[46]Adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session; entry into force 5 September 1991. Ethiopia is not a party.

[47]Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM. 58 (1982), entered into force October 21, 1986. Ethiopia acceded on 15 June 1998.

[48]Adopted on 6 October 1995.

[49]OAU Doc. OAU/LEG/MIN/AFCHPR/PROT.1 rev.2(1997)); ratified by Senegal and Burkina Faso; not ratified by Ethiopia.

[50]OAU Doc. CAB/LEG/24.9/49 (1990).

[51]Classically the name of the Austrian legal philosopher Hans Kelsen is associated with this view.

[52] The best example is the Treaty establishing the European (Economic) Community, which has been interpreted by the Court of Justice of the European Communities as containing provisions which are directly effective within Member States and take precedence over any contrary national provision; this not only applies to the Treaty but also for certain decisions taken by the EC pursuant to this Treaty.

constitution attributes to it. In this regard, human rights treaties, which aim to guarantee to citizens a minimum standard of behaviour by public authorities of their own (and other) states cannot remain entirely without consequence for any state.

The particular systems which national constitutions have designed as to the status and rank of treaty law within the national legal order are roughly the following.

1) A treaty which has become binding is either:

a) automatically part of the national legal order (the so-called "monism"; e.g. the Netherlands), or

b) it only becomes part of the national legal order after an national act of incorporation of that treaty into the national legal order ("dualist" systems, e.g. the United Kingdom).

2) Treaty provisions which have become part of the national legal order (either as such in monist systems, or by transformation into national law in dualist systems) has a rank equal to acts of parliament, or they have a superior rank and take precedence over acts of parliament; in few systems a treaty provision can even be superior to the constitution (e.g. Netherlands).

2. The status and rank of treaties under the Ethiopian Constitution

The FDRE Constitution is not overly clear on the status and rank of treaty provisions. Article 9 (4) states that "[a]ll international agreements ratified by Ethiopia are an integral part of the law of the land." Because Article 55 (12) says that the House of Peoples' Representatives "shall *ratify* international agreements concluded by the executive", it is utterly unclear what "ratified" means in Article 9 (4): treaties approved by the House of Peoples' Representatives (i.e. treaties "ratified" in the sense of Article 55 (12), or treaties with regard to which the Republic has expressed its consent to be bound under public international law (i.e. "ratification" in the sense of public international law). The former could possibly suggest a more dualist approach than the last option. The practical consequence of either view is not very great.

The issue what the rank of treaty provisions is, is of much greater practical importance. Article 9 (4), just quoted, does not say anything as to the rank of treaty law. However, Articles 9 (4) read in conjunction with Article 9 (1) must lead to the conclusion that treaty provisions do not have a status which is supra-constitutional; they are not of higher lower rank than the Constitution. Given the contrast with the Constitution of 1955, which explicitly declared treaty provisions to be of equal rank to the Constitution, the conclusion is that treaty provisions are infra-constitutional, *i.e.* of lower rank than constitutional provisions. This means that they may be compared to laws passed by the House of Peoples' Representatives, especially since treaties need the approval of this House.[53]

It must be emphasized that the rule contained in Article 13 (2) does not concern the hierarchical rank of human rights treaties, but is only a rule of construction which regulates the manner in which national law is to be interpreted. It provides:

> "The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia."

[53]Getachew Assefa, The Making and Status of Treaties in Ethiopia as Envisaged by the 1994 Constitution of the Federal Democratic Republic of Ethiopia: A Comparative Approach, Addis Ababa 1996 (unpublished LLB-thesis, AAU).

There is a point in saying that if one is to interpret a constitutional provision in conformity with another instrument, this instrument must be of at least equal rank to the constitution. But even if this may suggest that the rank of international instruments is equal (or superior) to the constitution, ultimately the validity of a constitutional provision cannot be affected by a human rights treaty provision with which it at variance. As the same can be said of a provision of a later parliamentary legislation, the conclusion must be that the hierarchy of norms is not affected by the rule contained in Article 13 (2).[54] We will discuss this provision somewhat further in the next section of this paper.

The result of this state of affairs is that the *lex posterior* principle applies: treaties can only overrule promulgations passed by the legislature if the treaty has become binding for Ethiopia after the relevant legislation. If relevant legislation is of later date than the treaty, then the promulgation takes precedence over the treaty provisions. For the human rights treaties we mentioned, we may notice that most treaties have become binding for Ethiopia before the 1994 Constitution. Notable exceptions are the African Charter and the Minimum Age Convention, which have become binding after the Constitution. To the extent that the fundamental rights contained in the Constitution might provide less protection than the human rights treaties to which Ethiopia is a party, the Constitution supersedes the treaties which became binding before the 1994 Convention became operative.

Clearly, legislation of lower rank than promulgations passed by the House of Peoples' Representatives have lower rank than treaty provisions and must conform to these.

3. Inverted hierarchies: the subsidiary nature of human rights treaties

From the above there emerges a clear picture as to the hierarchy between international and national norms. This picture in reality is more complicated when it concerns human rights treaties. This is due to the subsidiary nature of the international instruments on the protection of human rights: the norms contained in the human rights are minimum norms. They are no pretext for infringing or limiting the rights given to citizens in existent international or national legal instruments. This is explicitly provided in the general human rights conventions. Article 5 (2) of the International Covenant on Civil and Political Rights provides:

> "There shall be no restriction upon or derogation from any of the fundamental rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext hat the present covenant does not recognize such rights or that it recognizes them to a lesser extent."

In cases in which a national fundamental right provides more protection to the citizen, the national norm will have to apply even if the national hierarchy suggests that the international norm must be conformed with. This inversion must be based on the relevant treaty regime.

By way of example, one may point to the freedom of expression under Article 19 (2) of the International Covenant on Civil and Political Rights as compared to the protection of freedom of expression under Article 29 (3) and (6) of the FDRE Constitution. The latter forbid any form of censorship or limitation of an expression for reason of its contents, whereas censorship and limitations for reason of the content of expressions is not (absolutely) forbidden under the ICCPR.

[54]In this respect I disagree with Ato Getachew Assefa, op. cit., pp. 95-100.

B. Judicial Powers to Use and Enforce International Human Rights Standards

In the end the effectiveness of human rights provisions in treaties is dependent on the possibilities of enforcing standards as against opposing legal norms and governmental action based on these: can a citizen enforce the rights granted to him by treaty in court?

1. Exclusive power of the Council of Constitutional Inquiry and House of Federation?

To the extent that the dispute concerns federal or state legislation, one may wonder whether the compatibility of a treaty provision with such legislation is a "constitutional dispute" reserved to the Council of Constitutional Inquiry and House of Federation in the manner described in section I.B. 2 of this paper.

Theoretically, two answers can be conceived of. The affirmative answer could be based on the fact that the status of treaty provisions and their relationship to legislation is in principle determined by the Constitution. Moreover, the crux of the exclusive powers granted to the Council of Constitutional Inquiry and House of Federation is that they are the only institutions capable of declaring federal and state legislation of no effect. This matter should therefore be reserved to these institutions.

The alternative - negative - answer is that deciding on the compatibility of treaty provisions with national legislation involves the interpretation of the treaty and the legislation, but not of the Constitution. Although the Constitution regulates the consequences if there is any such conflict, no interpretation of the Constitution is involved.

To my knowledge this matter has been unresolved. I venture to prefer the second view, as it is more in line with the restrictive interpretation of the exclusive powers of the Council of Constitutional Inquiry and House of Federation. Given the rank of treaties as equal to parliamentary legislation, the activity of interpreting treaties and promulgations is in the normal scope of powers of ordinary courts.

The conclusion must be that ordinary courts can apply treaty provisions which have become binding after the parliamentary legislation on which the disputed governmental action is based.

2. The meaning of Article 13 (2) of the Constitution

Except the interpretation and application of treaties on the basis of the *lex posterior* principle, human rights treaties have a role to play in the interpretation and application of federal and state law on the basis of Article 13 (2), quoted above. It means that whenever a fundamental right as contained in the federal Constitution is relevant, it needs to be interpreted in such a manner that no conflict arises with a human rights treaty provision. Thus, the human rights provisions of treaties are read into the constitutional provisions. Hence, legislation and other acts of government may indirectly be interpreted in the light of human rights treaties.

The rule of construction of Article 13 (2) may also serve for a somewhat attenuated interpretation of Article 9 (4). If it is so that the Constitution must be interpreted in a manner which is consistent with human rights instruments, than laws which are of lower rank than the Constitution must *a fortiori* be interpreted in a manner which makes them conform with treaty provisions.

The rule of construction which we are discussing can apply only in case a rule can

potentially be read both in a way which conflicts with a human rights treaty provision and also in a way which is in conformity with the treaty provision. In other words, only if the wording of a provision of a law (or the Constitution) is ambiguous or apt to be applied in different ways, can it be made to conform to the treaty provision. If the wording or intent of the national provision is unambiguous and/ or can only be applied in one manner, there is no room for this rule of construction. It should be pointed out, however, that legal construction of provisions is in some legal systems sometimes such that the actual wording of a provision can be turned into its contrary by teleological or historical interpretation or by letting legislative intent prevail over the wording of a provision; also a "dynamic" interpretation in the light of changed circumstances and the evolution of insights shared in a certain society, may lead to an interpretation which changes over time and can be quite different from historical legislative intent, or even the wording of a provision. This is the case in most European legal systems. The argument can be put forward that given the importance which the Ethiopian Constitution of 1994 attaches to human rights as formulated in international instruments, the rule of construction of laws and constitutional provisions in the light of international human rights, should apply most liberally and should not too easily fail for reason of legislative intent or the particular wording of the relevant provisions. Only in such a manner the idea behind Article 13 (2) can faithfully be rendered in practice. But perhaps this is too optimistic a reading of the Constitution.

III Concluding Remarks: Human Rights as Limits to Unity and as Limits to Diversity

Federal systems are always based on a delicate combination of unity and diversity. For Ethiopia the choice for federalism is a heroic attempt to bring into balance the unity and diversity which have so often throughout its history been out of balance. The great tension between these two poles is evident in the field of human rights. These by their very nature set limits to diversity, but just as well they may constitute a limit to unjustified uniformity. This is brought out on the one hand by their supremacy within the constitutional framework (see Sections I.A.1-3). On the other hand, the very federal nature of the political order must necessarily leave some scope to an amount of diversity and differentiation in the formulation and protection of fundamental rights within the constituent parts of the federation (see Sections I.A.4-5). But diversity is not only a consequence of federalism. Yes, human rights are about equality, substantively and before the law. But human rights also guarantee the human and political identity and self-expression of individual persons and of groups. This respect for identity must also mean respect for human and political diversity. In the Ethiopian context this respect for identity and diversity has culminated not only in federalism, but also in the elevation of the right to develop and protect one's cultural identity to a fundamental right (Article 39 Constitution).

This paper has attempted to outline some of the legal parameters for these aspects of unity and diversity in the federal context of federalism with regard to the protection of fundamental rights. Perhaps all the above is excessively abstract. This is unavoidable when we describe such matters in terms of legal principle. But we must also dare to face up with what it may mean in practice. To a large extent it must be left to the political institutions, the courts, judges, solicitors and other practitioners, and legal academics, to do the arduous job of filling out the practical consequences of the lines of argument adumbrated in the body of this paper. Thus, one question is what "better protection" of human rights may mean if deciding on which norm to apply. This is certainly a matter which future legal practice, based on the assertions of practitioners in courts may clarify, and may lead to awkward questions of balancing rights

against each other.

But there are many more irksome issues to which things mentioned in this paper gives rise. I mention only a few.

Thus one of our conclusions was that even if one ultimate standard applies, this standard does not need everywhere to have the very same meaning. We saw that what is "obscene" in one of the states of the US and therefore is unprotected under the free speech amendment, is not necessarily "obscene" by the standards of another state and hence in the latter state be protected under as free speech. In Ethiopia this might mean that what is a "harmful custom" in one region and therefore be outside the protection of "cultural identity", need not necessarily be "harmful" in another region and be part of a cultural identity. Although the American example is about prevailing norms in the various states, the same argument may also apply to various communities *within* states. This is important in the Ethiopian context, where the regional states of which the federation is composed in reality are not culturally homogenous, as is evident also from the institution of autonomous districts within states along (semi-)ethnical lines. Ethiopian history teaches that a serious effort needs to be made in avoiding the problems of internal colonialism, a neo-feudal ethnical cast system, by surpassing the cultural self-organization and self-perceptions of communities. The question of "ethnical identity" looms large in Africa and elsewhere in the world - not only in the America's and Australia, with their ancient indigenous peoples, and in Asia (India and Indonesia are in the forefront but by no means the only countries in which cultural divergences abound), but certainly also in Europe. This should not be taken to mean that cultural identities are unchangeable static things. The strongest cultural communities derive their strength from their powers of adaptation to a changing environment. The place which the Ethiopian Constitution grants to the right to develop and protect one's cultural identity, and some of the constitutional rights associated therewith, such as the right to form a state and the ultimate right to secession, does not mean that this right implies separateness and exclusiveness. To the contrary, it implies that policies, whether federal or state, should be *inclusive*. That is the very power of federal arrangements. It assumes the willingness to consider and respect the other in its distinctiveness. It also assumes the necessity to take the differences of others into account. And this is only possible in a discursive environment, a manner of proceeding in political, administrative and judicial decision making in a discursive environment of continuous dialogue in which the assertions of all parties involved are taken seriously - even if an ultimate decision is not always one based on consensus and may not always please everyone. In judicial cases it is almost necessarily so that one of the parties will not be overly pleased. But still even displeasing decisions can be made acceptable due to the care taken in the process of reaching a decision, a care of taking both parties' views seriously.

The prominence of "ethnic" issues should not make us shut our eyes to the reality that also in Ethiopia many, many citizens cannot be categorized as belonging to any single ethnic community. This is so in Addis and other cities, but also outside there are those who for whatever reason fall outside regular categories. And even if one belongs to a certain culturally distinct community which should maintain its right to its identity, still individual rights of its members must be protected. Although a certain variety for instance as to what constitutes a harmful custom may be admitted, violence and cruelty can never be condoned under whatever pretext.

What uniformity is necessary, what diversity is unavoidable? What the paper has done is to give some outlines in the ranking of norms and say how these could be invoked in court, hopefully shedding some - if only little - light in difficult questions. But ranking will not do the whole trick. Balancing the interests of parties in being protected in often conflicting rights is

often the next and decisive step, for which hardly any guidelines can be provided.

All this is fraught with difficulties. As with many of these things, it concerns questions which require Solomonic wisdom to provide any conclusive answers.