

## ETHNICITY AND CONSTITUTIONALISM IN CONTEMPORARY ETHIOPIA

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### INTRODUCTION<sup>1</sup>

The phenomenon of ethnicity is being declared by many to be the cause of all the problems of Africa, especially those of violent conflict. Some salient examples are Rwanda, Burundi and Kenya. While in many cases ethnicity and ethnic-based antagonisms have indeed been a factor in conflicts and have often been suppressed within the structures of the post-colonial states (with their seemingly sacrosanct boundaries), the political relevance of the phenomenon has varied widely. In the political system and the laws of an African country, however, ethnicity seldom received official recognition.<sup>2</sup>

Ethiopia is an exception. According to the policy of the EPRDF-led<sup>3</sup> government (in power since 1991 and confirmed in a general election of sorts in May 1995) ethnic identity has been declared the ideological basis of political organization and administration, and has also been enshrined in the Federal Constitution of December 1994 defining the outlines of the new Ethiopia.<sup>4</sup>

This article examines some aspects of the formal constitutional solution that Ethiopia has offered to the problem of ethnic or ethno-regional tensions, in the context of the country's recent historical developments. However, it does not go into the practical aspects of its observance and its relation to the socio-political or international context of Ethiopia, nor into the ideological controversies which surround it.

First, a word about how ethnicity is understood in this article. Ethnicity cannot be defined in an essentialist or narrow sense<sup>5</sup>, but it is used here to refer to "a cultural interpretation of descent and historical tradition by a group of people, as opposed to others, and expressed in a certain behavioural or cultural style". It could also be seen as a kind of "expanded, fictive kinship". Ethnicity is also a variable quality in the cultural and historical identity of a human and it occasionally overlaps with regional and political-economic differences. It is often only one part of a person's or group's social identity, but is articulated in situations of conflict such as conquest, incorporation or marginalization, and is often consciously "appropriated" in a political sense by a collectivity. The

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<sup>2</sup> Cf. Claude Ake, "What is the problem of ethnicity in Africa?", (1993) 22 *Transition* 1-14.

<sup>3</sup> Ethiopian Peoples' Revolutionary Democratic Front, the rebel guerrilla movement which ousted Mengistu's communist dictatorship in 1991. Its core is the Tigray People's Liberation Front, a movement founded in the mid-1970s in the northern region of Tigray.

<sup>4</sup> This Constitution was ratified by the Constituent Assembly in December 1994 and became official in August 1996. It was the fourth Ethiopian constitution promulgated for the last 65 years. Another was drafted in 1974 in the early stages of the revolution, but it was ignored and shelved by the Derg military council which took over power later that year. I have used the following text: *The Draft Constitution of Ethiopia. A Draft Approved by the Council of Representatives* (an unofficial draft translation from the Amharic), Addis Ababa: Constitutional Commission of Ethiopia, 1994.

<sup>5</sup> Cf. Marcus Banks, *Ethnicity: Anthropological Constructions*, London, 1996, 10.

historical memory and cultural identity which crystallize as part of an "ethnic group" as a category of identification or as a movement to secure collective interests, are important ingredients which structure its social relations.

In contemporary Ethiopia the discourse of ethnicity has become strongly politicized, more so than ever before, and has created "realities" which did not previously exist. Few of the parties concerned (liberation movements which emerged largely in the 1970s and largely "mono-ethnic" political parties dating from the early 1990s) fully realize the artificial aspect of the matter or the implications of their aspirations, especially when they are cast in the inevitable and ubiquitous idiom of "national self-determination". Neither do they recognize the fact that Ethiopian government discourse on ethnicity, and its political practice, is unduly influencing them by setting the terms of the national debate and policy on ethnic relations and the political restructuring of the country.

This is not to say that ethnic rights are unimportant,<sup>6</sup> or even that federation is a bad idea for Ethiopia; it is not. But the striking fact is that the often newly created and delineated "ethnic identity" of groups is assumed to be a reflection of a primordial group character, of a group as a "natural" unit in which people of a multi-ethnic state have to live. This is, however, very questionable. Often an ethnic revival is primarily a result of failing state policy, which excludes certain ethno-regional groups, and of a political strategy of aspiring but blocked elite groups produced by the national educational system in a situation of economic stagnation. As a result of economic problems—limited resources and insignificant overall growth—this problem is quite common in Africa. Although other countries like South Africa and Rwanda up to 1994 gave ethnicity a measure of official recognition, Ethiopia is different in the sense that ethnic identity is the normative identity on the basis of which the new state prefers to deal with its citizens in many spheres of life, especially the political and economic. For election registration, for example, people have to state their ethnic identity.

The second key term of this article is constitutionalism, here seen as "... the legally defined limits on the power of the majority or on the sovereign state in any form (monarch, president or single party)". These limits are in some sense self-imposed<sup>7</sup> by the polity, in a process of debate and compromise. The function of a constitution is first to protect individual rights of citizens, and secondly to restrain or prevent certain (usually threatening) political changes which a majority or a self-declared sovereign power would simply impose on a minority,<sup>8</sup> that is, it is to make authorities answerable to the law.

#### CONTINUITIES IN PAST AND PRESENT "ETHNIC IDENTITIES"

Political developments in present-day Ethiopia also raise questions about the role and representation of ethnicity in the history and culture of Ethiopia at this juncture. In this context I briefly address the question of past and present forms of ethnicity, before moving to the discussion of the constitution.

<sup>6</sup> Nevertheless, the concept of "ethnic rights" is legally speaking still very unclear and not very useful (cf. Adeno Addis, "Individualism, communitarianism, and the rights of ethnic minorities", (1993) 67 *Notre Dame Law Review* 619.

<sup>7</sup> Cf. Jon Elster, "Introduction", in J. Elster and R. Slagstad (eds.), *Constitutionalism and Democracy*, Cambridge, 1988, 2.

<sup>8</sup> *Ibid.*, 3.

Social scientists are sceptical about the presumed primordial character of ethnic identity and its alleged long history, because it is so fluid and subject to change and manipulation, and also of its cultural content and core symbols. (This is a familiar argument since the work of Hobsbawm and Ranger on the "invention of tradition" in 1983 and the many field studies of anthropologists.) The contemporary language of ethnicity is usually a political language in disguise. One might ask, for instance, in what sense historical ethnic identities in the Ethiopia of today are re-surfacing or re-created. Do they show a continuity with past forms of social organization? How has the expansion of the Ethiopian state since its ideological reaffirmation of "national political unity" under Emperor Tewodros (1855–68) and in particular since the, in many respects, violent process of incorporation under Emperor Mimiik II (in the last decade of the 19th century) shaped the experience of groups since, and has this led them into the present? I will briefly touch upon this issue, which may be relevant to the question of whether there is a meaningful continuity between past modes of governance and cultural autonomy of the various ethnic groups and the recent constitutional re-arrangements which define their polity. This question is of course relevant to an assessment of the future prospects of the Ethiopian federation.

Reference to the *values* of traditional cultures of nations, nationalities and peoples in the programmes and ideological proposals of ethno-nationalist leaders is often surprisingly thin. The only domain where this is being realized is in education: children are now taught in their "native language", and Amharic, the lingua franca, is one subject among others which can be chosen.

I will mention only two cases where this issue of cultural continuity can be seen, or is thought to be, relevant. Most often mentioned in the recent literature is the case of the Oromo people, the largest ethnic group or nation in Ethiopia, with a long and rich historical tradition. Their age-grading and generation-set system called *gaadaa* is a case in point.<sup>9</sup> Particularly the Guji and the Boran-Oromo still practise it to this day, though most other Oromo groups abandoned it during their development of indigenous states (the Ghibe region kingdoms) in the 19th century and during the process of partial integration into a wider Ethiopian highland society. The intricate system of government represented by the *gaadaa* is grafted on an agro-pastoral way of life and its observance as an organizing political principle is susceptible to changes in social scale, economic life and external contacts. It will not work in a stratified society with economically specialized groups, such as in modern society. Most observers, including Baxter and Bassi, suggest that *gaadaa* nowadays serves mainly as a symbol of Oromo political ethos and achievement, as well as an illustration that there were traditional constitutional limits on the exercise of power. There are other elements in the Oromo political tradition which could be more directly accommodated in a new political system of federal government: the respect for the oral law (*seera*) and, more importantly, the democratic assembly system—collective

<sup>9</sup> Cf. Marco Bassi, "Power's ambiguity or the political significance of *Gada*", in P.T.W. Baxter, J. Hultin and A. Triulzi (eds.), *Being and Becoming and Oromo. Historical and Anthropological Inquiries*, Uppsala, 1995, 177f. Also Paul Baxter, "The creation and constitution of Oromo nationality", in K. Fukui and J. Markakis (eds.), *Ethnicity and Conflict in the Horn of Africa*, London, 1994, 167–186. Other relevant examples would be the Sidama (*luwa*) age-grade system, the traditional "sacred" or "divine" kingships in southern Omotic-speaking regions of Ethiopia (Maale, Wolayta or Gofa), the system of clan-elders and religious leaders among the Somali, or the Dizi councils of chiefs and elders. They all contain core elements of an indigenous "rule of law" system, whereby people have basic individual rights, next to community rights.

meetings (*guumi*) aimed at consensus (and which probably formed an integral part of the political system, in close association with the *gaadaa*).<sup>10</sup> Lewis<sup>11</sup> has called the political orientation and organization of decision-making through assemblies and election of leaders with specialized work functions among the Oromo as "republican". There are as yet few studies of how such structures articulate with the modern structures put in place under the Derg or under the new regime.

About this aspect more can be said on the basis of a second and very similar case, that of the "acephalous"<sup>12</sup> agro-pastoral societies like Mursi, Me'en and Surma in southern Ethiopia (where fieldwork has been carried out over the past few years). These small-scale societies have a system of political decision-making through a reigning age-set, community elders and ritual leaders. Decisions are also achieved in structured public debates, aimed at majority opinions and common action. The Surma, for example, constitute a society of about 28,000 people where no ethno-nationalist stirrings have occurred, but which, along with other rural groups in the South, has long been marginalized. Under the ethnic self-rule ideology of the new regional organization, a so-called Surma Council has been installed with 11 elected members. It consists of young people, often ex-soldiers who know Amharic, the national working language. The work of the Surma Council tends to bypass the traditional arena of political decision-making located in the above-mentioned Surma assemblies and public debates, because they are seen as irrelevant to the programme which the state wants to be implemented. For the state, "democratization" does mean "ethnic representation" and working through ethnic elites, but not necessarily autonomous grass-roots decision-making.

It must be said that this ethnic model has given the Surma at least a voice within the political structure: even though they are co-opted into a state structure where they have little influence, they have seats in the regional and "zonal" administration (a quota of three people), and are even represented (with one appointed deputy) in the national parliament, the House of People's Representatives. But if participatory local administration within the Surma community, public debate, consensus-building and the ritual confirmation of collective decisions are neglected, the Surma will remain an unstable element. This partly depends on which people are going to fill the position of chairmen in the "peasant-associations" which the Zonal government intends to install among the Surma. If the elders and traditional leaders are barred from exercising influence, another field of tension will be built up. The new stratum of young Surma leaders will not be able to enforce government policy, except by dividing the community.

These examples reveal once again that customary models and organizing principles from the ethnic past cannot and will not be accepted by the state as a direct basis for present-day political reconstruction, despite claims to the contrary. They will largely disappear in the new structures. The 1994 Constitution does not contain a structural and recognized place for such models and ideologies pertinent to an ethnic group/nationality. The actual regional policy so far shows

<sup>10</sup> See Bassi, loc. cit.

<sup>11</sup> Cf. Herbert L. Lewis, "Democracy and Oromo political culture", (1995) 7 *Life and Peace Review* 26.

<sup>12</sup> In the sense of more democratic, non-centralized societies without a strong executive power and characterized by more structural equality in collective decision-making.

even less concern with the "common culture, bond, identity, consciousness and territory" with which the "nations, nationalities and peoples" are defined in the Constitution (see below). Perhaps in the case of people not seriously exposed to modernizing political and economic influences of the past decades, like the Surma or the Boran, such traditional structures may be maintained for longer, but not, for example, among the majority of the Oromo or Gedeo or Kaficho who are farmers and traders.

In the emerging ethno-national movements and political parties, traditions of political organization, customary law and cultural autonomy provide elements of a value system and a fund of collective memory and identity which cannot be denied. As Paul Baxter has said in a study of the Oromo movement, "values drawn from the past do, nevertheless, have contemporary relevance and a hold on all our imaginations, for better or for worse".<sup>13</sup> The core point emerging from a study of past or pre-modern forms of political and social organization among "ethnic groups" which remained outside the sphere of the Ethiopian central state is that they usually had principles on the limitation of absolute power, which we would now call constitutional.

Because of the past struggle against the Derg dictatorship for more autonomy and recognition of rights and the current discourse of ethnic identity, there is no going back to past narratives of unity. But an integral part of these collective memories is that of the histories of inter-group contacts, exchange and mutual influences within state structures. These have to be institutionally and constitutionally acknowledged.

#### SOCIAL AND CULTURAL BACKGROUNDS OF THE RESURGENCE OF ETHNICITY

The question of how the ethnic heritage can be "translated" into political arrangements is a fundamental problem, with constitutional aspects. If one answers "autonomy or independence", the question arises, in what form? That it must be a Western-style parliamentary democracy with elections and a multi-party system may seem logical but only to external Western observers. A specific problem in the Ethiopian context is that every regional state now so designated under the federal arrangement is multi-ethnic, even Tigray (where Saho and Kunama as well as Amhara, Oromo and other minorities live with Tigray people). None of the nine regional states is mono-ethnic,<sup>14</sup> so the protection of "minority rights" is needed also in the future constitutions of such states. The problem for a federation "linking heterogeneous groups in a process of institutional dialogue",<sup>15</sup> is thereby just deflected towards another arena, a lower level, where the same problems of what the democratic exercise of rights means and how it can be guaranteed, come bouncing back. The spur to conflict of interests and identities has been the expansion of central state power in Minilik's time, consolidated under the centralizing rule of Haile Selassie, framed in a narrative of modernity, development and authoritarian control.

<sup>13</sup> Baxter, op. cit., 183.

<sup>14</sup> See the recent 1994 Census reports on the various regional states of Ethiopia, published by the Central Statistical Authority, Addis Ababa, 1995-1996.

<sup>15</sup> Cf. Adeno, op. cit., 621.

The 1994 Constitution thus intends to present a model restoring the federal tendency inherent in Ethiopia's geo-political character,<sup>16</sup> but its explicit reinstatement of ethnicity in law comes in a politico-economic situation which has made ethno-regional groups more interdependent than ever before, and where the central state has come to play an essential role as a resource and a mechanism of redistribution.

If historical or ethnic group identities do not show a direct continuity with the past, and if the current phase of political mobilization of ethnicity is not a direct or "logical consequence" of past exploitation and repression, as is often asserted by the elite spokesmen (mostly living in exile) of the ethnic groups, a direct return to models of the ethnic heritage for social and political purposes cannot be envisaged as a solution to redress current problems in the context of a state.<sup>17</sup> On the assumption that the state is still a desired mechanism to realize rights of a collectivity and of individuals, all ethno-regional/ethnic liberation movements (many of them represented at the National Conference in Addis Ababa in 1991, organized by the EPRDF) share the view that a state form of organization is useful, either as a vehicle for resources or to realize one's own ambitions of autonomy, democracy and development in a new ethno-region.

#### CURRENT ETHIOPIAN REALITIES AFTER THE DEMISE OF THE NARRATIVE OF UNITY

The Derg regime in Ethiopia crumbled because of centrifugal regional tendencies, but perhaps more so because of violent, authoritarian rule stifling the exercise of democratic rights which ultimately undermined the whole social fabric. Post-Mengistu Ethiopia is marked by a discourse of diversity, ethnic identification, and even confusion and fragmentation. The old national narrative of "unity in diversity" under Haile Selassie and "unity from diversity" under Mengistu, clad in the symbolism of respectively a national religion (Orthodox Christianity) and a historical process of a brightly unfolding socialist future (Marxist communism), is gone for good. But instead, a workable political formula to deal with the heritage and the memories of diversity and autonomous polity (19th-century kingdoms or chiefdoms from Maale to Kafa, from Jimma to Gojjam) has not yet been formed, unless one accepts the narrative of "national self-determination" and its ethno-nationalist elaborations. At present, despite five years of experimentation in Ethiopia, the idea of self-determination is, for many observers, still little more than a slogan, an ideology which has not received a workable political solution.

We know the actual ethnic diversity in Ethiopia, and the enduring problems of ethno-regional disparities in education, infrastructure, development and representation in leading administrative positions at the level of the central state. Both the large Oromo population and the many minority groups in Ethiopia, if looked at proportionally, were underrepresented in all major domains. Many groups which were incorporated or conquered by Minilik II in the late 19th century remained marginal to the polity, the economy and the exercise of

<sup>16</sup> During most of its history Ethiopia was *de facto* a kind of federal country, where the power of the monarch was often superficial and remote, and regional autonomy substantial. See Christopher Clapham, "Constitutions and governance in Ethiopian political history", paper for the Symposium "The Making of the New Ethiopian Constitution", May 1993. Addis Ababa: Inter-Africa Group.

<sup>17</sup> Cf. Baxter, *op. cit.*, 183.

administration. This was often conditioned by their geographical remoteness from the centre, for example, as a malarial lowland and a border area without roads and few interesting economic resources to harness. In view of the diversity of regions and ethnicity it is nevertheless remarkable how little of the fighting in the period of Haile Selassie and the Derg has been systematically against other ethnic groups as such, or because of "ethnic problems" and suppression. For instance, if any group had any reason to fight the central government it would be the Arssi Oromo,<sup>18</sup> violently subdued by Minilik and kept in check by Haile Selassie. But the Arssi did not mobilize an armed struggle against the regime. The ultimately successful revolt came from a core Abyssinian area of the empire, Tigray, which had always had a large amount of autonomy and leverage. Also, its people were not against specific "ethnic groups"<sup>19</sup> as such, but primarily against unjust and dictatorial rule which happened to come from Shewa. But the violent suppression of the Derg in later years ultimately also targeted the cultural identity of people: forbidding the use of their own languages and the organization of significant cultural ceremonies (initiations, age-group assemblies, religious rites) contrary to the "spirit of socialism" led to ethnic or ethno-regional mobilization.

In the various rebellions emerging just before and after the Ethiopian revolution of 1974, Marxism was the leading ideology. The formula of "national self-determination" of the various oppressed nationalities of Ethiopia was part of its discourse.<sup>20</sup> The EPRDF came to power in 1991 using this ideological tenet, rooted in its struggle for Tigrayan autonomy. The idea of "national self-determination" can be seen as the second major ingredient of the revolutionary ideology of the Ethiopian revolutionary student opposition, and it became prominent *after* the demise of the socialist narrative which emphasized class-analysis, as presented by the leftist Ethiopian movements MEISON and EPRP, movements which lost the struggle for power in the 1970s to the military Derg dictatorship. The Derg subsequently adopted a rigid and dogmatic version of this socialist ideology, relating all nationality questions to class questions and to a future socialist order in which such problems would dissolve. The EPRDF in fact is executing the second phase of the Ethiopian revolution with its emphasis on "national self-determination".<sup>21</sup>

The problem is, however, that the concept itself is much less popular now than in the 1970s and 1980s. Given the recent problems in, for example, Bosnia, Mexico, the former Soviet Union, India, or the Philippines, one is inclined to conclude with Eric Hobsbawm, in his monumental history of the 20th century,<sup>22</sup> that "national self-determination" is an idea whose time is past. In addition, from a legal view point, it is also clear that it is not a straightforward concept (as many self-appointed ethno-nationalist elites claim). Constitutional lawyer

<sup>18</sup> See Abbas Haji, *L'Etat et les Crises d'Intégration Nationale en Ethiopie Contemporaine*, Talence/Bordeaux, 1993.

<sup>19</sup> The word as such in Amharic (*behereseb*) did not even exist before the early 1980s, when Mengistu's neo-Stalinist ideologues introduced it during their work for the Institute for the Study of Ethiopian Nationalities.

<sup>20</sup> As expounded in a famous 1969 article by Walleigne Mekonnen in a student opposition paper (*Challenge*) in the Haile Selassie years, cf. Kiflu Tadesse, *The Generation. The History of the Ethiopian Peoples' Revolutionary Party. Part I: From the Early Beginnings to 1975*, Silver Spring 1993, 53-54.

<sup>21</sup> The TPLF long had as its ideological core the Marxist-Leninist League of Tigray, of which Ethiopia's present leaders were members. It is not known whether this League still formally exists.

<sup>22</sup> E. Hobsbawm, *Age of Extremes. The Short Twentieth Century 1914-1991*, London, 1995, 567.

Alan Buchanan<sup>23</sup> has made a case for the view that "self-determination" is always a *multidimensional* goal, thus a "qualified right" and not a "moral right" at all times and circumstances.

THE TRANSLATION OF ETHNICITY: A LOOK AT THE CONSTITUTIONAL CLAUSES ON NATIONALITY RIGHTS

Since 21 August, 1995, Ethiopia has been no longer a unitary but a federal state. The new Council of People's Representatives was installed and the new federal arrangement was officially proclaimed, with as its basis the December 1994 Constitution (which, incidentally, was only gazetted in December 1996).<sup>24</sup> Below are outlines of the main constitutional principles regarding ethnic or "nationality" rights and the judicial order, and some of their implications. It is to be noted that the Constitution drafters (consciously or not) have made an effort to link it with principles outlined in the African Charter of Human and People's Rights, adopted in 1983. This underlines community rights (second and third generation rights) next to the individual human rights which were seen by many Africans as based too closely on liberal Western ideas.<sup>25</sup> The main clauses of the Ethiopian Constitution, which make it certainly a very original document, refer to ethnicity and the federal order.

Sovereignty has been given to the "nations, nationalities and peoples" of the country (Article 8.1). This is potentially a very large number, although no list is given (only for the 45 groups in the Southern region, in Article 47.1, footnote).<sup>26</sup> These three terms are seen as equivalent and defined as communities having the following characteristics: "people having a common culture reflecting considerable uniformity or similarity of custom, a common language, belief in a common bond and identity, and a common consciousness the majority of whom live within a common territory" (sic) (Article 39.5). This definition is questionable, and it contains contradictory elements. Not all groups identifying themselves as a community do so on the basis of all these criteria, only on a number of them, and some groups may primarily refer to territorial, economic, religious or even a sub-ethnic clan identification (which allies them with people from another "ethnic group"). For the actual delineation of the group, the Constitution drafters appear to have taken the linguistic criterion as decisive (as did the Institute for the Study of Ethiopian Nationalities in 1983). But there will be uncertainty in the future about the extent and nature of such groups, even apart from the reluctance of people to be always identified on the basis of ethnicity.<sup>27</sup>

Interestingly, this sub-article on definition comes only five articles after the opening one (Article 39.1) which starts by giving the "nations, nationalities and peoples" (even before one knows who/what they are) their "... unrestricted

<sup>23</sup> Allen E. Buchanan, "The right to self-determination: analytical and moral foundations", (1991) 8 *Arizona Journal of International and Comparative Law* 41-50.

<sup>24</sup> The Constitution was published on 12 December, 1996, with the imprint "21 August 1995" (the date of the inauguration of the federal Republic of Ethiopia) in Vol.1, No. 1 of the new *Federal Negarit Gazeta*, which replaced 54 years of the *Negarit Gazeta*, set up by Emperor Haile Selassie I. Vol.1, No.1 of the *Federal Negarit Gazeta* thus appeared after about 40 subsequent issues were already published. The reason for the delay is not known.

<sup>25</sup> With good reason, see Buchanan, op.cit., 45.

<sup>26</sup> In the Constitution, 51 groups are mentioned if those contained in the names of the other member states are included.

<sup>27</sup> This "over-ethnic view" of people may, incidentally, be a serious bias in Western perceptions (and also within Africanist studies) of African societies.

right to self determination up to secession". This principle of secession is a left-over from the socialist-communist thinking referred to above, and is an extreme form of the "right to national self-determination". Furthermore, as defined in the Constitution, it has problematic aspects. The right has *not* been given to the nine member states of the federation (they are not the "sovereign units"), but instead to the "nations, nationalities and peoples" in the member states of the federation (in Article 47.2). So this means that they (the "nations, nationalities and peoples") can secede from the federation *and* from the member state.<sup>28</sup> This may have been designed to counteract actual secession. It is also a constitutional anomaly that the right to secede is given to rather badly defined units (the "nations, nationalities and peoples").<sup>29</sup> However, to seek a solution to this problem by asking<sup>30</sup> for a clear definition of the ethnic groups which are sovereign and which can be accorded the right to secession is a mistake. Except perhaps in the case of Region 9 (the small Harari city-state, created probably to "protect" the 50,000 Harari people in the midst of other, mainly Oromo, groups), actual social reality shows that ethnicity cannot be ordained on straightforward or fixed criteria. People shift allegiances according to perceived political and economic opportunities or to religious and cultural affinities. That is why the reference to "ethnic identity" of citizens is best left out of a Constitution as a structural principle.

There is no overlap between member states, and "nations, nationalities and peoples", and thus there arises a confusion to what the real sovereign units are and how many can claim their separate status. In practice, there have been various attempts to solve this in the past two years, such as by creating more and more "special districts" (called in Amharic *lyyyu woreda*) within the member states, carved out along "ethnic" lines within a larger region (for example Konso *woreda*, the Surma *woreda*) which become relatively autonomous enclaves in a member state. This has already had the effect that many groups now claim such a status, which may complicate administrative levels further.

A final interesting aspect of the reflection of ethnicity in the Constitution is that of a bypassing of the constituency voting system outlined briefly in Article 54, by some "minority nationalities and peoples": they were given a representative in the Council of People's Representatives (parliament) without elections. In subsequent legislation, 22 such groups were given such a free seat, all with a population of under 100,000 (which is the size of a constituency). "Minority nationality" is again a new term, cross-cutting the earlier division into nations, nationalities and peoples, and member states, supposedly also based on ethnic criteria.<sup>31</sup>

The actual division of federal powers between member states and federal government (as defined in the Constitution) is "not federal enough". As stated in Article 52.1-2, member states can enact federal legislation and can organize their own state political structures. But the clauses make it clear that the states have no role in debating policies and in proposing legislation formulated at, or with an impact on, the federal level. Most federal systems give the member states

<sup>28</sup> See the short but very perceptive paper by Flora Goudappel and Maarten Oosterhagen, "Ethnicity, federalism and development: constitutional solutions for Ethiopia?" Rotterdam, Erasmus University, Center of Constitutional Law, 1996, 2

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*, 6.

<sup>31</sup> *Ibid.*, 5.

more power of this kind; examples are Germany, Canada, Mexico, Nigeria. Goudappel and Oosterhagen<sup>32</sup> are correct in noting that there is no federal system of checks and balances in the Ethiopia model, to the detriment of the power of the member states.

The text also says (Article 50.9) that the federal government "may" delegate "some of its [many] powers" to the member states but not that it must, or that in the future it will do so. Also, states may delegate some of their powers and responsibilities to the federal government. The latter means that the central government can, with the proper "organizational operations" (the local term used), interfere almost as it pleases in regional state affairs. This has happened, for instance, in 1995 when the trouble-spot Dire Dawa was taken out of the Somali regional state and declared a separate region, directly administered under the federal government.

Another role of the member states is in the second (least important) chamber of the Parliament, the Council of the Federation. The members of this Council are chosen (delegated) by the nine member states, but the influence of the member states is minimal. The Council itself has limited powers: it can only "settle disputes" between member states, interpret and contribute to amending the Constitution. A Constitutional Court or Constitutional Inquiry Commission, announced in Article 82, was installed in July 1996. By serving under the rather impotent Council of the Federation it cannot maintain a sufficiently independent role. It may have received nominal judicial power in Article 84.1 (though supervised by the Council), but it still remains a non-judicial institution.<sup>33</sup> Its power therefore amounts to little if one realizes how the Council is dominated by the federal Executive power (Prime Minister and Council of Ministers). Six of the eleven members of this Constitutional Inquiry Commission are chosen from the Council of the Federation, and five are political appointments, close to the Prime Minister.

Goudappel and Oosterhagen<sup>34</sup> have rightly emphasized that the member states have few real powers to take care of their own internal affairs. If a member state has to be given powers (by decentralization and devolution) in the domain which warrants its existence, it has to be able to carry out its work. But the member states have not been given those powers: in practice there is no real subsidiarity (that is, the principle of letting policies be carried out by government organs which can do them best). The underlying problem is that the very basis on which the states have been defined is shaky: the prime criterion has been ethnicity and language. So this means that they are apparently considered to be the best entities to deal with matters like language policy, cultural policy and the education system. But for the devising and implementing of the practical economic, infrastructural or development tasks, the present-day regional states may not be the most effective units. (The record of many regional states so far indeed bears this out.) In order to enhance the role of the member states in the present situation, the Council of the Federation should constitutionally be given real controlling and legislative functions, more like those of the main parliamentary

body, the Council of People's Representatives, although even this does not have the right to initiate legislation.

The economic structuring of regional autonomy and decentralization to the states (partly contained in Article 51(1,2,6,9,11); see also Articles 77 and 89 on "economic objectives", 97, 98 and 100–102 on taxation powers) suggest, in combination with the legislation which has subsequently been issued,<sup>35</sup> that the central state intends to maintain a large extent of control over taxation and fiscal policy in the regional states, even the final say (as was the case in the 1991–94 period of transition).<sup>36</sup> The clause of "self-determination" is ambivalent also in the economic sense, perhaps partly because of the weak economic basis of the individual member states, especially the smaller ones which are hardly viable. Various other economic phenomena such as transhumant pastoralism, border trekking and labour migration (which were always very common in Ethiopia) are not accounted for in the scheme of things. If strictly enforced, the prevention of such activities will probably result in local conflicts over resources as well as the exclusion of people who used to migrate.

Again one gets the impression that "self-determination" was granted for rhetorical and ideological purposes, and that there seems to be no intention of the central federal government to relinquish real power (apart even from the question of the economic and administrative *capacity* of the present regions to go it alone). This inbuilt problem of resource allocation will lead to disputes. It may not be a problem for the smaller, dependent states, but may incite elite groups in the larger regional states not to seek compromise and integrative accommodation, but to go for secession all the more ardently.<sup>37</sup>

Land rights are an issue with a bearing on ethnicity. In Article 40.3, the Constitution has declared public (that is, state) ownership of land and natural resources (trees, wells and so on): they are said to be "... the common property of the nations, nationalities and peoples of Ethiopia". This means that individuals are declared perpetual tenants of the state. While perhaps laudable in its intention of trying to prevent inequality and the emergence of a new landed class and a landless proletariat, this clause has two main drawbacks: it perpetuates the unlawful confiscation of all private land (without compensation) by the Derg regime and creates an ultimate feeling of insecurity among the rural population, and it will inhibit long-term investments. (This does not mean that the government cannot and does not execute policies aimed at the improvement of productivity and at development, such as through extension schemes, better transport facilities, large-scale distribution of fertiliser and improved seeds.) The declaration of all land as state-owned may, in addition, subvert the rights of ethnic groups/communities to possess and utilize their own ancestral lands, with which they often have a relatively harmonious relation of "stewardship" (the Konso, the Hamar, the Dizi) as well as a strong cultural and ritual bond. The land can also be appropriated without restrictions for federal purposes like mining or hydro-electric projects.

<sup>35</sup> Cf. John M. Cohen, "'Ethnic federalism' in Ethiopia", (1995) 2 (N.S.) *Northeast African Studies* 172–74.

<sup>36</sup> See Eshetu Chole, "Opening Pandora's box: preliminary notes on fiscal decentralisation in contemporary Ethiopia", (1994) 1 (N.S.) *Northeast African Studies* 7–30.

<sup>37</sup> See Paul H. Brietzke, "Ethiopia's 'leap in the dark': federalism and self-determination in the new Constitution", [1995] 39 *J.A.L.* 32.

<sup>32</sup> *Ibid.*, 3.

<sup>33</sup> See Aberra Jembere, "The functions and development of parliament in Ethiopia", in C.M. Zoethout et al. (eds.), *Constitutionalism in Africa. The Quest for Autonomous Principles*, Deventer, 1996, 82.

<sup>34</sup> *Op. cit.*, 3–4.

In terms of national surplus extraction (such as for exports), the land issue may become a major one especially in the Oromia region, the largest and most productive area (most of the major exports come from there: coffee, gold, hides and skins). Ethno-nationalist groups such as the Oromo Liberation Front see here a central government ploy to exploit the region's resources "for its own benefit", not ploughing the profits back into the region for development purposes.

There is an absence of judicial review of the courts over the state executive and legislative powers in order to check their actions and possible infringements on individual and group rights. Judicial review is of course essential ultimately to safeguard human rights (enumerated in Articles 13-44 and 89-92).<sup>38</sup> Neither are there possibilities of independent constitutional amendment. Amendments can be made by proper (though very difficult) procedure in the Council of People's Representatives (Articles 93, 105.2) but in view of its dependence on the executive and the lack of a power of initiative to propose an amendment, this action will be inhibited. For instance, the Constitutional Court which is formally under the Federal Council has five of its members appointed by the Prime Minister and six members (most likely selected through party channels) delegated from the regional state governments and is thus not fully independent. It would have been better to make the Constitutional Court a part of the Supreme Court (which is less in the orbit of politics) and to have this body invested with constitutional review powers.

When reading the Constitution it is also notable how far the proclaimed text is removed from the actual practice of the political culture and social relations in Ethiopia. First, Ethiopians have always conducted their lives and regulated their disputes according to customary law and will continue to do so. In Chapter 9, the Constitution does not mention customary law jurisdiction; this is the domain of the 1960 Civil Code (still valid). On the basis of the Civil Code, Article 3347(1), customary law is indeed partially retained in court jurisdiction. But its relation to codified state law (mainly relating to the Christian-religious and monarchical tradition), which in Ethiopia has been well-developed since the Middle Ages, is tenuous. The mass of the population did not know this tradition very well, except in the Christian highlands.

Secondly, one cannot establish an independent judiciary by decree (as in Article 78.1). The Ethiopian justice and court system was well-developed in some areas, but has always been susceptible to corruption at the lower levels (of province and district) and to political pressure at the higher levels. It will remain so, although strenuous efforts are made to exterminate it. The judiciary is still not independent, certainly not after the wholesale replacement of all experienced judges of the courts in the past two years by ill-trained youngsters.

The problem of the independence and observance of the judicial power is connected to that of its relation with the legislative and the executive powers. Some observers (like Goudappel and Oosterhagen, Henze<sup>39</sup> and Abera<sup>40</sup>) have already noted that in the definition of this relationship the balance is tilted strongly towards the executive. The latter is itself invested with many legislative and judicial powers, or with powers to influence the two other branches. This

<sup>38</sup> Abera Jembere, op. cit., 88.

<sup>39</sup> Paul B. Henze, "Comments on the Ethiopian Draft Constitution of 1994", Washington, D.C., unpublished paper.

<sup>40</sup> Abera, op. cit.

reflects on the federal arrangement of ethno-regional power-sharing, mentioned above.

Reading the draft Constitution, there is no doubt where the real power lies: with the executive, that is, the Prime Minister (behind him his political party) and Council of Ministers. The Council of People's Representatives does not even have the right of initiative. Interviews with members of this Council confirm the interpretation that all the political dynamics emanates from the side of the executive. Council members do speak and offer criticism, but not independently. At all times they have to mind their language. As was evident in the past (first year of session (even from the Council's annual review presented in August this year by the House speaker), many members are inexperienced and intimidated. They do not even bring up pressing problems which may exist in their constituencies, certainly not when they concern violent conflict.

There remains a problem in the relation between the first generation rights (elementary human rights), the second generation rights (social and cultural rights) and the special third generation rights as vested in the nations, nationalities and peoples of Ethiopia. If the first two sets of rights are properly respected and maintained, the third set does seem a bit superfluous. During the discussion of the Constitution in the Constitutional Assembly on 8 December, 1994, there seemed to be a tendency to equate "human and democratic rights" with the rights of "peoples, nations and nationalities to self-determination".<sup>41</sup> But, as Henze noted: "the resolution of conflicts between individual rights and ethnic pressures, including the protection of individuals *within* nations, nationalities and peoples' is not specifically considered".<sup>42</sup> While a catalogue of first generation human rights is enumerated in Chapter 3 (Articles 13 to 27)<sup>43</sup> of the Constitution, their relation to the nationality rights (Articles 39, 47) could have been clearer. In a political sense, the latter may tend to overshadow the former. This problem will eventually present itself in any of the nine member states in the federation, because they all have their own minorities.

A final problem which encapsulates many of the foregoing critical points is the following. While the Ethiopian Constitution has recognized "ethnic rights" in one form or another, even if the outlines of this concept remain ambiguous and legally fuzzy,<sup>44</sup> it has not addressed the presence of the "non-ethnic" population in Ethiopia: not only do the large group of persons with "mixed origin" parents not have a structural place in the order of things, also the growing urban population is left out. What are the urbanites, what is their identity?<sup>45</sup> The Constitution has tried to answer this by declaring Addis Ababa, the largest urban centre with at least three million inhabitants, a special, chartered territory, with "complete powers of self-administration", but detached from the ethno-federal order (Article 49.1-5). But it is not only Addis Ababa that has a large,

<sup>41</sup> Cf. the state newspaper *Ethiopian Herald*, 9 December, 1996, 1.

<sup>42</sup> Henze, op. cit., 3.

<sup>43</sup> Art. 24 is a novel one, stating (24.1) "the right to human dignity and good reputation", and (24.2) "the right to freely develop his personality in a manner consistent with the rights of others".

<sup>44</sup> Cf. Adeno, op. cit., 619, 622.

<sup>45</sup> This problem was already implicit in the ethnic map of the Derg regime, drawn up in 1984 by the (Government) Institute for the Study of Ethiopian Nationalities, and discussed by J. Bureau, "À propos de l'inventaire des nationalités éthiopiennes", in C. Lepage et al. (eds.), *Études Ethiopeennes, Actes de la Xe Conférence Internationale des Études Ethiopeennes, Paris, 24-28 août 1988*, Paris, 1994, Vol. 1, 501-511. In fact, a lot of work of delineating "nationalities" by the Derg was without much change taken over by the EPRDF regime after 1991, showing an underlying common point of view derived from Marxist views on the "national question".

mixed population, including people who will never return to their "ethnic areas of origin", but also other towns like Shashemene, Awasa, Jimma or Asella. These people (numbering millions) have by implication been declared "non-existent", non-ethnic. The result in actual practice is that local ethnic groups to whom the region nominally belongs, or those who are a majority group in the region where these cities are located, are trying to assert their dominance on local affairs. For instance, in Awasa, a large town in the Southern Region, the Sidama (who are over-represented in the zonal administration) claim the town as part of their territory, although it was not traditionally theirs, and try with all means (often surreptitiously) to expand their numbers in the town. This local dominance would also mean that the Sidama language would have to be taught in the schools, pushing out Amharic, the national working language used until now in the mixed urban areas. For all such problems there are no obvious solutions.

#### CONCLUSIONS

Ethiopia's Prime Minister is reported to have said last year, in a talk with a constitutional scholar, that he did not really know where Ethiopia was going. This reflects a commendable openness of mind, but perhaps also an underlying confusion about a process which may have lost a clear direction. The Constitution did apparently not offer an adequate framework for national co-operation and cohesion.

No doubt the constitutional shaping of ethnicity in Ethiopia has been unprecedented and daring. It is a formidable and in many ways exciting challenge, perhaps with far-reaching lessons for poly-ethnic countries in Africa as a whole. However, in view of the dissenting voices on both the Constitution and the putting in place of democratic structures by the present regime, and in the light of the peculiarities in the actual Constitution, sketched above, it seems that the challenge is not yet met in a satisfactory way. It is not only that, like the three other constitutions before it, the 1994 one serves "to consolidate the power of those who already held it" (as Clapham puts it).<sup>46</sup> More importantly, the Constitution has tried to reify, to freeze something which is by nature fluid and shifting: ethnic identity. That language has been declared as one of its main defining characteristics is also highly debatable.

Nor has the Constitution solved the problem of reconciling the various generations of rights. The list of third generation rights goes far, probably too far, in acknowledging a "right to secession" as an extreme interpretation of "national self-determination". No other constitution of a democratic country has a clause stating this right, and no constitutional lawyer or commentator<sup>47</sup> can be found who would endorse this principle, even if they are positively disposed toward the regime issuing the constitution. Ethiopia is special, but not so special that such a principle is needed. Henze states that "the concept of secession has no validity as a feature or requirement of democratic governance".<sup>48</sup> Furthermore, as shown above, the Constitution does not take it seriously, because it retains all real power at the state level. This ambivalent formula will in itself encourage a radicalization of demands for separatism of ethno-regions or "nationalities",

<sup>46</sup> See Clapham, op. cit., 5.

<sup>47</sup> Cf. Brietzke, op. cit., 34-35; or Henze, op. cit., 4-5.

<sup>48</sup> Henze, op. cit., 4.

once they realize that the government is not serious about it. It would have been better to give real federal autonomy and maintain an institutionalized structure of integration- and compromise-politics on the national level. There is no doubt that the Constitution will sooner or later have to be amended in this respect.<sup>49</sup>

The actual implementation of the federal order as defined depends very much on a rapid and effective devolution of powers and on a phenomenal capacity-building in the "regional states". In view of what was said above and of the persistent stories in the Ethiopian press and the internal government assessment reports, there hovers a big question mark over the enterprise. The regional states of Beni Shangul-Gumuz, Somali, Afar and Gambela especially have been dismal failures, as indeed the central government has admitted, and show the unworkability of the structure. Also in this respect, the constitutional definition of the rights and the authority of the federal units vis-à-vis the central government will have to be amended.

An underlying failure of the Constitution and the federal structure is that the Ethiopian polity is not defined as, or designed as, an arena of compromise or issue politics. In this respect, constitutionalism is of course an underdeveloped field in Ethiopia. It is, purposely or not, set on the further strengthening of ethnicity as a political identity and as the vessel for "democratic rights". Interestingly, in this respect the Ethiopian political model shows that a country can be *post-modern* without having gone through a successful *modern* phase (it has no shared idea of the national state "project", no solid industrial society, no mass consumption, no media culture, and so on). It is post-modern in its casting out of grand narratives (as shown above), its emphasizing multiple identities, and its encouraging relativist commitments and partisan attitudes in people's identifications. But while this fits in with the global discourse on multi-culturalism and the "equality" of values and cultures, it is debatable whether it was ever the preferred option of the Ethiopian "toiling masses", in whose name the present regime and its predecessor alleged to have assumed power. Historical memories of exploitation and violent inclusion do exist among them, and they rightfully want a recognition of the dramatic events that have befallen them in the past century. But such a recognition does not necessarily subvert the need and possibility for a country-wide democratic polity (based on elementary individual rights). In addition, in the "pre-constitutional" law which existed within the various ethno-cultural traditions, ethnic identity as such was not a predominant principle.

Hence, in view of the underdeveloped political culture of debate and compromise among both the government and the various self-styled "liberation movements" and opposition parties, the cultivation of ethnicity as the political language is very problematic. Most elites of the ethno-regional groups now carved out seem to want to grab political power regardless of the consequences. They have no solutions to deal in an efficient and institutional way with the "minorities" in their own midst. In this, they bypass traditional mechanisms of debate, alliance and reconciliation which were characteristic of the ethnic groups until very recently and partially still exist (such as the Somali-Amhara *sedqo*

<sup>49</sup> The Constitution drafters have taken the extreme interpretation of "self-determination", i.e. they followed the "Nationalist Principle" (cf. Buchanan, op. cit., 46), without having sufficiently studied and weighed the various other options in this field: autonomous community structure (as in Spain), cultural autonomy, regional autonomy, self-government, etc.



institution, the Oromo *guumi* assemblies, the inter-ethnic ritual ("traditional") reconciliation-meetings between ethnic groups in the Maji or any other south-western area). If one looks at the possibility of grounding the federal-democratic order in new administrative structures, there are points in especially the Oromo political tradition (important because of its size and its "republican" nature) but also in that of others like the Kaficho, the Sidama and the pastoral peoples of the south and west, with which connections can be made, as they have these strong elements of a political culture of egalitarian consensus-building which cuts across "ethnic boundaries". This basis should be built upon in the actual implementation of the federal decentralized structure. Only then can a real "voluntary union of peoples, etc."—a declared aim of the EPRDF government—be established.

To conclude: of course, the issue of recognizing ethnic diversity in a poly-ethnic polity like Ethiopia deserves much attention. The present government has made a serious effort, although its societal and institutional basis for constitution-making, and for decision-making in general, has been slim. There is no going back to a unitary state structure in Ethiopia which denies ethno-regional differences and rights, or which lets one group dominate the state. The formula of ethnicization (although in a different, more effective, federal form) should perhaps be encouraged if, first, it is generally interpreted and implemented as liberation and democratization; secondly, it is sustained also in the domain of respecting *individual* human rights *within* the ethno-regions; thirdly, it works in the economic domain: and finally, it is a tendency and a frame of mind accepted by the "rural masses", the majority. If, however, all this does not happen and if the ethnic emphasis combined with economic problems would instead lead to ethnocentrism, regional economic disparities and a reproduction of inequalities on the intermediate level of the new ethno-regional states, then one wonders what is new, and whether the Ethiopian people have won anything yet by the constitutional recognition of their being ethnically separate.