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THE QUESTION OF THE SUPREMACY CLAUSE AND ITS RESOLUTION MECHANISMS UNDER ETHIOPIA'S FEDERAL AND CONSTITUTIONAL DESIGN AND PRACTICE: 'TOO MANY COOKS IN THE KITCHEN'?

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Abstract

In a federal system, laws made by the federal government and the constituent units usually contradict each other. Thus, which law should supersede would become a pressing issue. Despite variations, virtually all federal systems adopt the federal supremacy clause by stipulating it in their constitutions. However, this does not apply to Ethiopia where the Federal Constitution opts for a blanket silence on the supremacy clause. As a result of the constitutional lacuna on this subject, different approaches, including constitutional, legislative, executive and judicial ones, have been adopted which in turn raised many questions and dubieties. This article aims to critically evaluate the approaches employed by different government organs and its concomitant consequences from constitutional and comparative perspectives in federal dispensations. Methodologically, the study employed a qualitative research method in general and a doctrinal approach in particular. Moreover, it used a comparative analysis which puts the Ethiopian experience in the perspective of other federal systems. Case and document analysis regarding the question of the supremacy clause was also conducted. The study, thus, found out that the approaches adopted as regards the resolution of the question of the supremacy clause under the Ethiopian federal and constitutional design is not only an unconstitutional act and ineffective but also lacks the center of adjudication. Such a misplaced center of resolution mechanism may jeopardize the development of federalism and constitutionalism in Ethiopia.

Keywords: Federalism, Federal Government, States, Inconsistent Laws, Supremacy Clause, Ethiopia

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1. Introduction

Federalism is characterized by multilevel decision making centres and legal pluralism from among other things.[1] In such a case, each level of government is authorized to make laws over matters specifically granted to it by the federal constitution. The powers and responsibilities distributed between the federal government and constituent units pertain to legislative, executive, judicial, and fiscal dimensions. Of all these spheres of powers, it could be assumed that the legislative mandate may encompass the remaining ones as it is discerned with the rule of thumb that it is the law maker that defines and details the particulars of the executive and judicial functions under the constitutional ambit.

Where the federal government and constituent units make laws accordingly, it is inevitable that both laws may contradict each other. In this regard, it should be taken into consideration that conflict of laws made by the same level of government is different from those which are enacted by different levels of government over the same subject matter in a federal system. While the former sort of conflict of laws constitutes a legal interpretation, hence resolved by employing the rules and techniques of interpretation of the law, the latter, on the other hand, constitutes the constitutional interpretation hence resolved by the principles and institutions of the constitutional adjudication. As a foresight, many federal systems resolve such conflict of laws by explicitly stipulating the supremacy clause in their respective constitutions. However, there are different approaches to the adoption of the supremacy clause in federal systems. While some federations like the USA,

[1] There are many principles that characterize and distinguish federalism from other forms of political governance such as unitary and confederal systems. These are: the presence of the federal constitution which is written, supreme, and rigid; the existence of two or more tiers of government; bicameral parliament; shared rule and self-rule; constitutional adjudicatory system; the doctrine of the distribution of powers; and intergovernmental relations. In addition, there are some values and advantages that are supposed to be obtained from federalism. These include, but limited to, experimentation and local innovation, accommodation of diversity and preservation of unity, economic prosperity, morality, mobility, liberty and human rights protection. Ethiopia's federalism is also distinguished by some peculiar features such as a clear recognition of the secession clause, the sovereignty of the nations, nationalities and peoples, unicameral parliament, lack of the supremacy clause and intergovernmental relations, and the adoption of the a monolingual language policy at federal level as compared with other multinational or pluri-national federations.

Nigeria, and Australia adopt a categorical superiority of the federal laws over the state ones subject to constitutional limits, some others like India, Germany, South Africa, and Kenya prefer to provide for a qualified and exceptional approach whereby the laws of the constituent units have supremacy based on some specified circumstances. In this latter case, one could imagine that the laws made by the constituent units have a degree of protection against the probable annulment by the federal counterpart in times of discrepancies. By doing so, it is also helpful for preserving the diverse cultures and interests of the constituent units commonly known as legal pluralism. The unique features of the regional and local contexts of each constituent unit may also be better served where there is such a room for the state laws to have some degree of ascendancy. Some federations like Belgium, in addition to dealing with the supremacy clause, stipulate for the preventive approach as a proactive mechanism of averting potential conflict of laws in the adoption of the supremacy clause.

Ethiopia's approach to the adoption of the supremacy clause is peculiar as compared with other federal systems. A silent approach has been preferred by the federal constitution. As a result, professionals of justice sectors at federal and state levels, namely the police, prosecutors, judges, and similar experts have faced many problems and challenges as to which law they should apply where there is a clear inconsistency between the laws made by the two levels of governments over the same policy fields commonly known as concurrent powers.

As a gap-filling purpose, different measures and decisions have been offered by different organs of government *viz*. the legislature (statutory approach), executive organs (executive approach), courts (judicial approach), and state constitutions (constitutional approach). This trend resulted in the multiplicity of adjudicative centres for resolving the question of which law should prevail in cases of inconsistencies. More than its multiplicity, ineffectiveness may also ensue as a result of which the title is suggested as '*…too many cooks in the kitchen'*. That is to say, the fact that many governmental organs have participated in the adjudicative mandate of the resolution of the conflict of laws made by the federal government and the states resulted in an ineffective institution as regards the system. What is more, the role of the legislative, executive, and judicial bodies in taking over such a mandate raises the

constitutionality issue albeit the constitutional lacuna towards the supremacy clause. While the blanket silence of the constitution regarding the resolution of the conflict of laws made by the two levels of government is one problem, the involvement of the three government organs and state constitutions in resolving the issues related with the supremacy clause without a clear mandate is another problem.

Moreover, the decisions and measures taken by all these un-mandated institutions demonstrates that they all appear to have tilted towards the unification and centralization of laws against the notion of legal pluralism envisaged by the federal and constitutional architecture. This proposition is proven by simply looking at the decisions and measures that have given the superiority of the federal laws over the state ones. The objective of this study is, therefore, to critically evaluate the approaches employed by the different government organs and its concomitant consequences.

Accordingly, the article is organized into four major sections. The first section presents introductory insights to the study. The second section provides detailed accounts of concepts related with the supremacy clauses by articulating its approaches in different federal systems. This is followed by the critical analyses of the approaches adopted by the Ethiopian case from multiple perspectives, including constitutional, comparative, and practical considerations which are provided in section three. The last section provides concluding remarks and the way forward in levelling the playing field for the proper and effective resolution of the supremacy clause in the federal system. To this end, an attempt will be made to suggest the exact and strict mandate of the resolution of the conflict of laws made by the federal government and the states over the same policy fields.

2. Conceptual and Comparative Frameworks

Federalism as a blend of shared rule and self-rule concept, there are many circumstances of interdependence, overlaps, and conflicts of powers and jurisdictions. While an attempt is usually made to divide powers and functions between the federal and state governments as neatly as possible, a watertight compartment has proven impossible for all theoretical and practical reasons. As a result, a constitutional approach to dividing powers in an exclusive form has been impacted by concurrent powers whereby the two

levels of governments get involved in the same policy fields with similar and/or different roles. This gives rise to the concurrency of mandates in several policy areas which in turn raises the issues related with the conflict of laws of the federal and state governments and its resolution mechanisms; an intergovernmental relation which is vital for negotiation on concurrent matters at the centre; and the role of the second chamber in influencing the federal government on behalf of the constituent units.

This article, as briefly described in the introductory part, concentrates on the conflict of federal and state laws on concurrent matters and its resolution mechanisms from different perspectives. Accordingly, the concept of the supremacy clause and its variants, a comparative view of approaches used in resolving the conflict of laws made by the federal government and the states will be explored.

2.1. The Supremacy Clause

Overlaps of jurisdictions and consequent conflict of laws between the federal and state governments are common in any federal systems.[2]Majority of powers divided between different orders of government display concurrency at its broadest sense. In substance, a supremacy clause would solve the

[2] The notion of a "federal system" is used according to the definition provided in F. Palermo and K. Kössler, Comparative Federalism: Constitutional Arrangements and Case Law (Oxford: Hart Publishing, 2017), 8–9, to include "all those systems in which at least two political tiers of government exist, thereby combining self-rule and shared rule and thus making use (to a greater or lesser extent) of the federal toolkit". It thus applies "not only to denominate fully fledged federal states (synonymously called federations). It also includes what are often referred to as regional or devolved states", as well as compound or federal-type states. "The latter are federal systems in legal terms, as they are—like consolidated federal countries—constitutionally unitary states, subordinated to the national constitution and with constitutionally entrenched political autonomy of the subnational units. Notwithstanding the use of federal system and federal country as umbrella terms, the differentiated notions federal or regional or devolved states are used when specific countries are meant or when a distinction between these notions needs to be made. For example, even if both Spain and Germany are, using our terminology, federal systems, the former is a regional state and the latter is a federal state". Furthermore, in general, this book uses the term state to mean a country as a whole (frequently associated with the adjectives unitary and federal); however, it can refer to a subnational entity when writing about a country that uses this specific terminology (e.g. states in the United States, India, Nigeria, etc. Valdesalici, Alice and Palermo, Francesco (ed.), Comparing Fiscal Federalism, Copyright 2018 by Koninklijke Brill nv, Leiden, The Netherlands, Brill Sense and Hotei Publishing, P1)

regulatory disputes that may arise whenever legislative powers of both levels of government act on the same subject matter in accordance with the division of powers.[3] In such conflicting circumstances, a resolution device must be designed through an appropriate institutional system. We should stress that the only criterion used to resolve any conflicts that may arise when exercising powers is the 'competence principle'. In the event of a conflict, the Constitutional Court will determine whose power matches the disputed activity; whoever has the power conferred by the Constitution or by a Statute of Autonomy will be entitled to intervene, while the act performed without the power will be nullified as unconstitutional, being *ultra vires*.[4] To this effect, Steytler remarks that before the issue of consistency between federal and regional laws arises, the prior question is whether both the federal and the regional laws are consistent with the constitutional distribution of powers, and whether both laws meet an *intra vires* legality test by addressing if they fall within the domain of the policy field.[5]

Where both the federal government and the constituent units are explicitly empowered to legislate in the same policy fields, conflict of laws is unavoidable and thus a specific conflict resolution mechanism is provided for in constitutions. A conflict occurs when two laws are inconsistent to the point of being mutually destructive, that is to say, they cannot be applied at the same time.[6] In this regard, Dziedzic and Saunders argue that:

> *There is potential for conflict in any federal distribution of legislative powers that treats some or all powers as concurrent. The terminology of conflict in this context is used loosely to refer to any circumstance in which the same power is or might be exercised by both spheres of government, causing the legislation of one to fail. Each constitution in fact*

[3] Colasante, Paolo, "Concurrent Powers in Italy: The New State-centred Approach and Prospects for Reform", *in* Steytler, Nico (ed.), *Concurrent Powers in Federal Systems: Meaning, Making, Managing*, Brill Nijhoff, Leiden: Boston, 2017, P113

[4] Pi-Sunyer, Carles V. and Torrens, Mercè C., "De Facto Concurrency in Spain", *in* Steytler, Nico (ed.), *Concurrent Powers in Federal Systems: Meaning, Making, Managing*, Brill Nijhoff, Leiden: Boston, 2017, P117

[5] Steytler, Nico, "Concurrency of Powers: The Zebra in the Room", *in* Steytler, Nico (ed.), *Concurrent Powers in Federal Systems: Meaning, Making, Managing*, Brill Nijhoff, Leiden: Boston, 2017, P312

[6] *Ibid.*

> *provides for this contingency in different ways: Australia uses 'inconsistency' as the touchstone; India uses the language of 'repugnancy'; the comparable provision in South Africa is cast in terms of 'conflict'; in the United States the problem is foreshadowed by the supremacy clause, with no mention of inconsistency or conflict at all. In Germany, the notion is inherent in the description of the power of the Länder to 'legislate as long as and to the extent that the Federation' does not do so, suggesting that, in this federation, dualism is the problem.*[7]

The supremacy clauses confirm that federal law is superior to state law, so that in cases of conflict, valid federal enactments—be they constitutional provisions, statutes or administrative regulations—prevail over state enactments, including state constitutional provisions.[8] Such a trend may entail a negative consequence from the regional autonomy point of view unless there are some exceptions and limitations. Hence, it is argued that the federal supremacy clause limits sub-national constitutional space, and it may deter sub-national constitution-makers from adopting some provisions they favour.[9]

It is common in federal systems to deal with which law should supersede if there is repugnance between the federal and state laws regulating the same subject matter what is usually designated as concurrent powers whereby both orders of government are constitutionally empowered to exercise. In this respect, the subject of the supremacy clause is treated under the whole gamut of homogeneity clause, according to some commentators. In view of that, Burgess and Tarr define the homogeneity clause as constitutional provisions that impose on sub-national constitutions the respect of the principles and the spirit of the national constitution, thus regulating the amount of constitutional autonomy allowed to sub-national entities.[10] They articulate

[7] Dziedzic, Anna and Saunders, Cheryl, "The Meanings of Concurrency", *in* Steytler, Nico (ed.), *Concurrent Powers in Federal Systems: Meaning, Making, Managing*, Brill Nijhoff, Leiden: Boston, 2017, P20

[8] Burgess, Michael and G. Alan Tarr, *Sub-National Constitutions in Federal Systems*, Forum of Federations, 2021, P10

[9] *Ibid.*

[10] *Ibid.*

the homogeneity clause in the German and Austrian federal and constitutional context whereby in the former it requires the constitutional order in the Länder to conform to the principles of a republican, democratic, and social state of law whereas, in the latter Constitution further requires that Länder constitutions not to affect the federal constitution.[11] The homogeneity clause is unequivocally incorporated in the Provisional Constitution of the Federal Republic of Somalia as well.[12] While the Member States have the power to make their own constitutions, one of the fundamental principles enshrined in the Federal Constitution is that there must be harmonization between the Federal Constitution and the State Constitutions.

According to Steytler, the impact of an overriding federal law on a regional law could be twofold: it may invalidate the regional law (as is the case in Spain and Italy), or merely render the regional law inoperative (Switzerland, Germany, South Africa, and Kenya) whereby in the latter case the assumption is that since both orders of government may validly legislate in that particular area, the regional law simply becomes inoperative for as long as the conflict lasts; once the overriding federal law is removed, the conflict disappears and the law of the constituent units becomes operative again.[13]

2.2.Approaches to the Supremacy Clause: A Comparative Glance

There are different alternative approaches to the regulation and resolution mechanisms of conflicting federal and state laws over the same subject matter. Despite an inevitable occurrence of conflict of laws made by different levels of government, there are some indications towards the prevention of such inconsistencies designed by some federal systems. For example, the Belgian Constitution states that from the day on which the Constitution becomes enforceable, all laws, decrees, decisions, regulations and other acts that are contrary to it are abrogated.[14] From this constitutional provision, it is also sound to assume that any law of such kinds as listed herewith which are enacted thereafter shall be invalid if they contradict the Constitution. The peculiar approach followed by the Belgian Constitution is

[11] *Ibid*
[12] The Provisional Constitution of the Federal Republic of Somalia, Art.121 (1).
[13] Steytler, *supra* note 5, P.313
[14] The Belgian Constitution, Art.188.

that a preventive approach has been attempted in order to halt a conflict of laws in a proactive manner.[15] While this preventive approach is a good trend, it is hardly possible to avert conflict of laws and competences in federal systems. As a result, the Constitutional Court is empowered to receive and decide on cases involving conflict of laws.

Furthermore, Dziedzic and Saunders argue that the design of the distribution of powers, including the understanding of concurrency, may be directed to avoiding conflict in some federations to a greater degree than others.[16] In light of this assumption, they maintain that a concept of concurrency that confines the legislation of one sphere to the prescription of fundamental principles, as in Italy, for example, suggests that, in principle, conflict can be avoided altogether. In Germany, the qualification of the centre's power by reference to necessity, coupled with the participation of Land governments in the legislative process through the Bundesrat, may diminish the likelihood of conflict as well. In an illustration of a different kind, the emphasis on cooperation in the Constitution of South Africa seeks both to avoid the courts and to encourage the courts to interpret legislation to avoid conflict if they can. Nevertheless, none of these mechanisms can be relied on to eradicate the possibility of conflict, however: it is inherent in any distribution of concurrent powers.[17]

Consequently, different federal systems adopt different approaches to the resolution mechanism. Broadly, there are two major approaches. These are categorical federal supremacy and qualified federal supremacy or exceptional state supremacy. Some federations, such as the US, provide for the categorical federal supremacy over the state constitutions and laws.[18] In light of this, the US Constitution, laws made by the Congress, and

[15] Pursuant to Art.141 of the Constitution, it is clearly provided that the law organises a procedure to prevent conflicts between laws, federate laws and rules referred to in Article 134, as well as between federate laws themselves and between the rules referred to in Article 134 themselves.

[16] Dziedzic and Saunders, *supra* note 7, P21

[17] *Ibid*

[18] Art.VI Section 2 states that this Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding

international treaties are given the same status and taken to be the supreme of law of the land which altogether subordinate any other laws made by the states. The state constitutions, in this regard, are subordinate to the federal laws in cases of inconsistencies. However, this does not mean that federal acts enjoy preeminence over the state laws without any limitation. There are restrictions to this rule. In view of this exceptional circumstance, regard must be had to the constitutional distribution of powers and other underlying principles. There must be a valid constitutional basis for the federal policy in question on one hand and the powers of the federal government are limited and enumerated, and the president and Congress must always respect the boundary lines that the Constitution created, on the other.[19] The supremacy clause does not give the federal government an unlimited power over the states. The states retain all powers that are not expressly delegated to the federal government by the Constitution.

In the US experience, usually pre-emption is used more frequently instead of supremacy in which although there is no conflict between the federal and state laws, the former would displace the latter. The state laws become dormant and inoperative as long as the federal one endures to be effective in the area. Kincaid identifies various forms of preemption: total, partial, explicit, and implied.[20] Total preemption means that Congress occupies a policy field completely and exclusively, whereas partial preemption leaves some room for state law.For example, many federal environmental laws establish national environmental protection standards but allow states to enact standards that are equal to or stricter than the federal standards, such as state standards that mandate lower levels of particular pollutants in water than required by federal law. Such partial preemption, according to him, establishes a national floor that displaces state laws that fall below the floor but permits state laws that rise above the floor.

[19] Mikos, Robert A., *On the Limits of Federal Supremacy When States Relax (or Abandon) Marijuana Bans*, Policy Analysis, No.714, December 12, 2012.

[20] Kincaid, John, "From Dualistic Autonomous Concurrency to Marbleised Permissive Concurrency in American Federalism", *in* Steytler, Nico (ed.), *Concurrent Powers in Federal Systems: Meaning, Making, Managing*, Brill Nijhoff, Leiden: Boston, 2017, Pp.41-42

He contemplates four explanations how and why such a trend is different from the German framework concurrency.[21] First, these federal laws displace existing state laws, which is not ordinarily the case in systems that require the constituent polities to fill in the details of federal framework legislation and also administer it. Second, in 1992 the US Supreme Court ruled that '[t]he Federal Government may not compel the States to enact or administer a federal regulatory program' commonly known as the 'anti-commandeering' doctrine. The US system of concurrency requires each order of government to administer its own laws, except that the federal government can pay state authorities to administer federal laws. Nevertheless, states must comply with federal law as in, for example, achieving clean water and clean air standards set forth in federal law. Third, states are not left to fill in the details; instead, they are authorised to enact standards that can only equal or exceed federal standards. Fourth, the term 'framework legislation' in the United States usually refers to the establishment of internal congressional 'procedures that will shape legislative deliberation and voting on certain decisions in the future', an example being the Unfunded Mandates Reform Act of 1965 that establishes a point-of-order procedure in the US House and US Senate that can be used to stop bills containing unfunded mandates.

An explicit preemption is a federal statute or regulation that expressly displaces certain state laws. By contrast, an implied pre-emption occurs when a state law is overridden by a federal agency or federal court because its operation is incompatible with a federal law such that a party cannot comply with both the state law and the federal law, or the state law obstructs the execution of a federal law or the achievement of its objectives.

A similar approach is adopted by the Argentine Constitution with a quite differential treatment for the province of Buenos Aires.[22] The Australian Constitution also deals with the federal constitutional and legislative

[21] Kincaid, id, P42

[22] Art.31 of the Constitution of the Argentine Nation provides that this Constitution, the laws of the Nation enacted by Congress in pursuance thereof, and treaties with foreign powers, are the supreme law of the Nation; and the authorities of each province are bound thereby, notwithstanding any provision to the contrary included in theprovincial laws or constitutions, except for the province of Buenos Aires, the treaties ratified after the Pact of November 11, 1859.

supremacy in a clear manner.[23] Likewise, in the Swiss constitutional experience, precedence is given to federal laws in cases of inconsistencies with the cantonal laws.[24] Nigeria also shares similar approach.[25] In all these federal systems, subject to the constitutional limits, an unqualified supremacy of a federal law is adopted in cases of conflict.

The second approach to the resolution mechanism of inconsistent federal and state laws puts some conditions and exceptional circumstances on the side of the federal government on one hand and gives some room for the state laws to sustain on the other. There are some federal systems which could be categorized under this approach. In some federations such as Germany and Canada, the supremacy of state laws is preserved on some matters which are explicitly provided in their constitutions. In Germany, although the rule is the federal paramountcy,[26] there are exceptional matters whereby the Lander can make laws which may contradict with the federal ones. Since the package of federalism reforms that came into effect in 2006, the Länder have been able to enact deviating legislation in the exercise of particular concurrent powers that prevails over the federal law, at least for a while.[27] These reforms sought to reduce the potential for gridlock between the Bundestag and the Bundesrat by limiting the range of matters subject to the consent of the latter. To compensate the Länder for the loss of some powers, the Basic Law now authorizes Land legislation 'at variance' with existing centre legislation on six matters.[28] To facilitate the scheme, central legislation on these matters must not come into force within six months after

[23] The cumulative reading of art.5 and 109 indicate that the federal constitution and laws are superior to the state constitutions and laws and the former shall prevail in cases of inconsistencies. The state laws shall be invalid to the extent of the inconsistency.

[24] Art.49 of the Swiss Constitution clearly declares that federal law takes precedence over any conflicting provision of cantonal law; and the Confederation shall ensure that the Cantons comply with federal law.

[25] The Nigerian Constitution, Section 4 (5).

[26] The Basic Law of Germany, Art.31.

[27] Dziedzic and Saunders, supra note 7, P24.

[28] Art. 72 (3) of the Basic Law of Germany reads as: If the Federation has made use of its power to legislate, the Länder may enact laws at variance with this legislation with respect to: 1. hunting (except for the law on hunting licenses); 2. protection of nature and landscape management (except for the general principles governing the protection of nature, the law on protection of plant and animal species or the law on protection of marine life); 3. land distribution; 4. regional planning; 5.management of water resources (except for regulations related to materials or facilities);6.admission to institutions of higher education and requirements for graduation in such institutions.

promulgation, without the consent of the Bundesrat. The centre retains its power to legislate, however. If what has been described as 'legislative ping pong' unfolds, the most recent law prevails.[29] Likewise, as regards specific matters such as age pensions, provincial laws effectively prevail over federal legislation on the same subject in Canada. The Constitution of Canada deals with the Federal constitutional and legislative supremacy under different provisions.[30]

The Indian model offers a window of opportunity for the state laws to endure and operate in the state concerned even if they are repugnant to the federal law on a concurrent matter. Hence, although the principle is the federal supremacy, there is an exceptional circumstance whereby the state laws would prevail if the laws of the Union Government and the States are incongruous on concurrent powers.[31]State legislation that contains any condition 'repugnant' to existing federal law will prevail if, at the time of making, it was reserved for the consideration of the President of India (acting on the advice of the government) and it received the President's assent. However, the Parliament of the Union is at liberty to make, repeal or amend a law on the same subject matter at any time. Nayaran claims that this is a novel provision which is not present in other federal constitution; and it affords the Union Government an opportunity to examine the need felt by a State to legislate in a manner repugnant to Union legislation and to validate the repugnancy if there is sufficient justification for it in the light of the peculiar local conditions prevailing in that State.[32] This trend provides a good prospect for the preservation of regional and local diversity as an accommodationist approach. Althoughthe State legislation applies only in the State concerned and be overridden by the central legislature at any time,

[29] Dziedzic and Saunders, *supra* note 7, P24

[30] Art.52 (1) provides for the supremacy of the Constitution whereas art.92A (3) provides for the federal supremacy clause in which where a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

[31] Art.254 of the Indian Constitution, particularly sub-article 2 of this article provides that where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State.

[32] T. S. Nayaran Rao, "Distribution of Legislative Powers in the Constitution of India", *The Indian Journal of Political Science* , October-December 1950, Vol. 11, No. 4, (October-December 1950), Pp. 43-47, p.44

it offers an interesting additional application for concurrent powers.[33] As former Minister Shouri pointed out in 2014, a reforming federal government unable to get its legislation through a fractured federal Parliament could enable like-minded State governments to initiate 'progressive' legislation, to which the President would assent under article 254(2).[34]

The exceptional and qualified approach as an alternative to the categorical federal supremacy is adopted by South Africa and Kenya in which the prevalence of the central laws over the provinces and counties will be limited by certain conditions. If these requirements are not met, the assumption is that the provincial laws would supersede over the central laws. In South Africa and Kenya a qualified override clause is used, which introduces the subsidiarity principle not at the law-making stage but at the conflict-resolution stage.[35] Accordingly, in South Africa an extensive override clause sets a low subsidiarity threshold in favour of the centre as a result of which a national law prevails over a provincial law if: the former applies uniformly to the country as a whole and deals with a matter that cannot be regulated effectively by provincial legislation; a matter requires uniformity by establishing norms and standards, framework or national policies; or it is necessary for the maintenance of national security or economic unity, the protection of the common market, promotion of interprovincial economic activity, promotion of equal opportunity or equal access to government services, or the protection of the environment.[36]

The other exceptional approach is an instance where the state laws have a superior position over federal laws in some federal systems. If supremacy rests with the states, provinces or regions (which is rare, but was found, for example, in the 2005 Constitution of Iraq), then concurrent authority is that which the sub-national legislatures choose to leave up to the federal or national legislature; at any time, the sub-national legislatures may reclaim

[33] Dziedzic and Saunders, *supra* note 7, P24.
[34] *Ibid*
[35] Steytler, *supra* note 5, P.313.
[36] Section 146(2) of the South African Constitution and Art.191 of the Kenyan Constitution

power from the centre and assert their own legislative authority over a concurrent matter.[37]

In a nutshell, regulating the issue of which law should prevail in cases of inconsistencies between the federal government and the states through a constitutional means is of paramount importance for various reasons. For one thing, the laws made by a competent organ should have certainty of enforcement and be free from an arbitrary nullification. For the other thing, a clear constitutional stipulation for the resolving mechanisms of such conflict will guarantee both levels of government to be treated as co-equals over their respective mandates. As a whole, whatever the approaches in respect of a categorical federal supremacy, state supremacy or qualified and exceptional supremacy clause, the bottom line is that the rules of the distribution of powers and their boundaries enshrined by the constitutions remain intact. With this in mind, in what follows, an attempt will be made to provide an in-depth and critical analysis of the approaches followed by Ethiopia in the constitutional design and federal experimentation from a variety of perspectives.

3. Supremacy under Ethiopia's Federal Constitutional Design and Practice: Critical Evaluation

Lack of a clear and explicit provision for the supremacy clause is one of the unique features of Ethiopian federalism.[38]Setting aside the question whether it was intentionally sidestepped or due to a poor drafting, such a loophole has created difficulties among the practitioners as to which law should prevail and have applicability in case of inconsistencies between the federal and state laws on the same subject matters. This problem has been abounding in the criminal proceedings where the criminal statutes enacted by the federal government and the states are contradictory on some grounds. Consequently, many measures have been taken by the courts, executive organs, and

[37]Bulmer, Elliot, *Federalism*, International IDEA Constitution-Building Primer 12, International Institute for Democracy and Electoral Assistance (International IDEA), Second edition, P14

[38] Ethiopian federalism is characterized by some peculiarities that distinguish it from other federal systems. For example, explicit secession clause, unicameral parliament the second chamber of which is entrusted with extra legislative and policy mandate in the shared rule, 'ethnic' sovereignty, and dearth of clear intergovernmental relations.

legislature as a gap-filling purpose. However, a critical appraisal will be made whether such practices are used as gap-filling measures by way of interpretation of law and/or the constitution are unconstitutional acts.

In any case, the supremacy clause in the Ethiopian constitutional and federal discourse could be approached from four perspectives given the practical trends hovering across the concerned institutions. These are constitutional, legislative, executive, and judicial approaches. Each will be expounded in detail one by one in the following subsections.

3.1. The Constitutional Approach

Under the Ethiopian federal system, the Federal and State Constitutions deal with the supremacy clause differently as a result of which it should be discussed under different subsections. A distinction to this end has been made because both constitutions adopt different approaches to regulation of the supremacy clause which should be discussed separately as follows.

3.1.1. The Federal Constitution

The FDRE Constitution provides for both the homogeneity and supremacy clauses from the perspective of the Federal Constitution, putting same at the top of all laws including the state constitutions and laws. Nevertheless, unlike the experiences of other federal systems, Ethiopia's federalism is hallmarked by the blanket lacuna of the federal supremacy clause. Nowhere in the Constitution is the federal supremacy clause provided either explicitly or implicitly. It is an area of inquiry whether and why the Constitutional Commission and the Constitutional Assembly sidestepped such a profoundly instrumental notion in any federal system. Putting aside the intention of the drafters and adopters of the Constitution *pro tem*, it may be cogently speculated that the federal pre-emption is prevaricated in the Ethiopian Constitution due to the fact that the longstanding central domination in respect of social, economic and political aspects remains threatening in the camouflage of the federal supremacy clause.

In light of this suggestion, it may be argued that the Federal Constitution intentionally omitted the federal supremacy clause. As is observable from the readings of the preamble and several pertinent provisions of the Constitution,

one of the purposes thereof is rectifying the past wrongs, injustice and oppressions in the areas of history, culture, language, resource, politics, and socio-economic dimensions of the Nations, Nationalities and Peoples in the country. The country was ruled under a gross centralization and unitary state under the cover of a nation-state building project against the will of the Nations, Nationalities and Peoples of Ethiopia. So there is a fear that giving precedence for the federal laws over state laws may lead to the recurrence of similar history instead of rectifying same. Instead of accommodating and maintaining the diversity of each Nation, Nationality and People, it may destroy same in the name of federal supremacy clause.

Thus, the question begging for a tenable response is that which law prevails in cases of contradictions, inconsistencies, conflicts, or discrepancies? As a reaction to this question, the gist of the Constitution enlightens us with the general principle that the legislature, both at the federal and state levels, is the supreme political organ within the respective bounds of jurisdictions under the very postulation of the fact that no tier of government is superior or subordinate to the other in a federal system. Accordingly, laws made by the House of People's Representatives at the federal level are supreme and applicable in and by the Federal Government, whereas laws made by the state councils in particular are applicable within the regions and not subordinate to federal laws or the laws of other Regional States. Consequently, in cases of inconsistencies, neither the federal laws take precedence nor become subordinate to the state laws and the vice versa. Hence, federal laws are applicable within the bounds of Federal Government and the state laws are applicable within the spheres of each Regional State in their respective contexts without the need for worrying about the preemption or subordination of the federal laws or state laws. Nevertheless, this argument may not take further in such cases as criminal matters which are concurrent where the federal and state legislatures have been making conflicting laws over the same policy fields.

Consequently, Assefa explores different theories and assumptions on the constitutional loopholes of the supremacy clause.[39] Accordingly, the default

[39] Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*,(Revised edition, Wolf Legal Publishers, Nijmegen: the Netherlands, 2010), P199, 294 *et seq.*

supremacy, an assumption that the federal law should have precedence over the state laws in cases of contradictions; the fact that issues of the supremacy clause should be considered in light of the sovereignty, rights and privileges of the Nations, Nationalities and Peoples (Art.8, 39 of the Constitution) in which an assumption to be adopted that the state laws should have a prevalence; the case-by-case view; and the compact theory.

Hence, viewed against the alternative approaches described above, Assefa's proposals as a response to the constitutional silence are: the categorical federal supremacy; state supremacy, or exceptional and qualified supremacy based on the specific case lodged in the courts. The first two alternatives may be disadvantageous, especially in such a federation like Ethiopia where constitutional adjudication is negligible because the former approach may empower the federal government to overwhelm the state powers, whereas the latter advance a centrifugal sentiment. The third approach, the case-by-case alternative, appears to be plausible to be adopted as it is circumstantial and qualified that may take into account the principles of federalism and the Constitution. Despite these suggestions, as will be shortly discussed, the doctrinal and empirical illustrations reveal the categorical federal supremacy over the state laws. The categorical supremacy clause without any exception and qualified approach may imperil the diversity management, legal pluralism, and self-rule rights of the states which are the fundamental pillars of federalism.

3.1.2. The State Constitutions

Although the federal supremacy clause is circumvented by the Federal Constitution, nearly all constitutions of the Regional States provide for the clause.[40] In view of this, it is stated that the state councils enact laws which are not inconsistent with the Federal Constitution and laws. In other words,

[40] The Revised Constitution of the Afar National Regional State (2001), Art.47 (3) (a); The Revised Constitution of the Benishangul Gumuz National Regional State (2002), Art.49 (3) (1);The Revised Constitution of the Gambella Peoples National Regional State, Proclamation No.27/2002, Art.51 (3) (1); The Revised Constitution of the Oromia National Regional State, Proclamation No.46/2002, Art.49 (3) (a); The Revised Constitution of the Somali National Regional State (2002), Art.49 (3) (a); The Revised Constitution of the Southern Nations, Nationalities and Peoples National Regional State, Proclamation No.35/ 2001, Art.51(3) (a).

the States do not make laws which are repugnant with the federal laws and Constitution. From this provision, it could be understood that the federal supremacy clause is only dealt with in an implied, not explicit manner. As pointed out earlier, as far as the conformity of the state laws with the Federal Constitution is concerned, it is clearly enshrined with regard to the supremacy of the Federal Constitution,[41] under the provisions dealing with the fundamental principles of the Constitution.[42] And this is beyond questionable as a supreme, written, and rigid constitution is one of the underlying principles of federalism.

However, the fact that the supremacy clause is incorporated in the state constitutions begs for clarification when seen from various angles in relation to the federal laws. What does it mean to say that state laws made by the States must conform to the federal laws? How could we assess the constitutionality of the State Constitutions in light of the Federal Constitutional supremacy in this respect? From the outset, the question is whether the States could stipulate the federal supremacy clause which is not incorporated in the Federal Constitution and whether the state constitutions are constitutional viewed from the litmus test of the Federal Constitution. In order to explicate these themes as a course of responding to the questions raised herein, it is important as well as necessary to assess the two concepts of supremacy—the federal constitutional supremacy and the federal legislative supremacy—because the two notions are by far different and need to be treated differently. The State constitutions should also have accentuated the two notions in having incorporated the supremacy clause.

In the meantime, one should bear in mind that constitutions of some States differentiate between the Federal Constitutional and legislative supremacy clauses. For instance, the Tigray Regional State Constitution provides that the laws made by the state council should not contradict the FDRE

[41] The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995. The full text of Art.9 (1) of the Constitution reads as 'The Constitution is the supreme law of the land. 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.

[42] These fundamental principles adopted by the Constitution are the Sovereignty of the People (Art.8), Supremacy of the Constitution (Art.9), Human Rights (Art.10), Secularism (Art.11), and transparency and accountability (Art.12).

Constitution.[43] It gives precedence to the Federal Constitution which is its duty to do so and neglects the incorporation of the supremacy of the federal laws over the state ones within the Region. The Amhara Regional State Constitution affirms the region's constitutional supremacy over state laws enacted by the council and keeps silent as to the Federal legislative preemption.[44]

On the one hand, although the Amhara State Constitution seems silent with regard to the Federal Constitutional supremacy clause, Art.9(1) thereof binds it to respect the fundamental principle and needless to reincorporate in the Region's Constitution. On the other hand, the fact that the Region's Constitution ignores the federal legislative supremacy over the state laws appears to be valid viewed from the Federal Constitutional perspective. By the same token and with slight difference, the Harari Regional State Constitution does not stipulate both Federal constitution and laws to take precedence over the state laws.[45] This does not however mean that laws issued by the Harari Regional state council are unmonitored by any means. But rather both state and federal constitutional supremacy must be tacitly understood to be observed. At this juncture, one should not lose sight of the fact that the state constitutions are the supreme law of the respective Regional States. This rule has also been adopted as one pillar and fundamental principles of the state constitutions. Thus, any law made by the state council is supposed to be in conformity with the constitutions of each state.

The principle of the Federal Constitutional supremacy, under the wide spectrum of the fundamental principles of the Constitution, obliges the State Constitution to observe the preeminence of the Constitution under the pain of being rendered of no effect.[46] The word "*any law*" provided in the Federal Constitution includes the State Constitutions as a constitution is one of the

[43] The Constitution of the Federal State of Tigray (1995), Art. 49 (3 (a).
[44] The Revised Constitution of the Amhara National Regional State, Proclamation No.59/ 2001, Art.49 (3) (1).
[45] The Revised Constitution of the Harari People National Regional State (2005), Arts.47 and 51.
[46] Art.9 (1) of the FDRE Constitution declares that the Constitution is the supreme law of the land. 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.

laws designated as general and public laws. Besides, from the viewpoint of the duty of the States towards the Federal Constitution, it is unequivocally provided in State Constitutions that the Regional Government shall have the obligation to preserve, uphold and defend the Federal Constitution in addition to its own.[47] This obligation has already been imposed by the Federal Constitution upon the States.[48] The Federal Constitution gives a clear direction and guidance as to how the State Constitutions govern their respective internal matters in general and make regional laws including constitutions in particular. In light of this proposition, prescriptive mechanisms and procedures are envisaged by the Federal Constitution in drafting, adopting and amendingthe State Constitutions.[49] As such, the State Constitutions must maintain the federal constitutional supremacy upon drafting, adoption and amendment. This is an area where the homogeneity clause is clearly spelt out in the Federal Constitution. Moreover, there are pertinent constitutional provisions that make a clue that the state constitutions must keep the homogeneity clause of the Federal Constitution. This sense of the federal constitutional conformity is envisaged in relation to the emergency power of the States over natural disasters or an epidemic where they incorporate the emergency power in their constitutions.[50]

Besides, taking the constitutional provisions of the States which stipulate the federal legislative supremacy clause as they stand, it appears to be hardly sound to reach a persuasive argument. Literally, it means and implies that the state laws must conform to the federal laws even in cases where the specific federal law is allegedly unconstitutional. In this respect, the state laws would be locked between two compelling circumstances. These choices are either respecting the supremacy of the Federal Constitution which is one of the fundamental principles of it by ignoring federal laws which are adjudged unconstitutional, or violate same by conforming to the federal legislation

[47] Oromia State Constitution, s*upra* note 40, Art.47 (2) (d).

[48] Art.52(2) (a) of the FDRE Constitution provides that the States shall have the power and function to establish a State administration that best advances self-government, a democratic order based on the rule of law; to protect and defend the Federal Constitution

[49] Art.50 (5) of the FDRE Constitution states that the State Council has the power of legislation on matters falling under State jurisdiction. Consistent with the provisions of this Constitution, the Council has power to draft, adopt and amend the state constitution.

[50] Art.93 (1) (b) of the FDRE Constitution reads as "State executives can decree a State-wide state of emergency should a natural disaster or an epidemic occur. Particulars shall be determined in State Constitutions to be promulgated in conformity with this Constitution."

which are against the Constitution hence unconstitutional. To this end, one should underscore that the States could not invoke the federal legislative supremacy principle in violating the constitutional supremacy rule because what binds all tiers of government in the observance of the constitutional supremacy is the Federal Constitution without prescribing any exceptional circumstances to the rule. Therefore, notwithstanding the State constitutions that have provided for the supremacy of the Federal Constitution and legislation in a mixed phrasing, the constitutional tenet from the Federal Constitution is that the States are duty bound to respect the constitutional supremacy at the expense of the federal laws.

Consequently, the fact that the State Constitutions provide for the supremacy of federal laws over their own—the one which is not embodied in the Federal Constitution—serves neither as a gap filling mission nor is taken as a blessing in the discourse of the constitutional development of both the Federal and State governments. Rather, it is an unconstitutional practice and an approach and can be taken as defiance and a stumbling block that has the potential of stunting and retarding the linear and prospective processes of the constitutional development under the federal experimentation. Despite the fact that the State Constitutions oblige the State councils not to enact laws which are in conflict with the federal legislation, there are laws found contradictory to each other.[51] That is to say, no attention has been given to the federal supremacy clause which is incorporated in the state constitutions.

3.2.The Statutory Approach

The statutory or legislative approach to the resolution of conflicting federal and state laws empowers the legislature of a level of government, principally the federal government, to provide for the supremacy of the law of one order of government, predominantly of the federal government, over the state laws.

[51] For example, with regard to the coffee transaction and quality control, some provisions of Proclamation No.160/2002 which was repealed by Proclamation No.234/2021 of the Oromia Regional State dealing with the penalty clause and jurisdiction of courts are contradictory with that of the Federal counterpart *viz*. Proclamation No.602/2010 which was in turn repealed by Proclamation No.1051/2017. Likewise, the extent of punishments for crimes committed against forests varies in the federal and state statutes (Proclamation No.1065/2018 (Federal Forest Proclamation) *versus* Proclamation No.72/2003 (Oromia Forest Proclamation).

In light of this suggestion, the blanket silence of the federal supremacy clause by the FDRE Constitution appears to have provoked the law federal maker to fill the lacuna through imposing the paramountcy of the federal laws over the State counterparts. This approach abounds from the side of the federal government whereby its lawmaking wing—the House of People's Representatives—enacted proclamations which put the federal laws over the state ones as if they are in the hierarchy of laws under the same tier of government.

For instance, federal courts dispose cases involving state matters primarily by applying and interpreting the State laws.[52] However, if the State laws which are applied by the federal courts over the State matters are inconsistent with the federal laws and international treaties, they shall not be applicable.[53] In other words, federal laws shall have applicability in this respect. Nevertheless, the new Federal Courts Proclamation which repealed the previous one does not provide for the supremacy of federal laws over the state laws if the latter is contradictory with the former as far as a specific case brought before the federal courts is concerned. Thus, the question which law prevails in such inconsistencies remains debatable under the new Federal Courts Proclamation at least at formal and theoretical level.

The Ethiopian Electoral, Political Parties Registration and Election's Code of Conduct Proclamation, prescribes for the inapplicability of any law (including those made by the States) which contravenes this proclamation.[54] It further provides that Regional elections laws that pertain to regional council elections shall be in accordance with relevant elections provisions of the Constitution and this Proclamation.[55] It is noteworthy to mention the electoral proclamation issued by the Tigray National Regional State, which was controversial and adjudged unconstitutional and of no effect by the House of the Federation.[56]As a legal cover, it is provided that any federal and regional laws that contradict the Proclamation or regulations to be issued

[52] Federal Courts Establishment Proclamation, Proclamation no.25/96, Art.6 (1) (b).
[53] Federal Courts Establishment Proclamation, Proclamation no.25/96, Art.6(2)
[54] Art.162(2) of Proclamation no.1162/2019 provides that any law which contradicts this Proclamation shall not be applicable on matters covered by this Proclamation
[55]Proclamation No.1162/2019, Art.4 (2).
[56] Tigray National Regional State Electoral Proclamation, Proclamation no.321/2020.

subsequently shall not be applicable.[57] The declaration of the state of emergency was coincided with the rift between the Federal Government and the Tigray Regional State which eventually led to the all-out war. Thus, the political implication and connotation of the provision which subordinated the state laws to the federal counterpart was assumed to have been with the full intention of attacking the dissidents. In addition, the COVID-19 Emergency Proclamation issued by the House of People's Representatives clearly subordinated the laws of the states if they contradicted therewith.[58]In all these instances, the question remains as to whether the federal legislature is constitutionally empowered to make federal laws that preempt the state laws.

An intergovernmental approach to the resolution of the conflict of federal and state laws over concurrent powers is also attempted by legislative approach under the IGR regulatory scheme. In this vein, in the realm of intergovernmental relations, the National Legislative Relations Forum is empowered to ensure the harmonization and complementarity of laws made by the federal and state governments over matters exercised concurrently by either tier of government.[59] In this regard, as far as concurrent powers are concerned, the Forum oversees the compatibility of laws made by each order of government. What is more, the IGR Proclamation also emphasizes that each level of government should enact a law on matters constitutionally granted to it in a way that should not imperil the powers of the other tier of government. The Forum is also entrusted with rectifying and resolving inconsistent laws which have been in force and those which may be made in the future. Much is yet to be seen as to how this process is to be practiced as an intergovernmental resolution mechanism of conflict of laws made by both levels of government over the same policy fields is a new phenomenon under the federal system. However, it should be borne in mind that the power to resolve the supremacy issues between the federal and state laws is basically that of the House of Federation as it involves a constitutional dispute on account of the silence of the Constitution. As a result, it could be argued that the power of the National Legislative Relations Forum in this regard is unconstitutional and usurpation of power.

[57] The State of Emergency Proclamation,Proclamation No.3/2020, Art.3 (3).
[58] The State of Emergency Proclamation, Proclamation No.3/2020, Art.3 (3).
[59]IGR Proclamation, Proclamation No.1231/2021, Art.8.

On the other hand, this approach may be equated with the Belgian preventive mechanism of the conflict of federal and state laws where the compatibility of laws is ascertained by the National Legislative Relations Forum. But as future is uncertain and conflict of laws is unavoidable, federal and state laws may be inconsistent that calls for the resolution mechanisms and procedure. In such a case, while the Constitutional Court is empowered to resolve disputes surrounding the discrepancy of the laws of the federal government and the states in Belgium, it is the House of Federation in Ethiopia that is authorized by the Constitution. By doing so, the resolution of issues related with the supremacy clause would have a centre of adjudication and mandated to the specific.

3.3. The Executive Approach

The role of an executive organ is manifested in issues related with the resolution of supremacy clause in one or other ways. At regional level, the Oromia Attorney General is empowered to ensure the consistency of the enacted laws with the constitution, regional and federal laws, international conventions, rights of women and children as well as other legislations adopted by Ethiopia.[60] "Constitution" in this respect is the FDRE Constitution and Oromia State Constitution in accordance with the definition given by the Regional Attorney General Proclamation. At federal level, the task of ensuring the consistency of laws is maintained by the Federal Attorney General at the drafting phase. In light of this, the Federal Attorney General is entrusted with ensuring the draft laws prepared by government organs are consistent with the Constitution and federal laws.[61] From this proposition, one could comprehend that issues revolving around the consistency or otherwise of the laws made by the federal government and the states is taken into account when a bill is drafted by Attorney Generals both at federal and regional levels. This may be taken as a preventive mechanism.

However, as the state attorney generals are restricted to drafting the state laws and the federal counterpart is destined to draw up federal bills, it is

[60] The Oromia Attorney General Office Proclamation No.214/2018, Art.7(36)

[61] The Federal Attorney General Establishment Proclamation No.943/2016, Art.6 (5a).In addition, the Federal Attorney General is authorized to ensure that international agreements to be signed or adopted by Ethiopia are in consonant with the Constitution, and other laws of the country are acceptable in view of the standards of national interest.

rarely possible to avoid the likelihood of conflicting laws over concurrent matters so delineated by the Constitution. Furthermore, the draft bills are overseen by the respective legislative organs which may be guided by their internal policies and contexts which necessitates for the inclusion of unique local and regional matters calling for an inconsistent law. As hinted out in the preceding discussions, this trend is a commonplace in India whereby inconsistent state laws are tolerable as far as the specific regional and local matters are concerned. In such a case, it may be tough for the attorney generals to merely oversee the consistency of laws by a mechanical text of the law under drafting. In fact, this too could be assumed to be unconstitutional particularly as regards the consistency of state laws in line with federal laws which may be debatable especially when the federal government has not enacted a law on the subject matter under way.

The other circumstance where an executive approach has been taken is where some federal authorities compel the state governments to reject the state laws and apply those enacted by the federal government when they are contradictory. In light of this, an executive approach has been advanced in order to resolve the federal-state legislation inconsistencies in an [informal] intergovernmental administrative manner. For instance, with regard to the coffee, laws made by the Federal Government and the Oromia Regional State with respect to quality control and marketing mandate, the provisions dealing with the jurisdiction of courts exhibit a conflicting incidence, from other things.[62] The conflicting provisions arise from the fact that while Federal Coffee law empowers the Federal First Instance Court to assume the jurisdiction of cases involving coffee quality and marketing transactions, the Oromia State law, on the other hand, empowers the District Court of the Region regarding such a case arising in the Region. There are diverging arguments with regard to these inconsistent laws among judges and prosecutors of the Region and others. This argument has also been rooted in the practical realities on the ground. Some of them assert that the federal law should be applicable and the Regional High Courts must consider coffee cases upon delegation, whereas others hold that the Region's law should be applied and the Regional District courts are competent to adjudicate the

[62] Oromia Region Coffee Quality and Trade Control System Proclamation No.160/2010, Art.24 which is currently repealed and replaced by Proclamation of Oromia Region Market and Agricultural Products Quality Control System No. 234/2021

cases. Such divergence of opinions over the statutes invites us to pose the question which law should prevail in such an inconsistent situation as this.

With regard to these conflicting laws, the Federal Attorney General and the Oromia Justice Bureau (currently the Oromia Attorney General) made a circular-based question and answer-like exchange of ideas. In this case, the Federal Attorney General ordered the Justice Bureau to apply the Federal Coffee legislation and the Regional High Court should consider criminal cases involving coffee quality control and marketing transactions. The reasons mentioned by the Federal Attorney General are (*translation mine, from Amharic*):

> *As per the cumulative reading of Art.4 and 15 of the Federal Coffee Quality Control and Marketing Proclamation (No.602/2008), Art.2(4) of the Federal Attorney General Proclamation and Art.55(5) of the FDRE Constitution, the power to enact criminal law—which is to be implemented in the entire federation—belongs to the Federal Government as a result of which it has issued the Coffee trade criminal legislation. The Regional States shall have criminal legislative power only on areas which are not specified by the Federal Government. However, the Oromia National Regional State has enacted a Proclamation (No.160/2010) on coffee quality control and marketing transaction which is the exact verbatim copy of the Federal counterpart. In so doing, the Region has not only made the criminal law for oneself but the law itself is also inconsistent with that of the Federal law on the subject which has resulted in conflict of jurisdiction among the crime investigation bodies of the two tiers of government, perversion of justice and dearth of predictability thereby violating the Constitution and the Coffee legislation of the FDRE. Based on these reservations, the Federal Attorney General warned the Oromia Justice Bureau not to apply the Region's legislation and to notify all concerned organs of the Region accordingly.*[63]

[63]A letter written by the Federal Attorney General to the Oromia National Regional State Justice Bureau, numbered as 01/--2068/2009, dated 27 Yekatit, 200 E.C.

The Oromia Justice Bureau reacted in a very unyielding and recalcitrant manner to the order addressed to it from the Federal Attorney General. The Bureau Head resisted the letter of order having reasoned as follows (*translation mine, from Amharic*):

> *Based on the federal arrangement adopted by the Constitution, the powers of the Federal Government and of the States are distinctively stipulated. Accordingly, the States shall have the power to enact regional laws including their own constitutions. Likewise, the Oromia Regional State issued a law dealing with coffee marketing transactions which is applicable within the Region. In so doing, the Region is not only authorized by the Federal Constitution, but it is also empowered by the Federal Coffee Quality Control and Marketing Proclamation. The law made by the Region on Coffee trade has not been verbatim copied from the Federal counterpart as arrogated by the Federal attorney General. Thus, if the laws made by the two tiers of government are contradictory, we may resolve it through consultation and dialogue with the concerned bodies in accordance with relevant procedures. Apart from this, the letter full of indiscretion, criticisms, and command, which undermines the law made by the Region, is strictly both illegal and unacceptable.*[64]

The Federal Government enacted the coffee proclamation prior to the Oromia Regional State and empowered all the Regional States to make laws of their own on coffee trade by stipulating that any law which is against the federal coffee law will be of no effect.[65] Setting aside the question whether the state power as regards an intrastate commerce in general and a specific subject matter on coffee in particular emanates from the Constitution or a federal law, it is worth appraising the action and reaction made between the Federal Attorney General and the Oromia Regional State Justice Bureau with respect to the conflicting laws of the Federal Government and of the Region.

[64] A letter written by the Oromia Justice Bureau to the Federal Attorney General, numbered as 01/wg.60/2429, dated 12/07/2009 E.C

[65] The Federal Coffee Quality Control and Marketing Proclamation No.602/2008, Art.19(3) and 17(2) which is repealed and replaced by Proclamation No.1051/2017

From the outset, one should be mindful of the fact that the two proclamations, especially the provision dealing with the jurisdiction of courts over criminal matters of coffee marketing transactions are apparently contradictory and has become the point of controversy among legal practitioners as stated in the letters written by the Federal Attorney General and Oromia Justice Bureau. But the way out proposed by the Federal Attorney General that insists on asserting that the Region's law must be rendered inapplicable and the Oromia Regional State justice actors including the public prosecutors must apply and implement the law made by the Federal Government tends to be unconstitutional, illegal and ill-procedural as well. Critically appraised against this rule, the letter written by the Federal Attorney General to the Oromia Justice Bureau is ill-grounded. No regional law or federal law which is unconstitutional may be annulled through such an intervention as this. The Federal Attorney General does not have such a power both constitutionally and statutorily. From the Regional Justice Bureau too, disputes on issues related with the supremacy clause are not resolved through a consultation and dialogue to be made between executive organs. Laws made by competent organs at federal and state levels which should be implemented by executive organs should not be put to negotiation for annulment outside the procedural channels set forth by the constitutions and laws.

In addition, there are many occasions where high profile executive officials made a press statement that in case of discrepancies between the federal and state laws, it was highly commanded that the federal laws should undoubtedly prevail. For instance, during the COVID-19 emergency situation, Mr. Nigusu Tilahun, the then Prime Minister Office Press Secretariat Head, gave a press statement that if the Federal state of emergency proclamation and the state counterpart (namely, of the Tigray Regional State) contradict each other, the latter should not have applicability. The issues revolving around the federal supremacy clause which lacks a constitutional ground can be resolved by neither a legislative mechanism nor an executive press statement. It requires something more than this—a constitutional litigation through the Council of Constitutional Inquiry and the House of Federation—whose performance thus far is relatively poor in the constitutional development.

3.4. The Judicial Approach

Courts have also engaged in resolving issues related with the federal supremacy clause on cases brought before them. A judicial approach has been practiced both by the Federal Courts and State Courts in deciding the inconsistent laws made by the federal government and the states. For example, in *Imran Taju v Oromia Attorney General*[66] the Federal Cassation held that the Federal Coffee Proclamation should have applicability as there is a clear inconsistency with that of the Oromia Coffee Proclamation as regards the amount of punishment for crimes related with coffee trading. The Cassation reasoned *inter alia* that the power to make a criminal law belongs to the House of People's Representatives by virtue of art.55(5) of the Constitution as a result of which the states have no mandate to enact a criminal statute which is repugnant to the federal one. This argument advanced by the Cassation may provoke the question whether the states are empowered to make a criminal law which is in conformity with those which are already issued by the federal government pursuant to the constitutional provision specified hereinabove.

The practice of federal supremacy clause has also taken ground at regional level. In *Oromia Attorney General v Asmarew Iniyew et al*[67] the Oromia Supreme Court Cassation division handed down a precedent that subordinates the Regional forest statute which contradicts with the federal counter part on the provisions dealing with the extent of punishment over crimes committed against the forest. The Regional Cassation bench analysed the case on the grounds of the fact that the Oromia forest proclamation was enacted based on the federal forest Proclamation No.94/1994, the law which was repealed and replaced by Proclamation No.542/2007 and subsequently by Proclamation No.1065/2018 as a result of which it does not have relevance to apply; in accordance with Art.49(3A) of the Oromia State Constitution, *Caffee* should make a law which conform to the federal constitution and laws; the power to make a criminal law belongs to the federal government, and the states may make such laws when it is not

[66] Imran Taju v Oromia Attorney General, Federal Supreme Court Cassation Division, Vol.25, File No.209763, dated 25/5/2014 EC

[67] Oromia Attorney General v Asmarew Iniyew *et al*, vol.5, File no.303547, Supreme Court of Oromia, 2020

covered under the federal criminal statutes, but all forest criminal acts are fully stipulated in the federal forest proclamation, hence the Oromia forest proclamation dealing with the penalty clause lacks applicability.

The subordination of the Oromia forest law to the federal counterpart by the Regional Cassation in handing down a binding judgement has been taken by some legal practitioners as a good strategy of creating a uniformity of punishments across the country.[68]Nonetheless, this precedent may be virtually subject to many criticisms. First, the court has no power to annul the law made by *Caffee,* the legislative organ of the Region, by virtue of the principle of separation of power. To this end, the courts and other branches of government of the Region are duty-bound to execute the laws of the Region.[69] In this respect, although the court is authorized to interpret the law, its scope of power in this regard would not extend to annulling it in the disguise of interpretation which belongs to the law maker in the separation of powers. What is more, there is no need for the interpretation of the law as it is clear enough to pass a judgement within the regional self-rule of the State based on the Federal and State Constitutions. Second, the power to decide on issues connected with the supremacy clause lies outside the jurisdiction of the regular courts including the Cassation. Consequently, based on these grounds, one could assert that the Cassation has failed the Federal and Regional Constitution in general and that of the State law and self-rule right which should have been advanced by the judicial organs in particular.

The forest case was also decided by the Federal Cassation with majority as to the superiority of the federal forest proclamation over the Oromia State

[68] Raggasa Yimenu, East Showa High Court judge and criminal bench coordinator argued that the binding cassation decision passed by the Regional Cassation with respect to the interpretation of legal issue dealing with the forest criminal case has solved many problems and challenges (such as the uniformity of the application and interpretation of the law in one country, that the constitutional right of the accused (the right to equality before the law) and taking advantage of the favourable law. Mr. FayisaTolasa, the Cassation Bench Coordinator at the Supreme Court of Oromia also argued that the binding decision handed down by the Oromia Supreme Court Cassation Bench has created the uniform application of laws in relation to cases involving coffee and coffee trade issues in the Region.

[69] The Reestablishment Proclamation of the *Megeleta* Oromia News Paper Proclamation No.186/2014, Art.3(2) states that the Legislative, Executive and Judicial body of Government and any natural or legal person shall have obligation to execute laws published on the *Megeleta* Oromia.

counterpart. In *Negash v Oromia Regional Attorney General,*[70] the majority held that the federal forest statute should prevail over the Oromia Regional State forest proclamation for various *raison d'être*. The reasons advanced by the majority are: One, the Oromia Regional State forest Proclamation No.72/2003 was issued in accordance with Art.49(3A) of the Regional Constitution and the federal forest Proclamation No.94/1994, a proclamation was repealed and replaced by Proclamation No.542/2007 which in turn was in force at the time of the commission of the forest crime; two, Art.18 of the federal forest Proclamation No.542/2007 enumerated the powers and duties of the regions. Art.20(1) of the same Proclamation also clearly provided for the punishment for the crimes related with forest; three, in addition, by virtue of the Art.55(2A) and 55(5) of the Federal Constitution, the power to make laws over natural resources and enact a criminal law belongs to the HPR; four, pursuant to Art.22(2) of Proclamation No.542/2007, the Oromia Regional State forest proclamation has no applicability as it is inconsistent with the federal forest statute;[71] and five, the federal forest Proclamation No.542/2007 was issued later than that of the Oromia forest Proclamation No.72/2003 and the crime which the petitioner was accused of was incorporated therein which favoured him. As a result, courts have an obligation to choose the law which favours the defendant in accordance with Proclamation No.25/1996 and Art.22(2) of the Federal Constitution, and Art.6 of the FDRE Criminal Code.

On the other hand, the dissenting Judge held that the federal forest Proclamation No.542/2007 could not repeal the Oromia Regional State forest Proclamation No.72/2003 as a law made by a state council (*Caffee*) is ought to be repealed by the same body, not by anybody else, as the Council has ultimate legislative power in the region. Federal laws have no privilege to rescind state laws. As forest is a scarce resource, and is indispensable for green economy and climate change for the Region, Ethiopia and the world over, *Caffee* intended to impose grave punishment for the conservation and utilization of forest in the Region as a result of which no lenient punishment

[70] Negash Haile v Oromia Regional State Attorney General, Federal Supreme Court Cassation Division, file no: 107960, dated 18/4/2008 EC (unpublished).

[71] Proclamation No.542/2007, Art.22(2)provided that no law, regulation, directive or practice shall, in so far as it is inconsistent with this Proclamation,have effect on matters provided for in this Proclamation.

for perpetrators was foreseen. Hence, the state forest law should be applicable even if it is in contradiction with the federal forest statute.

In the meantime, it is noteworthy to evaluate the reasoning presented by the majority and dissenter in this very case as regards the pre-eminence of the federal law over the state counterpart. To begin from the dissention, the argument holds water because any law made by a constitutionally authorized organ in a federal setting ought to be repealed and rendered inapplicable by the same body following the appropriate processes and procedures. The federal government organs such as the court, the House of People's Representatives or any other body is not empowered to rescind the laws made by the states whatsoever with the exception of challenging it before the House of Federation. The dual institutional set up designed by the Constitution attests this assumption. What is more, problems and crises connected with the deforestation are key points and an argument that should be emphasized beyond the mechanical application of the provisions of the law.

The arguments advanced by the majority should be scrutinized as there is a scant understanding among the scholars and practitioners of law as to how the federal and state laws are applicable and interpreted and their scope of application. On the onset, federal matters are adjudicated by federal laws and state matters are adjudicated by state laws.[72] Accordingly, there is no principle of choice of law between the two groups of laws on the respective matters. If there is a need for interpretation, a judge is obliged to choose

[72] This assumption generally draws on the dual institutional set up designed by the Constitution. By virtue of this arrangement, both the federal government and the states have their own legislative, executive, and judicial organs (Art.50(2) which are entrusted respectively with making, executing, and adjudicating laws over matters granted to each by the Constitution(Art.50(3, 5) cum 55; Art.50(6) cum 72-77; and Art.50(7) cum 78-80). Particularly, this argument is maintained by some statutes issued in accordance with the Constitution. For example, the Federal Courts Proclamation No.1234/2021, Art.6 states that: Federal Courts shall settle cases or disputes, submitted to them within their jurisdiction on the basis of: a) the Constitution, Federal Laws and International Treaties to which Ethiopia is a party; b) Regional, Addis Ababa or Dire Dawa city laws where the case relates to same. In other words, federal courts decide federal matters with federal laws and state matters with state laws. This could be replicated at state level as well where the state courts draw on federal laws when they dispose federal matters on delegation and decide state matters with state laws and constitutions.

between the state laws for the state matters and federal laws for the federal matters. A federal judge cannot choose between federal laws and state laws for state matters and the vice versa for the state judge(s) over state matters and federal matters. In this respect, whether a federal law is issued later or earlier than the state one, includes a more lenient punishment than that of the state, it has little relevance in applying the state law/federal law. True, the state forest proclamation incorporates a graver punishment and was issued earlier than that of the federal counterpart. The principles set out in Proclamation No.25/96, the FDRE Constitution, and Criminal Code with regard to the favourable provision what is also known as the lenity principle, do not work for choosing between the federal law and state law. It is only applicable within the laws made by the same tier of government. This principle is stipulated in the State Constitution which should have applicability within the laws made by *Caffee*. And the one incorporated in the Federal Constitution must be applicable within the federal laws which the federal judges should be heedful.

The other reason underscored by the majority is the power of the House of People's Representatives in relation to the natural resources and criminal law by virtue of Art.55(2A) and 55(5) of the Constitution. Yes, it is very true. However, the question which law should have precedence in case there is contradiction between the federal and state laws over matters which belong one or the other tier of government constitutes a constitutional adjudication, not resolved by a court whose mandate is limited to interpretation of the law, not the constitution. One should be clear with the two different notions of the issues of interpretation of the law and of the constitution. These mandates are granted respectively to the courts and the House of Federation, by virtue of the FDRE Constitution. As explained elsewhere in this study, Art.55(5) is subject to different approaches of interpretation which at the same time calls for a constitutional interpretation. In this connection, the provisions of the laws made by the federal government and that of the Oromia State are clear that does not warrant an interpretation which lacks the existence of the fundamental error of law. Other reasons that the majority presented are also scrutinized within this consideration. In light of these propositions, the arguments presented by the dissenting judge are more convincing.

To sum up, although the practice that revolves around the resolution of the federal supremacy through the state constitution, federal laws, executive, and judicial approaches, all of them tend to be unconstitutional. The only way out to the deadlock is either through the amendment of the Constitution or by way of interpretation by the House of Federation.

4. Conclusion and the Way Forward

The idiom "Too many cooks in the kitchen", according to the Collins dictionary, means that something may not be successful if too many people try to do it simultaneously. It is an old saying that connotes the presence of multiple chefs in the kitchen which may probably cause the ineffectiveness of the cooking task. This expression describes an age-old problem: If too many people help to complete a task, it may not go very well and successful. As is understood from the practices of adopting and dealing with the federal supremacy clause under the Ethiopian federal experimentation, there are many institutions involved therein. Although the Federal Constitution opts for a blanket silence due to implicit reasons, the state constitutions, laws made by the federal government, acts of executive organs, precedents handed down by federal and state cassations could be categorized into different approaches, including constitutional, statutory, executive and judicial ones, These approaches have been employed as mechanisms of resolving the question of the [federal] supremacy clause.

All these practices, in addition to being unconstitutional acts, would render the resolution mechanisms of issues related with supremacy of federal laws and state laws over one another ineffective owing to the multiplicity of the centre of arbitration or decision making. Moreover, a close look into the decisions rendered by each institution, one could readily comprehend that all of the approaches adopt the precedence of federal laws over the state ones. The implication and consequence of such a trend is profoundly significant. On the one hand, it subordinates the laws and institutions of the states to the federal counterpart which may boil down eventually to non-federal and/or unitary system governance. This propensity, indeed, is the antithesis of federalism which we are talking about. On the other hand, and which is the corollary of the first implication is that accommodating diversity and the self-rule right of the states which are the bedrocks of the Constitution would be at peril.

Consequently, the only way out to the deadlock is either through the amendment of the Constitution or by way of interpretation by the House of Federation. By doing so, the issue of resolving the question of the supremacy clause would have a centre of adjudication. In addition, the constitution could be developed and federalism be experimented in a linear and progressive manner. Even so, if the House of Federation hands down a precedent on the supremacy clause or the Constitution is amended sooner or later, it should be taken into account that a qualified and exceptional approach to the federal supremacy clause be adopted so that the diversity-friendly model would be preferable in the federal set up. In this vein, the experiences of India, Germany, South Africa and Kenya, where the categorical supremacy is qualified may impart an important lesson for Ethiopia for an effective diversity management, protection of legal pluralism and ensuring the self-rule rights of the states.

Lastly, it is suggested that, as this piece paves the doors for potential inquiries, prospective researchers are advised to further the study by employing various research methods on the subject of the conflict of laws made by the federal government and the states and its resolution mechanisms in Ethiopia and beyond.

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