

Supervisory Power of the Centre to Regions in South Africa and Ethiopia: A Comparative Analysis

A research paper submitted to the Law Faculty of University of the Western Cape, in partial fulfilment of the requirements for the degree of Masters of Law (LL. M).

By: MULUNEH, YITAGES ALAMAW

Student Number: 2866450

Supervisor: Professor NICO STEYTLER



Declaration

I declare that 'Supervisory Power of the Centre to Regions in South Africa and Ethiopia: A Comparative Analysis' is my own work. It has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

MULUNEH, YITAGES ALAMAW

Student Number 2866450



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While writing this research and during my study, I proved that God is a God of dialogue. He gave me all I needed and showed me that he is always there for me. I, therefore, have many reasons to thank Him. Secondly, I am grateful to my supervisor, Professor Nico Steytler, for his critical and insightful suggestions, and his patience to read the draft. Had it not been for him, this work would have not been a reality.

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To my father!

Dad, I know, you are in Heaven.



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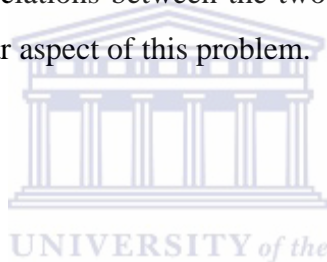


Chapter One

Introduction

1.1 Background of the study

As opposed to the unitary form of government established by the Constitutions that were adopted by successive government of the Ethiopian state,¹ the present Constitution has ushered in a new dispensation by declaring a federal form of government.² The Constitution of the Federal democratic Republic of Ethiopia (hereafter, the FDRE Constitution) has established a two-order government: Federal and State Governments.³ Each order of government has its own exclusive powers in certain areas⁴ while sharing powers in other areas.⁵ This presents a fertile ground for intergovernmental relations. However, the problem is that the Constitution as well as the legal system have not given sufficient attention to the regulation of intergovernmental relations between the two orders of government. This work will be concerned with a particular aspect of this problem.



1.2 Statement of the problem

Establishing different orders of government implies not only division of powers between the different levels of government but also adopting a framework through which the relationship between the different orders of government⁶ is regulated. In the absence of such frame work, dispute, competition, and lack of flow of information between and among the different orders

¹Habib 2004, available at <http://www.hofethiopia.org/pdf/The%20role%20of%20the%20House%20in%20EFDRE%20constitution.pdf>, accessed on 19/05/08.

² Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution, hereinafter), Art.1.

³ FDRE Constitution, Art.50 (1).

⁴ FDRE Constitution, Arts 51 & 96 for the Federal Government, and Arts.52 & 97 for the State Governments.

⁵ FDRE Constitution, Art. 98.

⁶ This relationship is known as intergovernmental relations. See Department of Provincial and Local Government Republic of South Africa (DPLG) 2007, 1.

of governments will prevail.⁷ Such situations hinder the different orders of government from discharging their responsibilities as public institutions.

As mentioned above, although Ethiopia has adopted federal form of government since 1995,⁸ it has not adequately dealt with matters of policy and legislative frameworks that are supposed to breathe life into the system. This includes intergovernmental relations. As a result, the system is facing problems related to information flow and oversight of the implementations of laws and policies at state level. It is only in 2005 that the Federal Government started to pay attention to issues of intergovernmental relations.⁹

The Ethiopian federal system of government especially suffers from a lack of constitutionally or legislatively sanctioned clear and structured system of supervision. Put simply, supervision represents an act of monitoring and intervention. It is an aspect of intergovernmental relations whereby one order of government oversees the act of another and intervenes in case of failure to fulfill particular obligations. Of course, the autonomy of subnational units must be guaranteed. The concept of autonomy should not, however, be protected to the extent that it compromises the objectives of the federal system. In emerging federations like Ethiopia, endowing the national government with supervisory powers is essential and hence this aspect of intergovernmental relations should be given due consideration.¹⁰ This is mainly because the centre is where most important laws and policies are made and often plays significant role in strengthening the federation.¹¹ The subnational units in Ethiopia, which are referred to by the Constitution as regions, are not, at least some of them, in a position to discharge their Constitutional obligations in their respective jurisdictions. This says that the Federal Government must have at its disposal a means by which it can ensure the effective

⁷ DPLG 2007, 3.

⁸ It adopted a Constitution that establishes federal state structure in 1995. See the FDRE Constitution, Art.1.

⁹ Proclamation No. 359/2003, Art.21 (6).

¹⁰ Work 2002, 5-6, available at http://www.undp.org/governance/docs/DLGUD_Pub_overview-decentralisation-worldwide-paper.pdf, accessed on 03/08/08.

¹¹ FDRE Constitution, Art.51.

implementation of laws, the provision of effective service delivery and effective governance in regions.

In addition, supervisory role should not be regarded as undesired element in Ethiopian federalism. It is by no means against regional autonomy if properly entrenched under the Constitution. Supervision is even said to be an incentive for effective decentralization.¹² Therefore, Ethiopia by clearly dealing with the supervisory role of the centre can strengthen its decentralization process.

In this research, an attempt will be made to address the following problems.

First, the Constitution mandates regional Governments to implement federal laws.¹³ This begs the following question: How can the Federal Government ensure that the regions have enforced these laws and policies? The FDRE Constitution does not provide for a mechanism to address this issue in a comprehensive manner. The Constitutional basis and/or extent of such supervisory power of the centre, if there is any, is not clear. In South Africa, the national government has a supervisory power that allows it to ensure that national laws are implemented by the provinces.¹⁴ The Constitution of the Republic of South Africa, 1996, (hereinafter, SA Constitution) clearly outlines the nature and extent of the supervisory role of the national government.¹⁵ The South African case provides a good example in terms of which to analyse the Ethiopian system.

¹² De Visser 2005, 45.

¹³ FDRE Constitution, Art.52 (2) (d).

¹⁴ Simeon & Murray 2004, 290.

¹⁵ Act 108 of 1996.

Second, one of the drawbacks of decentralization is regional imbalance.¹⁶ Decentralization increases inter-regional inequalities.¹⁷ However, a supervisory role by a national government can go a long way in mitigating this particular disadvantage of decentralization.¹⁸ Partly owing to the absence of a supervisory framework, Ethiopia is facing a growing problem of regional imbalance even more than a decade after the FDRE Constitution came into operation.¹⁹

In addition, the intervention role that the centre is supposed to play in terms of the FDRE Constitution is not clear. Even in cases where this is provided, they represent reactions that are adopted after every thing went wrong. This shows that the FDRE Constitution focuses on correction rather than prevention. Moreover, supervision is employed for extreme cases only. The focus, it seems, is on intervention without monitoring. A supervisory role should have not only reactive element but also proactive element,²⁰ something that is lacking in the Ethiopian Constitutional system.

In this research I will address the following question: ‘what is the extent of supervisory power of the Federal Government of Ethiopia over the Regions?’ Among other things, I will deal with the following sub-questions:

- Does the Federal Government have monitoring power over the Regional Governments? And
- Does Federal Government play a supervisory role?

In this research paper, I argue that the supervisory role of the centre as provided under the FDRE Constitution is insufficient. A more structured and elaborated approach to supervisory

¹⁶ De Visser 2005, 45.

¹⁷ Miller 2002, 11.

¹⁸ De Visser 2005, 45.

¹⁹ The Federal Democratic Republic of Ethiopia: The House of Federation 2007, 2.

²⁰ DPLG 1999, 24.

role of the centre is required in Ethiopia. I also argue that Ethiopia needs a defined supervisory role of the centre for effective federalism (federalism that serves objectives it is designed for). In addition, I argue that the supervisory framework adopted by the SA Constitution provides a good model for Ethiopia.

1.3 Scope of the research

It is no doubt that intergovernmental relations has various aspects. Dealing with all its aspect is beyond the object of this research. This research is limited only to the supervision aspect of intergovernmental relations. Therefore, it only deals with supervision, in general, and monitoring and intervention, in particular. Furthermore, it is limited only to the FDRE Constitution and the SA Constitution frameworks.

1.4 Objectives of the study

The objectives of this study, among other things, are

- to describe and analyse the supervision aspect of intergovernmental relation established by the FDRE Constitution and SA Constitution;
- to show the gap under the provisions of the FDRE Constitution relating to the supervisory role of the centre on regions; and
- to show that the South African experience of supervision presents a good example to Ethiopia.

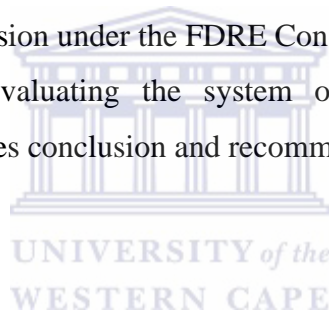
1.5 Significance of the study

This study is an attempt to come up with a comprehensive study of the supervision aspect of intergovernmental relations as enshrined under the FDRE Constitution and the SA Constitution. It also helps to expose some of the problems supervisory relationship of different orders of government in Ethiopia and South Africa face. It is significant as it deals with the intergovernmental relations gap in the FDRE Constitution and draws attention to a

very important aspect of a multi-order government's feature. It helps Ethiopia to learn from the experience of other countries. It suggests adjustments needed, in particular having regard to the relatively well developed national supervision system enshrined in the SA Constitution. Finally, the work adds upon studies relating to supervision by the centre of regions in African states.

1.6 Overview of the chapters

Chapter one outlines the problem statement and thesis. Chapter two provides for a short overview of the state structure and principles of intergovernmental relations as enshrined under the FDRE Constitution and the SA Constitution. Chapter three, by way of presenting the background for the discussions in the next chapter, discusses the concept of supervision under intergovernmental relations established by the SA Constitution. It thereby presents the parameters against which supervision under the FDRE Constitution is evaluated. Chapter four is primarily concerned with evaluating the system of supervision under the FDRE Constitution. Chapter five provides conclusion and recommendations.



Chapter Two

Constitutional Context of Supervision in Ethiopia and South Africa

2.1 Introduction

This chapter discusses, very briefly, the Constitutional context of supervision in Ethiopia and South Africa. It provides for how power is divided between the centre and the subnational units or regions and provinces as they are called in Ethiopia and South Africa, respectively. It also shows the manner of intergovernmental relations and the basis of supervision in such relations.

2.2 Ethiopia: Constitutional context of supervision

A brief review of the Constitutional history of Ethiopia would reveal that the country had passed through the experience of three written Constitutions prior to the adoption of the FDRE Constitution, 1995. All the three written Constitutions of the previous regimes opted for a unitary state structure.²¹ This unitary tradition came to an end with the fall of the military regime, commonly known as the Derg, in 1991. A Transitional Government Charter (TGC), adopted in 1991, rejected the unitary option and embraced a system of government that is characterised by a great degree of devolution.²² This was further affirmed by the series of 'federally flavoured' proclamations that were enacted by the Transitional Government of Ethiopia.²³ Therefore, it would not be incorrect to say that the federal dispensation that is officially adopted under the FDRE Constitution is the follow up of the decentralisation process that was rolled out during the transitional period. It can also be argued that the TGC had established a roadmap to the establishment of the federal arrangement that is now in place in Ethiopia. In 1995, the TGC was replaced by the FDRE Constitution.

²¹ Federal Democratic Republic of Ethiopia, Ministry of Capacity Building (MCB) 2005, 7.

²² Some writers say that federalism was introduced into Ethiopia in 1991. See Aalen 2002, 1.

²³ Morrison 1992, 129-130; Cohen 1994, 6.

The FDRE has officially established a federal state structure and declared Ethiopia to be a federal state.²⁴ According to the Constitution, the Federal Democratic Republic of Ethiopia consists of Regional States and City Administrations.²⁵ The City Administrations are under the Federal Government for any administrative matters and are directly accountable to it. The regions, on the other hand, administer themselves by Regional States Governments.²⁶ As it is the case with many other federal Constitutions,²⁷ the FDRE Constitution has allocated powers both to the Federal²⁸ and Regional Governments.²⁹

2.2.1 Division of powers

A look at the FDRE Constitution shows that government powers are divided into exclusive, residual, concurrent, delegated or undesignated powers. Each will be discussed below.

2.2.1.1 Exclusive powers

Exclusive powers refer to the powers specifically or exclusively given to either the Federal or the Regional Governments but not both.³⁰ The competence lies only with the tier of government that is Constitutionally entrusted with the power unless lawfully delegated.³¹ The other level of government is prohibited from exercising and interfering into those powers.³²

²⁴ FDRE Constitution, Arts 1, 46 (1) & 50 (1).

²⁵ City Administrations are different from Regional Governments as they are under the direct control of the Federal Government. See, FDRE Constitution, Arts 46(1), 47 (1) & 50 (1); Proclamation No.416/2004; Proclamation No.361/2003.

²⁶ FDRE Constitution, Arts 49(3) & 50 (2) (4); Proclamation No.416/2004, Art.15. It is important to note that the City Administrations or Councils have their own councillors elected by the people of the Cities. See MCB 2005, 12.

²⁷ Elazar 1995, 15.

²⁸ Functional areas of City Administrations are determined by proclamations passed by the Federal Government. See Proclamation No.416/2004; Proclamation No.361/2003, Art.17.

²⁹ See FDRE Constitution, Arts 50 & 51.

³⁰ Steytler 2001, 242.

³¹ Steytler 2001, 242.

³² Steytler 2001, 242.

The exclusive powers of the Federal Government of Ethiopia and the Regions are stated under Articles 51 and 52 (2) of the FDRE Constitution respectively. This says that Regional Governments are autonomous with respect to those powers assigned to them and the Federal Government is prohibited from interfering with them.³³ The border between federal and state powers is not always clear. For example, carving out exclusive powers is problematic as far as the ‘power to protect and defend the Federal Constitution’ is concerned as this power rests on both the Federal and Regional Governments.³⁴ However, the writer believes that this power needs to be interpreted in such a way that it is exclusively given to the Regional Governments within their territory. Although, the Federal Government has the exclusive power to protect and defend the Constitution throughout the country, intervention should be allowed only in case a Region fails to discharge its Constitutional obligation in that respect. The whole concept will be discussed in chapter four.

2.2.1.2 Residual powers

Residual powers are powers that are ‘remaining’ and not mentioned under exclusive jurisdiction of one order of government.³⁵ The FDRE Constitution bestows such powers on Regional Governments.³⁶ This means that the Federal Government exercises only those powers that are expressly assigned to it.³⁷ One may, however, argue that federal powers includes powers that are incidental to the powers expressly provided as it will be absurd to hold that the Federal Government has the powers expressly given to it but not powers necessary to exercise those same powers.

³³ FDRE Constitution, Art.50 (8).

³⁴ FDRE Constitution, Arts 51(1) & 52 (2) (a).

³⁵ *Cambridge Advanced Learner’s Dictionary* 2003.

³⁶ FDRE Constitution, Art.52 (1).

³⁷ Nahum 1997, 37.

2.2.1.3 Concurrent powers

Concurrent powers are powers that can be exercised by different orders of governments simultaneously.³⁸ The only concurrent power that the FDRE Constitution provides for relate to taxation, which is stipulated under Article 98.

2.2.1.4 Delegated powers

The Regions in Ethiopia exercise delegated powers, which are funded by the Federal Government.³⁹ This reveals two important points about the FDRE Constitution. First, it allows the delegation of powers that are deemed to be appropriate to be exercised by Regions. Second, but it prohibits unfunded delegation of such powers.

2.2.1.5 Undesignated powers

Undesignated powers are powers that are not allocated to any order of government.⁴⁰ They are different from residual powers as they are not left for Regions to exercise them. Rather, they are to be assigned either to the Federal or Regional governments upon a decision of the joint session of the House of Peoples' Representatives and the House of Federation.⁴¹

2.3 Intergovernmental relations in Ethiopia

Generally speaking, the FDRE Constitution does not adequately deal with intergovernmental relations between the Federal and Regional Governments. However, a close look at some of the provisions of the Constitution indicates to the existence of some conditions that call for intergovernmental relations between the two orders of government. It, for example, calls for cooperation of the two orders of governments in the areas of taxation under Article 100 of the

³⁸ Steytler 2001, 241.

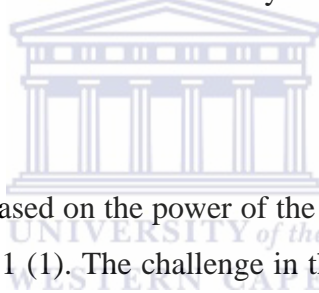
³⁹ FDRE Constitution, Arts 50 (9) and 94 (3).

⁴⁰ *Cambridge Advanced Learner's Dictionary*, Cambridge University Press 2003.

⁴¹ FDRE Constitution, Art.99.

Constitution. It is only through cooperation and discussion that the two governments can avoid acts that may ‘adversely affect their relationship’ while exercising their taxation powers as distinct levels of government. But the way such cooperation should be conducted is not provided for. Considering that Ethiopia is new to federal form of government, a law that regulates such cooperation may be beneficial as it helps to clarify and strengthen such cooperation. This however, begs another question: Which order of government should enact laws that regulate such cooperation? The Federal Government or Regional governments?

A simple reading of the FDRE Constitution might suggest that the Regional Governments have the power to enact such laws pursuant to the residual power entrusted to them. But this particular construction of the Constitution presents a significant problem because it allows for the existence of different laws by permitting each Regional Government to pass its own law. Existence of different laws further calls for various ways of cooperation as each region comes up with its own law.



There is also possible argument based on the power of the Federal Government to protect the Constitution pursuant to Article 51 (1). The challenge in this argument is whether protection of the Constitution goes to the protection of the relationship created by the Constitution.

The other provision under the FDRE Constitution that seems to provide condition for intergovernmental relations is Article 94 (2), which calls for federal support to emerging regions. It is limited in the form of relation and the organs to be regulated by it as it is about financial support and deals with part of the relation that may exist between the centre and emerging states only.

2.4 South Africa: Constitutional context of supervision

The SA Constitution declares that the Republic of South Africa consists of Provincial, Local and National Governments.⁴² Although each sphere of Government has its own powers, the list of concurrent powers is very long. These powers are listed under Schedule 4 and 5 of the Constitution. The powers of the provincial and the national spheres of governments are briefly discussed below.

2.4.1 Exclusive powers

As stated above, exclusive power represents a power given to one sphere of government. Hence, the other sphere of government may not exercise them unless lawfully permitted in line with the Constitution. The National Government 'has exclusive power in respect of all matters other than those specifically vested in provincial legislatures by the' Constitution.⁴³ Similarly, the Provincial Government also has exclusive power on certain matters.⁴⁴ Generally speaking, however, exclusive powers do not appear prominent in the South African Constitution. The Constitution provides that the National Government has 'power over almost all...matters, both listed and unlisted,' hence it has little room for exclusive powers.⁴⁵ As far as provinces are concerned, the Constitution is characterised by its allocation of concurrent powers rather than allocating exclusive power to only one sphere of government.⁴⁶

⁴² Constitution of the Republic of South Africa, 1996, (SA Constitution, hereinafter), Secs 40 & 41.

⁴³ See *In re: Certification of the Constitution of the Republic of South Africa, 1996*, 1996 (10) BCLR 1253 (CC), para.256.

⁴⁴ SA Constitution, Sec.104 (b) (ii). This power includes power incidental thereto. See *In re: Certification of the Constitution of the Republic of South Africa, 1996*, paras 244, 252 & 254. It is, however, important to note that this argument is true only generally speaking. Exceptionally, the National Government may enact on the matters under Schedule 5 of the Constitution. Such exception is warranted where a national legislation is necessitated by any one or more of the reasons mentioned under SA Constitution, Section 44 (2). See also Steytler 2001, 242-244; Steytler 1999, 300. Such powers are powers "necessary 'for South Africa to speak with one voice, or to act as a single entity.'" See *In re: Certification of the Constitution of the Republic of South Africa, 1996*, paras 239-240; SA Constitution, Sec.104 (b) (iv); De Visser 2005, 80; Steytler 2001, 242.

⁴⁵ Steytler 2001, 241.

⁴⁶ Steytler 2001, 241.

2.4.2 Residual powers

Under the SA Constitution, residual powers are left for the National Government.⁴⁷ This is inferred from the language of the Constitution.⁴⁸ Hence, the National Government exercises powers that are not mentioned under either the concurrent list of Schedule 4 or 5.⁴⁹

2.4.3 Concurrent powers

The CRSA provides that both the National and Provincial Governments have concurrent power over Schedule Four matters. However, the powers of both the national and provincial governments with respect to Part B of the same schedule are limited to making laws that set out general frame work and principles for local government and does not include the power to make detailed regulation of the matters provided thereof.⁵⁰

2.4.4 Delegated powers

The CRSA provides that provinces may exercise delegated powers.⁵¹ It provides for a possibility of delegation of power by the National Government to the other spheres of governments.⁵² Hence, it is valid to say that provinces can exercise power on any matter 'expressly assigned to' them 'by national legislation.'⁵³

⁴⁷ SA Constitution, Secs 44 (1) (ii) & 164. See *In re: Certification of the Constitution of the Republic of South Africa, 1996*, para.244.

⁴⁸ *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development et al 1996*, (12) BCLR 1360 (CC), paras 25-28; See also De Visser 2005, 129-130.

⁴⁹ Steytler 2001, 241; SA Constitution, Secs 44 (1) (ii) & 146.

⁵⁰ De Visser 2005, 129-130. See the first statement of SA Constitution, Schedule 4, Part B.

⁵¹ SA Constitution, Secs 104 (b)(iii), 164 & 44 (1) (iii).

⁵² SA Constitution, Secs 104 (b)(iii), 164 & 44 (1) (iii).

⁵³ SA Constitution, Secs 104 (b)(iii), 164 & 44 (1) (iii).

2.5 Intergovernmental relations in South Africa

The CRSA provides that the three ‘...spheres of government... are distinctive, interdependent and interrelated.’⁵⁴ This Constitutional provision reveals a lot about the nature of the South African multi-order government. The ‘distinctiveness’ of the three orders of government refers to the autonomy each one of them enjoys while exercising its exclusive powers.⁵⁵ In other words, ‘[d]istinctiveness lies in the provision made for elected governments at national, provincial and local levels.’⁵⁶ Their ‘interdependence’ refers to the manner in which they should exercise their powers.⁵⁷ It says that the three spheres of government should cooperate while exercising government power to the common good of the people of South Africa.⁵⁸ Their ‘interrelatedness’ refers to the supervision of one sphere of government by the other.⁵⁹ In the language of the Constitutional Court of South Africa, “[t]he interdependence and interrelatedness flow from the founding provision that South Africa is ‘one sovereign, democratic State.’⁶⁰ These features of the South African government are further stressed by the principles of cooperative government under Section 41.

The provisions under Chapter Three of the Constitution generally signify that intergovernmental relationship in South Africa is founded upon two bases.⁶¹ The first basis of the intergovernmental relationship is equality,⁶² i.e., equality of all spheres of government.⁶³

⁵⁴ SA Constitution, Sec.40 (1).

⁵⁵ Malan 2005, 227; Woolman et’al 2007, 14-8.

⁵⁶ *Premier of the Province of the Western Cape v President of the RSA and Others 1999* (4) BCLR 382 (CC) para.50; Malan 2005, 227.

⁵⁷ Woolman et’al 2007, 14-8.

⁵⁸ Woolman et’al 2007, 14-8; *Premier of the Province of the Western Cape v President of the RSA and Others 1999*, para.50; Malan 2005, 227.

⁵⁹ Steytler 1995, available at <http://www.federalism.ch/files/categories/IntensivkursII/southAfricag1.pdf>, accessed on 29/06/08. Others say that the ‘interdependence’ refers to the supervision element. See Malan 2005, 227.

⁶⁰ Malan 2005, 227; *Premier of the Province of the Western Cape v President of the RSA and Others, 1999*, para.50; SA Constitution, Sec.1.

⁶¹ I am referring to the manners of conducting intergovernmental relationships. DPLG 1999, 24.

⁶² Parallel or horizontal intergovernmental relations. DPLG 1999, 24.

⁶³ DPLG 1999, 24.

It deals with intergovernmental relation that is conducted on equal footings, i.e., each sphere of government enjoying or having the same status.⁶⁴ It accords equal protection to each sphere of government.⁶⁵ This can be seen from the components of cooperative government as explained in Section 41(1) of the Constitution.⁶⁶

The second basis of intergovernmental relationship is hierarchy, i.e., subordination of a particular sphere of government to one or the other.⁶⁷ Intergovernmental relationship on such basis specifically refers to the supervision power of one sphere of government over the other as supervision in its essence refers to a hierarchical relationship.⁶⁸ The supervising sphere is in most cases perceived as the superior sphere of government as it directs the other sphere of government what and how to do something.⁶⁹ Supervision will be dealt with under the next chapter.

2.6 Conclusion

The foregoing discussion shows that the FDRE Constitution and the SA Constitution provide for different orders of governments and assign powers to them. The former allocates more exclusive powers to regions than the latter. Though both Constitutions provide fertile ground for intergovernmental relations as they establish different orders of governments, it is only the SA Constitution that has adequately dealt with such relationship. Furthermore, the SA Constitution provides for intergovernmental relations through cooperation and supervision. But the FDRE Constitution does not deal with such relations. However, it does provide for

⁶⁴ DPLG 1999, 24. It can also be said that having ‘the same guarantees of preservation.’ Baldi, *Beyond the Federal-Unitary Dichotomy*, p. 4, available at http://igs.berkeley.edu/publications/working_papers/99-7.pdf, accessed on 30/05/08.

⁶⁵ DPLG 1999, 24.

⁶⁶ See SA Constitution, Sec.41 (1).

⁶⁷ DPLG 1999, 23-24. It is a kind of ‘vertical’ intergovernmental relationships.

⁶⁸ DPLG 1999, 23-24.

⁶⁹ This may seem unacceptable in relation to the supervision of provinces on the National Assembly through NCOP. Therefore, this situation may be taken as an exception to the general rule or uniqueness of South African legal system.

the concept of supervision (See chapter four). Supervision under the FDRE Constitution and the SA Constitution will be discussed in the following chapters.



Chapter Three

Supervision of Provinces by the National Government in South Africa

3.1 Introduction

This chapter outlines the manner and extent of the supervisory power of the National Government of South Africa over the provinces (national supervision hereinafter). The discussion covers the meaning, nature and rationale of supervision under the SA Constitution, 1996. It provides that supervision includes acts of monitoring and intervention. Furthermore, it provides that though the SA Constitution has dealt with intervention clearly and to a reasonable extent, monitoring is said to be an implied power and not dealt with.

3.2 Meaning, nature and rationales

3.2.1 Meaning

Simply put, supervision refers to the task of overseeing the activities and conduct of another and making 'certain that everything is done correctly, safely.'⁷⁰ This says supervision is a double act. It is the act of observing and ensuring that every thing is correct.⁷¹ The two acts are interrelated in the sense that the act of observing is carried out with a view to accomplish the act of ensuring.⁷² Similarly, the Constitutional Court of South Africa has defined supervision as 'a double process.'⁷³ The Court said 'supervision' consists in 'a process of [national] review of the actions of [provincial government], so as to measure the fulfilment by [provincial government] of executive obligations conferred by statute, and a process of implementation of corrective measures should [provincial government] fall short of its obligations.'⁷⁴ This understanding shows that supervision is an act of both 'review of ...

⁷⁰ Cambridge Advanced Learner's Dictionary 2003.

⁷¹ Murray & Ampofo-Anti 2007, 20-26.

⁷² Murray & Ampofo-Anti 2007, 20-26.

⁷³ *In re: Certification of the Constitution of the Republic of South Africa, 1996*, para.370.

⁷⁴ The same as above.

action,’ which is an act of oversight, and an act of ‘implementation of corrective measures,’ which is an act of ensuring.

In states with multi-order government, the need for effective governance of sub-national units holds an important place.⁷⁵ Hence, supervision of regions by the national or federal governments is needed by this value and has to be established under a Constitution as one of the commonly known constitutional norms.⁷⁶ In line with this, supervision has been enshrined under the SA Constitution.⁷⁷

3.2.2 Nature

Under SA Constitution, supervision in general and national supervision in particular has the following attributes. To begin with, national supervision, as discussed above, consists of two important elements. It has both proactive element, which is an act of oversight or ‘review of action’, and reactive element, which represents ‘implementation of corrective measures.’⁷⁸ Hence it is made up of corrective power (i.e., a power to correct mistakes made by one level or sphere of government) and preventive power⁷⁹ (i.e., a power to oversee.)⁸⁰

⁷⁵ Murray 1999, 355.

⁷⁶ Murray 1999, 355. Even the framework under which supervision is to be made need to be established under a Constitution. Murray 1999, 355.

⁷⁷ SA Constitution, Secs 100, 139 & 214 (1) (c); Murray 1999, 355.

⁷⁸ DPLG 1999, 24. These elements are implied in the ‘SPEECH BY MINISTER MUFAMADI ON THE OCCASION OF BUDGET VOTE NO 22, DEPARTMENT OF PROVINCIAL AND LOCAL GOVERNMENT, National Council of Provinces, 13 June 2000’ available at [http://www.search.gov.za/info/previewDocument.jsp?dk=%2Fdata%2Fstatic%2Finfo%2Fspeeches%2F2000%2F000614355p1004.htm%40SpeechesandStatements&q=%3Cphrase%3E+\(issued+by%3A+department+of+provincial\)+%3CAND%3E\(+Category%3Cmatches%3Es+\)&t=MUFAMADI%3A+PROVINCIAL+AND+LOCAL+GOVERNMENT+BUDGET+VOTE+2000%2F2001%2C+NCOP](http://www.search.gov.za/info/previewDocument.jsp?dk=%2Fdata%2Fstatic%2Finfo%2Fspeeches%2F2000%2F000614355p1004.htm%40SpeechesandStatements&q=%3Cphrase%3E+(issued+by%3A+department+of+provincial)+%3CAND%3E(+Category%3Cmatches%3Es+)&t=MUFAMADI%3A+PROVINCIAL+AND+LOCAL+GOVERNMENT+BUDGET+VOTE+2000%2F2001%2C+NCOP), accessed on 09/08/08.

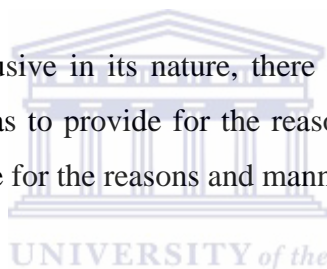
⁷⁹ It is a power to correct irregularities that may lead to mistakes or failure on the part of a given sphere or level of government. This can be equated with the saying that runs ‘prevention is better than cure.’ DPLG 1999, 24; Murray & Ampofo-Anti 2007, 20-26.

⁸⁰ Murray & Ampofo-Anti 2007, 20-26; De Visser, 2005, 44.

Second, national supervision has to do with the interdependent nature of the three spheres of government. As pointed out in Chapter Two, ‘interrelatedness’ refers to the supervision of one sphere of government by the other.⁸¹ This, as noted by the Constitutional Court, is in line with the founding principle stated in Section 1 of the SA Constitution.⁸² The National Government in particular needs to supervise the other spheres so as to ensure that the other two spheres are working towards the realization of the provision of better social services, adequate standard of living and equitable development opportunity.⁸³

Third, national supervision is an intrusive act,⁸⁴ in our case into provinces, as it involves monitoring and intervention.⁸⁵ Therefore, it has been confirmed that supervision affects or compromises the autonomy of provinces unless properly regulated.⁸⁶

Fourth, since supervision is intrusive in its nature, there must be clear constitutional rules governing it.⁸⁷ In particular, it has to provide for the reasons and manners of supervision.⁸⁸ The SA Constitution does provide for the reasons and manners of all kinds of supervision.⁸⁹



⁸¹ Steytler 1995, available at <http://www.federalism.ch/files/categories/IntensivkursII/southAfricag1.pdf>, accessed on 29/06/08. Others say that the ‘interdependence’ refers to the supervision element. See Malan 2005, 227.

⁸² *Premier of the the Province of the Western Cape v President of the RSA and Others*, 1999, para. 50; See SA Constitution, Sec.1; Murray 1999, 340.

⁸³ Murray 1999, 340-341; Woolman et’al 2007, 14-8.

⁸⁴ De Visser 2005, 169-171; *In Re: Certification of the Constitution of the Republic of South Africa*, 1996, para.370. That means an act of intrusion into the exclusive power or functional areas of the sphere of government to be supervised, the provincial government.

⁸⁵ De Visser 2005, 169-171; *In Re: Certification of the Constitution of the Republic of South Africa*, 1996, para.370.

⁸⁶ De Visser 2005, 169-171; *In Re: Certification of the Constitution of the Republic of South Africa*, 1996, para.370.

⁸⁷ De Visser 2005, 169-171; *In Re: Certification of the Constitution of the Republic of South Africa*, 1996, para.370; Murray 1999, 355.

⁸⁸ De Visser 2005, 169-171; *In Re: Certification of the Constitution of the Republic of South Africa*, 1996, para.370; Murray 1999, 355.

⁸⁹ SA Constitution, Secs100 & 139; De Visser 2005, 169-171; *In Re: Certification of the Constitution of the Republic of South Africa*, 1996, para.370; Murray 1999, 355.

At this juncture, it is important to note that the intrusive nature of supervision does not necessarily make it undesirable.⁹⁰ Supervision is rather a necessary evil in some decentralized governments.⁹¹ Seen in light of South African decentralization, it may be argued that supervision is a necessary evil as it is essential to assure that national laws are properly implemented in all provinces.⁹² The significance of supervision is particularly notable when seen in light of the fact that the National Government has the power to make important policies and laws.⁹³ In fact, one of the underpinning principles of decentralization in South Africa is ‘effective government through the implementation of national policy.’⁹⁴ Second, one of the demerits of decentralization of government power is unequal development of sub-national units (i.e., regions or provinces).⁹⁵ This particular problem can be addressed through supervision.⁹⁶

Supervision is a necessary evil for it encourages ‘central governments’ to decentralize and helps to achieve national objectives that a country sets for itself.⁹⁷ In South Africa, supervision is said to be an integral part of the cooperative government provided under the Constitution as it is a means to correct provincial failures that may ‘jeopardize’ the whole scheme of cooperative government.⁹⁸

⁹⁰ De Visser 2005, 45; Murray 1999, 340-341.

⁹¹ De Visser 2005, 45; Murray 1999, 340-341.

⁹² De Visser 2005, 45; Murray 1999, 340-341. ‘[E]stablish a system in which effective delivery of national policy is a key element.’ De Visser 2005, 45; Murray 1999, 340-341.

⁹³ Murray 1999, 341.

⁹⁴ Murray 1999, 340.

⁹⁵ De Visser 2005, 45.

⁹⁶ De Visser 2005, 45 & 197.

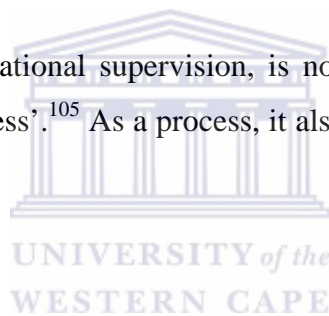
⁹⁷ De Visser 2005, 45 & 197.

⁹⁸ DPLG 1999, 71.

Fifth, national supervision should not be taken as the only possible instance of supervision. The CRSA shows that supervision may be exercised by other spheres of governments as well. In addition to national supervision of provincial governments,⁹⁹ the Constitution provides for provincial supervision of both the National and Local Governments.¹⁰⁰ The provinces protect their interest in the national law making process through the National Council of Provinces (NCOP, hereinafter).¹⁰¹

Sixth, national supervision is made upon a constitutionally specified grounds and procedures.¹⁰² This helps to ensure provincial autonomy.¹⁰³ Therefore, the National Government may not exercise supervisory power on any other ground and in any other manner except as enshrined under the Constitution.¹⁰⁴

Finally, supervision, including national supervision, is not a one time task. It is rather an ‘ongoing’ activity as it is a ‘process’.¹⁰⁵ As a process, it also signifies an act of follow up and correction.¹⁰⁶



In the following section, I briefly deal with monitoring and intervention by the National Governments into provinces.

⁹⁹ SA Constitution, Secs 100 & 139 (7); Tapscott 2000 (a), 125; Woolman & et'al 2007, 14-24; Madlingozi & Woolman 2007, 19-18.

¹⁰⁰ SA Constitution, Secs 139 & 73-78; Tapscott 2000 (a), 125; Woolman & et'al 2007, 14-24; Madlingozi & Woolman 2007, 19-18.

¹⁰¹ SA Constitution, Secs 100, 139, 67, 163, & 221 (1) (c); Tapscott 2000 (a), 125; Woolman & et'al 2007, 14-24; Madlingozi & Woolman 2007, 19-18.

¹⁰² SA Constitution, Secs 100 & 139.

¹⁰³ *In Re: Certification of the Constitution of the Republic of South Africa, 1996*, para.370.

¹⁰⁴ *In Re: Certification of the Constitution of the Republic of South Africa, 1996*, para.370.

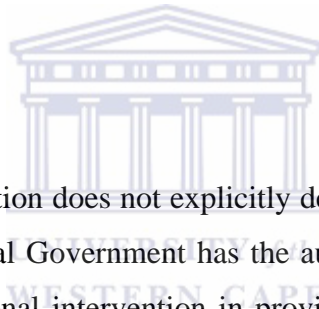
¹⁰⁵ *In Re: Certification of the Constitution of the Republic of South Africa, 1996*, para.370.

¹⁰⁶ *In re: Certification of the Constitution of the Republic of South Africa, 1996*, para.370; De Visser 2005, 45; Murray 1999, 340-341.

3.2.2.1 Monitoring of provinces

In South Africa, monitoring is defined as an act that ‘occurs when one sphere measure the compliance of another sphere with legislative directives.’¹⁰⁷ But what is monitoring?

According to one writer monitoring is ‘[a] continuing function that uses systematic collection of data on specified indicators to provide’ information to the supervising organ ‘of the extent of progress and achievement of objectives and progress in the’ activities to be carried out.¹⁰⁸ Hence, one can say that monitoring is a systematic collection of information on a defined time basis to identify problems and corrections that are needed thereto.¹⁰⁹ It is different from a simple act of checking. It must be regulated by law and carried out regularly.¹¹⁰ Hence, through monitoring, the National Government regularly gets information about the activities of the Provincial Government. This information may be used by the former in evaluating the conduct of the later.



Considering that the SA Constitution does not explicitly deal with the issue of monitoring,¹¹¹ one may ask whether the National Government has the authority to monitor provinces. The Constitution provides for ‘[n]ational intervention in provincial administration.’¹¹² Does this mean national supervision contemplated under the SA Constitution is limited in scope to intervention under defined circumstances only?

At first, the CRSA seems to be only contemplating intervention by the National Government. However, such conclusion would be incorrect as intervention power can hardly be exercised

¹⁰⁷ DPLG 2007, 33.

¹⁰⁸ World Bank, What is Monitoring and Evaluation (M&E)?available at http://www.worldbank.org/ieg/ecd/what_is_me.html, 02/09/08.

¹⁰⁹ ..., What is monitoring? available at <http://www.ces-vol.org.uk/index.cfm?pg=166>, 29/08/08.

¹¹⁰ ..., What is monitoring? available at <http://www.ces-vol.org.uk/index.cfm?pg=166>, 29/08/08.

¹¹¹ Murray & Ampofo-Anti 2007, 20-26.

¹¹² SA Constitution, Sec.100.

without monitoring or oversight power.¹¹³ The National Government has to collect information in order to make a proper decision to intervene or not.¹¹⁴ In short, intervention without monitoring is impractical. In line with this, scholars argue '[i]mplicit in the intervention of the national government is a responsibility to see that provinces are functioning properly'¹¹⁵ and provinces in South Africa 'accept that monitoring is required by the Constitution'. The problem is how and when monitoring should be made and what it should entail?¹¹⁶

It is important to note that monitoring should not be limited only to overseeing whether provinces are discharging their executive obligations.¹¹⁷ It has also to do with monitoring 'the performance of provinces in delivering services.'¹¹⁸ This is a qualitative monitoring of good and efficient governance, not linked to specific statutory obligations.'¹¹⁹ This is necessary as the National Government shares and bears ultimate duty to the people of provinces¹²⁰ to realise the objectives of decentralisation in South Africa like efficient service delivery and effective governance.¹²¹



¹¹³ DPLG 1999, 143; Murray & Ampofo-Anti 2007, 20-26.

¹¹⁴ This has to be read in relation with the time and manner of monitoring. The time of monitoring must be defined and the information may be submitted by the request of the supervisory organ or by the other organ as the case may be. ..., Monitoring and evaluation, p.3, available at <http://66.102.9.104/search?q=cache:ZaYKxNdJAcJ:www.civicus.org/new/media/Monitoring%2520and%2520Evaluation.pdf+Monitoring&hl=en&ct=clnk&cd=1&gl=za>, accessed on 28/07/08; Murray & Ampofo-Anti 2007, 20-26.

¹¹⁵ Murray & Ampofo-Anti 2007, 20-26.

¹¹⁶ Murray & Ampofo-Anti 2007, 20-26; DPLG 1999, 143. However, it has been agreed that '[a]s a minimum, it entails the due performance of provinces' statutory executive obligations. Whether such obligations are fulfilled requires monitoring, and processes giving effect to it should be devised.' Murray & Ampofo-Anti 2007, 20-26.

¹¹⁷ See the discussion in the following section, Section 3.2.2.2.

¹¹⁸ DPLG 1999, 143.

¹¹⁹ DPLG 1999, 143. It is referred to as the 'second level of monitoring.' DPLG 1999, 143.

¹²⁰ *In re: Certification of the Constitution of the Republic of South Africa, 1996*, para.118.

¹²¹ Murray 1999, 340.

As far as the manner in which national monitoring should be conducted is concerned, it may be done in different manners that range from the most to the more and least intrusive processes and by different institutions.¹²² Practically, national monitoring in South Africa has been conducted in those same manners.¹²³ Provinces, however, ‘did not welcome extensive and intrusive monitoring.’¹²⁴

In line with the above discussion, it has been held that monitoring power is implied from the intervention power stated under Section 100 of the CRSA.¹²⁵ In line with the argument that supervision power should be clearly specified under a law to protect and strengthen provincial autonomy, national monitoring, as it is the case with intervention, should be specified in legislation as well.¹²⁶

Accordingly, the Intergovernmental Relations Framework Act was introduced in 2005. This Act has ‘[t]he overarching purpose of’ creating ‘intergovernmental structures necessary to coordinate the development and *monitoring* of policy and legislation across the spheres of government.’¹²⁷ It was enacted with the aim to create forums that ‘facilitate monitoring of

¹²² DPLG 1999, 71-72. ‘The least intrusive form is routine reporting on a monthly or yearly basis, which compels provinces to put in place systems to provide the required information. A slightly more intrusive form is requesting information on a specific issue. This could include the appointment of a commission of inquiry with powers to subpoena witnesses and documents. The most intrusive method is the power of entry and inspection.’ DPLG 1999, 71-72. The institutions involved in national monitoring include Department of Provincial and Local Government and the Department of Finance. DPLG 1999, 71-72. ‘There is sectoral supervision through *line functions of national departments*. Over the past five years there were various national investigations into the functioning of provinces. From the Department of Public Service and Administration (DPSA), there were the audits by the then director-general, Dr Paseka Ncholo, on the administrative and managerial performance of provincial governments (the so called Ncholo Reports, 1998).’ DPLG 1999, 71-72.

¹²³ DPLG 1999, 72. ‘The Department of Provincial and Local Government ... plays a general monitoring role through requesting information [more intrusive manner of monitoring] and visiting provinces [less intrusive manner of monitoring as it is simple conduct of visiting, not entry and inspecting. For instance,] [d]uring 1998 the Minister of Constitutional Development and Provincial Affairs, in conjunction with the Department, undertook provincial visits aimed at discussing the progress of the provinces. ... [T]he deputy director-general for provincial affairs visited most of the provinces (except Northern Cape and Free State) during August 1999, holding discussions with senior officials.’ DPLG 1999, 72.

¹²⁴ DPLG 1999, 72.

¹²⁵ Murray & Ampofo-Anti 2007, 20-26.

¹²⁶ DPLG 1999, 72.

¹²⁷ Fesseha & Steytler 2006, 6. (emphasis added); See also DPLG 2006, 9.

how policy and legislation is [*sic*] implemented to ensure that legislative intention translates into tangible, measurable results,' among others.¹²⁸ Under this Act, provinces are required to report to the President's Co-ordinating Council at least once a year.¹²⁹ This can reasonably be taken as a mechanism of monitoring provinces by the National Government. But still, provinces are uncertain as to the number of report they are required to submit for the Act provides for the minimum number of report only, which is once a year. This formulation does not seem to prohibit the request of additional reports from provinces by the National Government.

Finally, monitoring in general and delivery of services, in particular, requires establishing key efficiency, effectiveness and impact indicators. It also requires putting in place systems to collect record and analyse information relating to such indicators with a view to use the information to inform proper administration or service delivery in the provinces.¹³⁰ But all these should be done in consultation and agreement with Provincial and National Governments.¹³¹



3.2.2.2 Intervention into provinces

Intervention is defined as 'the unilateral interference by one sphere into the affairs of another sphere in order to remedy an unacceptable situation.'¹³² Intervention into provinces by National Government (national intervention hereinafter) in South Africa, therefore, refers to a unilateral interference by the National Government into the affairs of Provincial Government with a view to rectify the failure to 'fulfill executive obligations.'¹³³ With this definition in

¹²⁸ Fesseha & Steytler 2006, 6; See also DPLG 2006, 9.

¹²⁹ Intergovernmental Relations Framework Act, 2005, Sec. 20.

¹³⁰ See Monitoring and evaluation, p.7, available at <http://66.102.9.104/search?q=cache:ZaYKxNdJAcJ:www.civicus.org/new/media/Monitoring%2520and%2520Evaluation.pdf+Monitoring&hl=en&ct=clnk&cd=1&gl=za>, accessed on 28/07/08.

¹³¹ DPLG 1999, 72.

¹³² DPLG 2007, 34.

¹³³ SA Constitution, Sec 100; Chaskalson & Klaaren 1999, 3-34.

mind, I shall proceed to examine the substantive and procedural requirements of national intervention in South Africa.

i) Substantive requirements

Substantive requirements are conditions or facts¹³⁴ that should exist to enable the National Government to intervene into provinces.

The SA Constitution provides that a national intervention may be made '[w]hen a province cannot or does not fulfil an executive obligation.'¹³⁵ Though not defined by legislation, it has been submitted that executive obligation is an obligation to implement laws and excludes the obligation to make laws.¹³⁶ Therefore, national intervention is allowed only when a province fails to implement laws or policies and not when it fails to make laws.¹³⁷ The executive obligation a province is alleged to fail should also be an obligation that exists under legislation and the legislation should be in force.¹³⁸ Any other provincial executive obligation that cannot be traced back to a law in force may not authorize an intervention into provincial administration under the Constitution.¹³⁹ From this fact follows that the national government must show a specific provision under a law¹⁴⁰ that imposes an executive obligation on a

¹³⁴ SA Constitution, Sec 100; Chaskalson & Klaaren 1999, 3-34; De Visser 1999, 5.

¹³⁵ SA Constitution, Sec.100 (1); Chaskalson & Klaaren 1999, 3-34.

¹³⁶ Roberts 2002, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=310799, accessed on 08/11/08; De Visser 1999, 7; Tapscott 2000 (b), 6; Murray & Ampofo-Anti 2007, 20-26. The National Government has intervened into the Province of Mpumalanga where the provincial government would 'not be able to fulfil some of its executive obligations' 'due to its cash flow difficulties in terms of law' despite the bold steps already taken over a period of about 18 months to address the precarious state of the Province's finances. See General Notice 947 of 2001, National Treasury General Notice, Agreement between the Government of the Republic of South Africa and the Government of the Province of Mpumalanga in terms of Section 100 of the Constitution.

¹³⁷ DPLG 2007, 41. This does not mean that legislative intervention is not allowed. Legislative intervention, however, is dealt with under another section. SA Constitution, Sec.42 (2); Murray & Ampofo-Anti 2007, 20-26.

¹³⁸ De Visser 1999, 7. It has been said that '[a]n intervention in case of failure to fulfil an obligation presupposes a pre-existing legal obligation.' De Visser 1999, 7.

¹³⁹ De Visser 1999, 7; Roberts 2002, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=310799, accessed on 08/11/08; Tapscott 2000 (b), 6; Murray & Ampofo-Anti 2007, 20-26.

¹⁴⁰ The law may be either national or provincial legislation, or SA Constitution or provincial Constitution, if any. De Visser 1999, 7; Roberts 2002, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=310799, accessed on 08/11/08; Tapscott 2000 (b), 6; Murray & Ampofo-Anti 2007, 20-26.

province, the specific obligation thereto and failure on the part of the province to carry out that obligation before initiating any attempt to intervene.¹⁴¹

The next issue is whether all types of failure to fulfil executive obligations results in a national intervention of the same nature. National intervention is an act of the national executive that may constitute a range of acts as it is deemed to include ‘any appropriate steps.’¹⁴² Therefore, national intervention in the form of an assumption of responsibility in all cases is not, for instance, what the drafters of the Constitution intended. Intervention in such manner is allowed only if such failure is prejudicial to ‘essential national standards, established minimum standards for the rendering of a service, economic unity, or national security, or that is prejudicial to the interests of another province or the country as a whole.’¹⁴³

Another issue is whether the particular cause that precipitates the failure of the province to fulfil an executive obligation matters.¹⁴⁴ The SA Constitution provides that intervention is lawful ‘[w]hen a province cannot or does not fulfil an executive obligation.’ Therefore, the cause of the failure to fulfil an executive obligation may be either the inability or lack of willingness on the part of the provincial government.¹⁴⁵ Consequently, the intention of the province is immaterial.¹⁴⁶ Whenever a province fails to fulfil its executive obligation, be it as a result of incompetence, inability or unwillingness, the National Government can intervene lawfully.

¹⁴¹ Roberts 2002, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=310799, accessed on 08/11/08; De Visser 1999, 7; Tapscott 2000 (b), 6; Murray & Ampofo-Anti 2007, 20-26.

¹⁴² Chaskalson & Klaaren 1999, 3-34. Such steps ‘include the issuing of directives to the provincial government or, in certain circumstances, the direct assumption by the National Government of responsibility for the neglected executive obligation.’ Chaskalson & Klaaren 1999, 3-34.

¹⁴³ *In re: Certification of the Constitution of the Republic of South Africa, 1996*, paras 119-121.

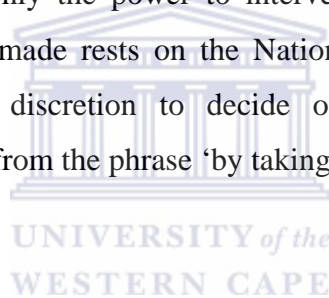
¹⁴⁴ *In re: Certification of the Constitution of the Republic of South Africa, 1996*, para.266; De Visser 1999, 6.

¹⁴⁵ *In re: Certification of the Constitution of the Republic of South Africa, 1996*, para.266; De Visser 1999, 6.

¹⁴⁶ De Visser 1999, 6.

The extent of assumption of provincial executive power by the national government is also an important issue.¹⁴⁷ Whenever intervention is allowed, it should have a clear scope.¹⁴⁸ Otherwise, it would amount to providing for an intrusive power without limitation.¹⁴⁹ Such arrangement will compromise provincial autonomy. Accordingly, the issue here is whether the scope of national intervention has been outlined under the SA Constitution. A close look discloses that the Constitution limits the scope of the intervention to the particular executive obligation that the provincial government failed to fulfil¹⁵⁰ as it is ‘to ensure fulfilment of *that obligation*.’¹⁵¹

Finally, it is important to note that the National Government has two discretionary powers as far as intervention into a provincial administration is concerned. First, it has the discretion to decide to intervene or not.¹⁵² This can be seen from the discretionary formulation of the Constitution.¹⁵³ Therefore, not only the power to intervene but also the power to decide whether intervention should be made rests on the National Government.¹⁵⁴ Secondly, the National Government has the discretion to decide on the form and extent of the intervention.¹⁵⁵ This can be seen from the phrase ‘by taking any appropriate step.’¹⁵⁶



¹⁴⁷ Murray 1999, 355; De Visser 2005, 169-171; *In Re: Certification of the Constitution of the Republic of South Africa*, 1996, para.370.

¹⁴⁸ Murray 1999, 355; De Visser 2005, 169-171; *In Re: Certification of the Constitution of the Republic of South Africa*, 1996, para.370.

¹⁴⁹ Murray 1999, 355; De Visser 2005, 169-171; *In Re: Certification of the Constitution of the Republic of South Africa*, 1996, para.370.

¹⁵⁰ Murray 1999, 355; De Visser 2005, 169-171; *In Re: Certification of the Constitution of the Republic of South Africa*, 1996, para.370; Chaskalson & Klaaren 1999, 3-34.

¹⁵¹ Chaskalson & Klaaren 1999, 3-34 (emphasis added).

¹⁵² De Visser 1999, 12.

¹⁵³ It provides that ‘the national executive *may* intervene.’ See SA Constitution, Sec.100; De Visser 1999, 7 (emphasis added).

¹⁵⁴ De Visser 1999, 7.

¹⁵⁵ De Visser 1999, 7.

¹⁵⁶ De Visser 1999, 7. SA Constitution, Sec.100.

ii) Procedural requirements

Procedural requirements refer to the manner by which the National Government takes what the Constitution puts as ‘any appropriate steps’ with a view to ensure the realization of the provincially unfulfilled executive obligation.¹⁵⁷ In other words, it refers to how national intervention should be made.¹⁵⁸ In the following paragraphs, the discussion focuses on the procedure of national intervention as outlined by the SA Constitution.¹⁵⁹

As far as the procedure for national intervention is concerned, there are various ways of intervention for different kinds of failures to fulfil provincial executive obligations.¹⁶⁰ This conclusion is also supported by the indicative or illustrative term ‘including’ under SA Constitution.¹⁶¹ The consequence that follows from a failure to fulfil a particular obligation seems to guide the national executive in choosing or determining the ‘appropriate step’ that it should take in a form of intervention.¹⁶² For instance, national intervention in the form of assumption of responsibility is deemed to be the ‘appropriate step’ if such failure is prejudicial to ‘essential national standards, established minimum standards for the rendering of a service, economic unity, or national security, or that is prejudicial to the interests of another province or the country as a whole.’¹⁶³

Before the national executive intervenes into the provincial administration, it has to first issue directives to the provincial government.¹⁶⁴ Directive is ‘an official instruction.’¹⁶⁵ It is an instruction that should set out ‘the failure of the provincial government and the steps that are

¹⁵⁷ *Cambridge Advanced Learner’s Dictionary* 2003.

¹⁵⁸ *Cambridge Advanced Learner’s Dictionary* 2003.

¹⁵⁹ SA Constitution, Sec.100.

¹⁶⁰ DPLG 1999, 143.

¹⁶¹ SA Constitution, Sec.100 (1); De Visser 1999, 7; *In Re: Certification of the Constitution of the Republic of South Africa, 1996*, paras 115-117.

¹⁶² Chaskalson & Klaaren 1999, 3-34.

¹⁶³ *In Re: Certification of the Constitution of the Republic of South Africa, 1996*, paras 119-121.

¹⁶⁴ *In Re: Certification of the Constitution of the Republic of South Africa, 1996*, para. 120.

¹⁶⁵ *Cambridge Advanced Learner’s Dictionary* 2003.

required to make sure they are met.¹⁶⁶ It serves as a form of intervention¹⁶⁷ as it requires the provincial government to act in a certain way.¹⁶⁸

After issuing directives, the national executive may intervene into a provincial administration by assuming responsibility provided that ‘the directive is not complied with.’¹⁶⁹ When intervention is made in this manner, two important limitations must be observed. First, the assumption must be for those obligations which are relevant to rectify the consequences of the failure by the provincial administration.¹⁷⁰ Therefore, the assumption of responsibility goes only ‘to the extent that is necessary to do so for any of the purposes set out’ under the Constitution.¹⁷¹ Secondly, such intervention should obtain the approval of the NCOP.¹⁷² Should the national executive intervene in the form of assumption of responsibility, it is required to ‘submit a written notice of the intervention to the [NCOP] within 14 days after the intervention began.’¹⁷³

The NCOP is given the discretion to approve or disapprove the intervention. Disapproval could be explicit or implied. If the NCOP is not convinced about the grounds for intervention and would like to end the intervention, it should do so explicitly. Contrary to this, implied approval of intervention is deemed to authorize intervention for six months only.¹⁷⁴ If the

¹⁶⁶ DPLG 2007, 41.

¹⁶⁷ DPLG 2007, 41; SA Constitution, Sec.100 (1) (a).

¹⁶⁸ DPLG 2007, 41; SA Constitution, Sec.100 (1) (a).

¹⁶⁹ DPLG 2007, 41; SA Constitution, Sec.100 (1) (b).

¹⁷⁰ DPLG 2007, 41; *In re: Certification of the Constitution of the Republic of South Africa, 1996*, para.265.

¹⁷¹ *In re: Certification of the Constitution of the Republic of South Africa, 1996*, para.265; See SA Constitution, Sec.100 (1) (b).

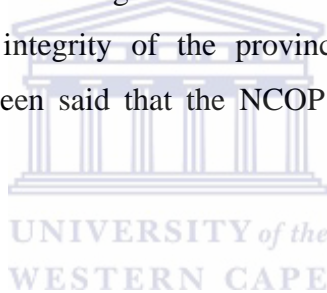
¹⁷² Chaskalson & Klaaren 1999, 3-34.

¹⁷³ SA Constitution, Sec.100 (2) (a).

¹⁷⁴ DPLG 2007, 41; SA Constitution, Sec.100 (2) (b).

NCOP does not explicitly approve an intervention within six months, the national executive is required to end the intervention upon the lapse of six months.¹⁷⁵

It is also important to note that the role of the NCOP is not only limited to the approval or rejection of the intervention. It extends to periodic or regular review of the intervention.¹⁷⁶ NCOP's review power includes but is not limited to checking whether the situation that called for the intervention still exists. If the situation does not exist any more or any thing that needs attention of the national executive is there, it makes 'any appropriate recommendations' to the national executive.¹⁷⁷ This may include the ending of the intervention.¹⁷⁸ It is important to note that the role of the NCOP is limited in cases where the intervention is approved expressly.¹⁷⁹ In such cases, the NCOP only reviews the intervention and makes recommendation. The national executive may, however, disregard the recommendation. But the decision to disregard such recommendations could be justiciable as it impacts on the institutional integrity of the provincial government. This being the theoretical construction, it has been said that the NCOP can terminate intervention at all times.¹⁸⁰



3.2.3 Rationales of supervision in South Africa

Supervision, in general, and national supervision, in particular, is needed for different reasons and may be justified on different grounds. It may be difficult to exhaustively list its importance. But in addition to the merit each of its components may have, supervision in national supervision is said to be necessary for the realization of effective service delivery and governance in provinces.¹⁸¹ Supervision can be regarded as one of the tools that the

¹⁷⁵ DPLG 2007, 41; SA Constitution, Sec.100 (2) (b).

¹⁷⁶ DPLG 2007, 41; SA Constitution, Sec.100 (2) (c).

¹⁷⁷ DPLG 2007, 41; SA Constitution, Sec.100 (2) (c).

¹⁷⁸ Chaskalson & Klaaren 1999, 3-34.

¹⁷⁹ Chaskalson & Klaaren 1999, 3-34.

¹⁸⁰ DPLG 2007, 42.

¹⁸¹ Murray 1999, 341.

national government can use in ensuring the achievement of the objectives of decentralization in South Africa, which include effective service delivery and governance.¹⁸²

Second, supervision is ‘an important way of improving the performance of’ government as it presents incentive to the provincial governments and provided an opportunity to correct a failure to discharge executive obligations.¹⁸³ It can even be argued that it is of equal value or importance as that of decentralization in improving the performance of government.¹⁸⁴

Third, supervision in general and monitoring in particular contributes in establishing well organized decentralized governance¹⁸⁵ as it is a means to oversee performance at all provinces.¹⁸⁶

Finally, supervision enables the national government to ‘ensure that mistakes are rectified in time’ when a province ‘can or does not fulfil executive obligations’ arising from legislations.¹⁸⁷ It can also be helpful to avoid negative consequences and when such negative consequences happen, to limit their impact.¹⁸⁸

¹⁸² Murray 1999, 341.

¹⁸³ Nyiri, available at <http://unpan1.un.org/intradoc/groups/public/documents/NISPAcee/UNPAN005561.pdf>, accessed on 28/07/08.

¹⁸⁴ Nyiri 4, available at <http://unpan1.un.org/intradoc/groups/public/documents/NISPAcee/UNPAN005561.pdf>, accessed on 28/07/08.

¹⁸⁵ Nyiri 4, available at <http://unpan1.un.org/intradoc/groups/public/documents/NISPAcee/UNPAN005561.pdf>, accessed on 28/07/08; Thompson 1991, 53.

¹⁸⁶ Decentralisation does not only need the division of government functions to sub-national units and the centre but also needs the prior setting of ‘procedures for setting objectives and monitoring..., and a control structure that links each responsibility center to the goal of the organization as a whole.’ Nyiri 4, available at <http://unpan1.un.org/intradoc/groups/public/documents/NISPAcee/UNPAN005561.pdf>, accessed on 28/07/08; Thompson 1991, 53. It should also not be taken that supervision is a feature of centralization as ‘[c]entralisation is not policy direction from the top, hierarchically established goals, and central control procedures. These are the characteristics of all well-managed organizations.’ Nyiri 4, available at <http://unpan1.un.org/intradoc/groups/public/documents/NISPAcee/UNPAN005561.pdf>, accessed on 28/07/08; Thompson 1991, 53.

¹⁸⁷ SA Constitution, Sec.100; Hessel 2006, 99.

¹⁸⁸ Steinich 2000, 5-6.

3.3 Conclusion

In sum, this chapter has shown that national supervision has been provided under the SA Constitution for various reasons. It is also indicated that supervision consists of an act of monitoring and intervention on specified grounds. The discussion has also revealed that although national intervention has been regulated to a reasonable degree, such is not the case with national monitoring.



Chapter Four

Supervision of Regions by the Federal Government in Ethiopia

4.1 Introduction

Federalism is in effect decentralisation¹⁸⁹ and the federal government need to know what is going on in the states in a constitutionally established basis.¹⁹⁰ In line with this, practically, the Federal Government of Ethiopia is supervising regions. The extent and manner of the supervision and monitoring is neither wholly regulated nor similar. In some regions, the extent of supervision and monitoring is higher than in others.¹⁹¹ This chapter assesses the supervisory role of the Federal Government of Ethiopia over Regional Governments.

4.2 The supervisory role of the Federal Government of Ethiopia with regard to regions

It is not an easy task to identify the supervisory role of the Federal Government of Ethiopia by looking at the FDRE Constitution as it is not clearly spelt out except in relation with subsidies to disadvantaged regions.¹⁹² The question is: does the Federal Government have a supervisory power except with respect to subsidies? In order to provide an answer to this question, it is important to examine the FDRE Constitution in light of the elements of supervision set out in chapter three. The first issue that need to be addressed is will be discussed in the next section.

4.2.1 Federal Monitoring

Does the FDRE Constitution give the federal government the power to monitor regional governments? This study suggests a negative answer. The Federal Government does not have

¹⁸⁹ Serra-Horguelin, The federal experiment in Ethiopia: A socio-political analysis, available at <http://www.cean.sciencespobordeaux.fr/page%20perso/TD64.pdf>.

¹⁹⁰ Woolman et'al 2007, 14-3-14-5.

¹⁹¹ Ayenew 2002, 140.

¹⁹² FDRE Constitution, Art.94 (2).

a constitutional basis to monitor Regional Governments. In practice, however, the Federal Government monitors Regional Governments and some legislation support the practice of such monitoring.¹⁹³ For example, the Ministry of Federal Affairs practically monitors Regional Governments in relation to conflicts among and within regions. The Ministry has established a conflict prevention office, which focuses on monitoring the likelihood of conflicts and engages in preventive work in areas of conflict. The Ministry was also preparing to launch a conflict mapping program in September 2008.¹⁹⁴ The FDRE Constitution does not, however, explicitly authorize the Federal Government to do so. The constitutionality of these practices of the Ministry could be challenged. One may, however, argue that such monitoring power should be implied from the power of the Federal Government to resolve conflicts arising between and among regions.¹⁹⁵

The Environmental Protection Authority of Ethiopia is empowered to monitor Regional Governments in the implementation of environmental policies, strategies and laws. This can be read from the objective, powers and duties of the Authority as set out under the Environmental Protection Organ Establishment Proclamation and others.¹⁹⁶ It is also possible to read this power of the Authority from the duty of Regional Governments to report to the Authority ‘on the respective state of the environment and sustainable development of their respective states.’¹⁹⁷ Moreover, it is reasonable to see the need for monitoring by the Authority where Regional Governments in particular opt to ‘issue and implement their own’ environmental standards as these standards should not be less stringent than the federal environmental standards.¹⁹⁸ It appears to be practically difficult to ensure regions’ compliance with such standards in absence of monitoring by the Federal Government. This practice may be supported by the fact that regions are required to implement federal laws

¹⁹³ See Proclamation No.456/2005, Art.16 (2) (3); FDRE Constitution, Art.52 (2) (d); Proclamation No.471/2005, Art.13 (2) (3), Art.19 (9), Art.17 (3) (4) & Art.14 (1).

¹⁹⁴ Interview with Ato Tsegaw Mekonnen, Conflict Prevention and Resolution expert at the Ministry of Federal Affairs, July 6, 2008.

¹⁹⁵ FDRE Constitution, Art.62 (6).

¹⁹⁶ Proclamation No.295/2002, Arts 5 & 6 (2) (7) (9) (11) (21) (22); Proclamation No.300/2000, Art.5 (2) (4).

¹⁹⁷ Proclamation No.295/2002, Art.15 (5).

¹⁹⁸ Proclamation No.295/2002, Art.15(4); Proclamation No.300/2000, Art.6 (4).

with respect to natural resources and the power of the Federal Government to ensure the implementation of such laws.¹⁹⁹

Finally, the Ministry of Health receives reports from Regional Governments at least once a year.²⁰⁰ It has established committees and reporting systems to oversee, among others, the implementation of the health sector development programmes by the Regional Governments.²⁰¹ Under the Health Management Information System (HMIS)/ Monitoring and Evaluation (M&E), there is a concept called participatory review meetings whereby the Federal Ministry of Health ‘gathers Regional Health Bureau managers and program experts in Annual Review Meeting’, and a concept called supportive supervision through which the Ministry may get information via ‘HMIS reporting to understand the weakness and strength of’ regions in health sector and provide supervision that is ‘supportive and empowering.’²⁰² However, what kind of supervision is ‘supportive and empowering’ is not clearly indicated. This might be compromising regions’ autonomy as it is a broad description.

Furthermore, the Ministry has been developing supervision guidelines since January 2008 and that may be used in the future.²⁰³ This writer had no access to the document. The Ministry has also been the sole organ ‘publishing *Health and Health Related Indicators* annually’ for, at least, the last ten years.²⁰⁴ Furthermore, one of the open-ended powers of the Ministry relating to its monitoring power is that it has the power to ‘[a]ct on issues revealed by monitoring information.’²⁰⁵ This has a negative effect impacting on the autonomy of regions.

¹⁹⁹ FDRE Constitution, Art.52 (2) (d).

²⁰⁰ Federal Ministry of Health, Health Management Information System (HIMS) Reform Team 2008, 6.

²⁰¹ Federal Ministry of Health, Planning and Programming Department 2005, 28-29.

²⁰² Federal Ministry of Health, Health Management Information System (HIMS) Reform Team 2008, 3-4.

²⁰³ Federal Ministry of Health, Health Management Information System (HIMS) Reform Team 2008, 5.

²⁰⁴ Federal Ministry of Health, Health Management Information System (HIMS) Reform Team 2008, 4.

²⁰⁵ Federal Ministry of Health 2007, 48-60.

It is difficult to find constitutional clauses that support these practises of the Ministry, be it explicitly or implicitly. However, in light of the general power of the Ministry to ‘direct the country’s health sector development’¹ it may be argued that it has a monitoring power. Regardless of the validity of the argument, monitoring power should be clearly stated and delimited.

However, some of the laws and practice do not have constitutional basis, even by implication. With respect to organs that may claim federal monitoring based on an implicit constitutional authorization, there is no clear law that sets out the manner of monitoring and what it should entail.

4.2.2 Intervention into regions by the Federal Government in Ethiopia

As far as the FDRE Constitution is concerned, the concept of intervention is provided for under Articles 51(4), 55(16) and 62(9). It is also defined in relation with these provisions as ‘a system for intervention in the regions pursuant to Article 62(9) of the Constitution and includes measures to be taken in accordance with Article 51(14) or Article 55(16) of the Constitution.’²⁰⁶ At this juncture, it is important to evaluate whether the intervention enshrined under the FDRE Constitution conforms to the understanding of intervention as outlined in this study. As indicated earlier, intervention is a unilateral act of interference by the Federal Government into the ‘affairs’ of Regional Governments. In the next sections, the writer discusses the following questions: who intervenes, when intervention is allowed, and how intervention is to be made and for how long?

4.2.2.1 Types of intervention

The FDRE Constitution deals with intervention under three provisions²⁰⁷ providing for intervention on different grounds.²⁰⁸ Therefore, it seems possible to conclude that there are

²⁰⁶ Proclamation No.359/2003, Art.2(1).

²⁰⁷ FDRE Constitution, Arts 51(4), 55(16) & 62(9).

three types of interventions under the Constitution. Whether such conclusion is warranted will be shown in the subsequent discussions.

4.2.2.2 When is intervention allowed under the FDRE Constitution?

According to the FDRE Constitution, intervention in a regional government is allowed only under one of the following situations (substantive requirements).

The first ground of federal intervention is when there is ‘a deteriorating security situation within’ a region and when the Regional ‘authorities are unable to control it.’²⁰⁹ This provision raises two important issues. The first issue is: what constitutes ‘a deteriorating security situation?’ The Constitution does not provide for a definition. This may be understandable as a Constitution is supposed to be a general document and details are to be supplemented by subsidiary legislations. Unfortunately, neither does the Constitution authorize any particular organ to define this phrase. Can the Federal Government define it under a federal law? Although it may be argued that there is no need for statutory interpretation as it is a constitutional power, it is useful to define the phrase to provide certainty in the process of intervention and guarantee regional autonomy.

It is argued that the Federal Government does not have such power. First, the Federal Government has only the powers explicitly given to it by the FDRE Constitution. It is important to note that ‘powers *not given expressly* to the Federal Government alone, or concurrently to the Federal Government and States’ are left for the Regional Governments.²¹⁰ The power to make a law to define a circumstance amounting to the deterioration of security situation is one such power. Second, it is important to note that the policing power is given to the regions and, consequently, they should define what a deteriorating situation of security

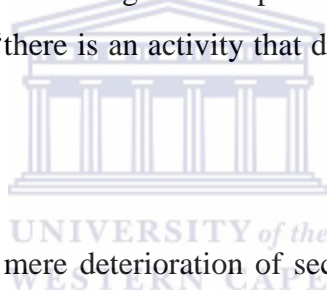
²⁰⁸ FDRE Constitution, Arts 51(4), 55(16) & 62(9).

²⁰⁹ FDRE Constitution, Art.51(14).

²¹⁰ FDRE Constitution, Art.52(1). Emphasis added.

is.²¹¹ Third, in situation of deteriorating security, it is the regions that demand intervention. The situation gives rise to a right in favour of the regions. Therefore, when and under what situation to exercise such power should be left to them. Regions should be able to request not only intervention by the Federal Government but also determine a situation that amounts to ‘a deteriorating security situation’ as that enables them to exercise their power, right and duty of calling for such intervention. Generally, it is contended that the power to determine a situation that amounts to ‘a deteriorating security situation’ rests with the Regional Governments. However, some scholars argue that what constitutes a deteriorating security situation should be determined by the Federal Government on the basis that the power to determine when to intervene is inherent in the power to supervise.

In practice, however, ‘a deteriorating security situation’ has been described by the Federal Government in a proclamation. According to that proclamation, ‘a deteriorating security situation’ is a situation in which ‘there is an activity that disturbs the peace and safety of the public’ in a region.²¹²



The second issue is whether the mere deterioration of security situation suffices to request intervention by the Federal Government? The FDRE Constitution is clear in this regard. Intervention should be requested only if the authorities of the requesting region are not able to control a deteriorating security situation. Security situation in a region may deteriorate for one or another reason. In such cases, the obligation to maintain the security of a region primarily rests upon the Regional Government itself.²¹³ But in cases where a deteriorating security situation goes beyond the control of a Regional Government, the Federal Government may extend its help to restore the security of the requesting region. It is only in the later situation that the system of intervention is functional.

²¹¹ FDRE Constitution, Art.52(2)(g).

²¹² Proclamation No.359/2003, Art.3.

²¹³ As policing power is Regional power. See the FDRE Constitution, Art.52(2)(g).

As far as this ground of intervention is concerned, it is not convincing to call it an intervention. Intervention is a unilateral act of the Federal Government. But, in this case the Federal Government interferes into regions only upon their request.

The second ground of intervention is when regional ‘authorities are unable to arrest violations of human rights within their jurisdiction.’²¹⁴ But there is an issue to be raised at this point. The issue is whether protection of human rights is an exclusive power of the regions. This is to see whether there is intervention in the strict sense of the term. The answer is in the negative.

As far as this ground of intervention is concerned, there are two important requirements for a lawful intervention. First, there must be human rights violations in the region. When can one say acts of human rights violation have been committed and thus intervention should be made? A federal law provides that human rights violations is deemed to exist ‘where an act is committed...in violation’ of the human rights provisions under chapter three of the FDRE Constitution, and other laws passed in accordance thereto.²¹⁵ From where should information concerning human rights violation come? The information may come from the Human Rights Commission, a member of the House of Peoples’ Representatives from the region in which the human rights violation is committed, or any other person, be it juridical or physical.²¹⁶ The issue not sufficiently addressed is: what should be the extent of the human rights violations to invite a federal intervention?

The second prerequisite for intervention on the grounds of human rights violations is the inability on the part of a region to arrest the same. Human rights violations in a particular Region do not outright give the Federal Government the right to intervene into a region. The Federal Government must make sure that there is a failure on the part of the region to arrest

²¹⁴ FDRE Constitution, Art.55 (16).

²¹⁵ Proclamation No.359/2003, Art.7.

²¹⁶ Proclamation No.359/2003, Arts 2 (2) & 8(1).

such violation.²¹⁷ Therefore, whenever human rights violations exist, the Federal Government may intervene provided that the Regional Government is unable to arrest such violation. Hence, a mere incident of human rights violation does not simply allow the Federal Government to intervene. Here, it is important to note that although the National Government may not deploy force, it may intervene in another way. As said above, the concept intervention is broadly defined to include any ‘appropriate measure.’ The writer deals with this in the next section.

To conclude, the second ground of intervention is not clear as the FDRE Constitution requires both the Federal and Regional Governments to protect human rights.²¹⁸ If human rights protection is not in the exclusive area of regions, the act of the Federal Government to address human rights violations may not, strictly speaking, constitute an intervention. In addition, it is not clear whether federal intervention is possible when a regional policy violates human rights in the region. But if the Federal Government can interfere into regions on such grounds, such an act may safely be regarded as an intervention.

The third ground of intervention is a situation that ‘endangers the constitutional order.’²¹⁹ Where there is a situation that puts the constitutional order in danger, the Federal Government is empowered to intervene and stabilize the situation. This is a direct follow up of the duty of the Federal Government to protect and defend the Constitution and the order established thereby.²²⁰ Emphasis should be given to the way Article 51 of the Constitution is framed. The duty to defend and protect the Constitution and the order established under it is the first duty of the Federal Government. Of the different organs of the Federal Government,

²¹⁷ Proclamation No.359/2003, Art.7.

²¹⁸ FDRE Constitution, Art.13 (1).

²¹⁹ Proclamation No.359/2003, Art.62 (9). Is the state of emergency one type of intervention for the House of Federation under this ground? A famous Ethiopian scholar argues that federal intervention on the third ground ‘can not be anything but a state of emergency.’ Nahum 1997, 76. But I do not agree with him. Because, a state of emergency is declared when the grounds specified under Article 93 exist. Secondly, even if it is said to be a state of emergency, the power to declare a state of emergency is given to the Council of Ministers not the House of Federation. See FDRE Constitution, Art.93 (1) (a).

²²⁰ FDRE Constitution, Art.51 (1).

the House of Federation is the ‘ultimate defender of the constitutional order in Ethiopia.’²²¹ Consequently, intervention in such instance is left within the competence of this House.²²²

At this juncture, it is important to see whether the intervention contemplated under the third ground is an intervention in the sense of intrusion into the exclusive areas of Regional Governments. Accordingly, if we look into the FDRE Constitution, it is possible to see that the duty to defend and protect the Constitution is a power given to both the Federal and Regional Governments.²²³ This renders it difficult to talk of intervention in the strict sense unless the Constitution is interpreted in such a way that the power to protect and defend the Federal Constitution is a Regional power as long as the regions can do so.

Having said that, what acts are regarded as acts that endanger ‘the constitutional order?’ Such acts are acts that are ‘carried out by the participation or consent of a Regional Government in violation of the Constitution or the constitutional order.’²²⁴ They include ‘armed uprising; resolving conflicts between another region or Nation, Nationality or People of another region by resorting to non-peaceful means; disturbance of peace and security of the Federal Government;’ or non-compliance to the directives given by the House of Peoples’ Representatives to a respective region in which an act of human rights violations occurred to arrest same.²²⁵

At this point, it is important to raise the issue what happens if any of these acts or activities is not carried out by the consent or the participation of the Regional Governments? It is clear that such act does not fall into the category of acts that endanger the ‘constitutional order.’ The problem is that it may actually ‘endanger the Constitution order’ and it is in violation of

²²¹ Nahum 1997, 75.

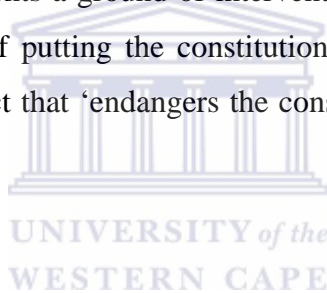
²²² FDRE Constitution, Art.62 (9).

²²³ FDRE Constitution, Arts 51 (1) & 52 (2) (a).

²²⁴ Proclamation No.359/2003, Art.12.

²²⁵ Proclamation No.359/2003, Art.12 (1) - (4).

the Constitution. For instance, an armed uprising or demonstration²²⁶ is a clear violation of the Constitution as such act is not allowed by the Constitution and endangers the constitutional order.²²⁷ This puts such acts in the ranks of acts that endanger the constitutional order, in the language of the FDRE Constitution. But the federal law complicated the issue by inserting a concept of Regional Government's consent or participation. Leaving the constitutionality of the law aside, it is possible to see that even if such acts without the consent of the region in which they happen are not deemed to be acts endangering the constitutional order, they may fall into the other grounds of intervention. For instance, if there is an armed uprising in a certain region without the consent or participation of the region, the region may attempt to arrest the uprising and, in case of failure, it may request the Federal Government to intervene. This safely falls into the first ground of intervention discussed above. But it is difficult to determine whether 'disturbance of peace and security of the Federal Government' by an activity or act in a Regional Government without the consent or participation of such region presents a ground of intervention. In the language of the FDRE Constitution, it is a clear case of putting the constitutional order in danger. The same act would not be considered as an act that 'endangers the constitutional order' if we rely on the language of the federal law.



It is important to note that, unlike the first two grounds of intervention, under the third ground of intervention there is no need to look into the responses of the Regional Government. This is because it is difficult to expect a Regional Government that consents to or participates in acts that endanger the constitutional order to make an attempt to arrest them.

4.2.2.3 How is intervention to be made?

This subsection focuses on the procedure and measures to be taken under the concept of intervention in Ethiopia. Before going to the discussion, however, it is important to bear in mind that the FDRE Constitution does not really provide for an exhaustive system of procedure for intervention. The complete picture of the 'how' of intervention can be captured

²²⁶ Armed demonstration is unlawful. See FDRE Constitution, Art.30 (1).

²²⁷ FDRE Constitution, Art.30 (1).

only through the analysis of both the federal law and the Constitution. Accordingly, focusing on the grounds for intervention, I will deal with the ‘how’ of intervention in light of these two laws below.

i) Procedure for intervention on the first ground

In this case, intervention should be initiated by the Regional Government itself. It has to make a request to the Federal Government to intervene. This makes the act of the Federal Government discretionary. Therefore, strictly speaking, it is not an intervention as defined under chapter three. Having that in mind, the request for intervention has to be made to one of the offices vested with ‘[t]he highest executive powers of the Federal Government,’ i.e. the office of the Prime Minister.²²⁸ This is because under the first ground of intervention, the request can result in the deployment of Federal defence forces.²²⁹ Therefore, it is proper to direct the request to the Prime Minister as he is ‘the Commander-in-Chief of the national armed forces.’²³⁰ The request has to be made by the State Council, which is ‘highest organ of State authority’ and legislative of the Region, or the highest executive organ of the region, which is ‘[t]he State administration.’²³¹ The request can not be made directly to the office of the Prime Minister but to The Ministry of Federal Affairs, which serves as a bridge for such request.²³²

Why is the Ministry involved in the communication? It is because the Ministry is supposed to ‘coordinate the implementation of decisions authorizing the intervention of the Federal Government in the affairs of Regional States’.²³³ Therefore, its involvement from the outset of the process is advantageous for the smooth operation of the intervention. Such prior notice

²²⁸ Proclamation No.359/2003, Art.4; FDRE Constitution, Art.72 (1). The other office vested with the highest executive authority is the Council of Ministers. See FDRE Constitution, Art.72 (1).

²²⁹ FDRE Constitution, Art.51 (14).

²³⁰ FDRE Constitution, Art.74 (1).

²³¹ FDRE Constitution, Art.50 (3) (5) (6); Proclamation No.359/2003, Art.4.

²³² Proclamation No.359/2003, Art.4.

²³³ Proclamation No.359/2003, Art.21 (4).

should also be given to the Ministry of Defence as it is the one responsible for the enforcement of ‘security measures and the constitutional order...where situations endangering public safety are beyond the control of Regional States’ and when such intervention is ordered in accordance with the law.²³⁴ The issue not addressed is about the Federal Police Commission. Can it be deployed? Should it be communicated?

Who should be deployed? The Constitution empowers the Federal government to deploy ‘Federal defence forces.’²³⁵ Though it is not clear, the ‘Federal defence forces’, as a broader concept,²³⁶ include the Federal Police and the National Defence Force.²³⁷ This is also consistent with the practice. If one agrees with this interpretation, it is possible to see the need for prior notice of a request for Federal intervention for the Federal Police Commission as well.

When one comes to the measures to be taken, it is important to see number and mandate of the force to be deployed. The number and mandate of the force deployed as a result of intervention into a Regional State pursuant to the first ground of Federal intervention is determined based on the situation of the deteriorated security. The force has to be a size that can bring the security situation under control and the measures to be taken by the same should also ‘be proportionate to enable to arrest the deteriorating security situation and maintain law and order.’²³⁸ Neither the excessive number of Federal defence forces nor the use of excessive measures is allowed. Whether the number of the Federal defence forces or the measures taken is proportional or not has to be determined on a case by case basis. In addition to arresting the deteriorating security situation, the Federal defence forces are

²³⁴ Proclamation No.359/2003, Art.24 (5).

²³⁵ FDRE Constitution, Art.51 (14).

²³⁶ Compare Art.51 (14) & Art.55 (7) of the FDRE Constitution.

²³⁷ Proclamation No.359/2003, Art.5 (1).

²³⁸ Proclamation No.359/2003, Art.5 (2).

responsible to ‘take necessary legal measures to bring to justice those who participated in deteriorating the security situation’ in the region.²³⁹

Coming to the role of other bodies during intervention on the first ground, the organs worth mentioning are the Regional Government and the House of Peoples’ Representatives (HPR). The Regional Government is obliged to provide all available information required in the task of arresting the ‘deteriorating security situation and facilitate conditions’ for such arrest.²⁴⁰ As far as the HPR is concerned, it has a checking role. It follows up how the intervention is going on and on the activities carried out to arrest the deteriorating situation in the Region. This power, however, is not clearly mentioned. It can be read from the duty of the Prime Minister to report ‘on the activities carried out’ by the Federal defence forces in the regions to the House periodically.²⁴¹ But the law is not clear as to within what period the Prime Minister has to make such a report. It simply states that ‘[t]he Prime Minister shall present a periodic report.’²⁴²

Finally, such intervention lasts until either of the following situations happens: either until the situation that deteriorates the security situation in the region has been successfully arrested or the Regional council or the highest executive organ of the region requests its termination.²⁴³ This begs two questions: First, can the Regional Council request termination when the intervention is requested by the highest executive organ of the State or vice versa? This thesis suggests a supportive answer. The Regional Council is the highest State authority in the Region. Therefore, it has a power to terminate an intervention requested by the Regional State’s highest executive organ. The power of the highest executive organ of the region to terminate intervention requested by the Regional Council by is, however, questionable.

²³⁹ Proclamation No.359/2003, Art.5 (4).

²⁴⁰ Proclamation No.359/2003, Art.5 (3).

²⁴¹ Proclamation No.359/2003, Art.6.

²⁴² The same as above.

²⁴³ Proclamation No.359/2003, Art.5 (5).

Second, can the termination of an intervention be demanded even if the deteriorating security situation is not completely arrested? The answer is yes. First, the intervention in such a situation is only valid upon the consent and request of the Regional Government. Therefore, any time the region feels that it no longer needs the assistance of the Federal defence force, it can validly request the termination of the federal mission or intervention. Secondly, the way the law is framed does not make a distinction as to when a Regional Council or the highest executive organ of the state can request the Prime Minister to terminate the intervention. Therefore, it seems that the termination can be requested regardless of whether the deteriorating security situation has been arrested or not. For instance, at a certain time after intervention by the Federal Government, the Regional Council or the highest executive organ in the region may feel that it can now takeover the situation and arrest the deteriorating security situation. In such cases, it may request the termination of the mission and the withdrawal of the Federal defence forces even if the situation is not brought under control. Of course, it is up to the region to request for assistance and the moment the region thinks that it no longer needs the help of the Federal Government, it can request the termination of the mission or intervention. But one may still wonder if there are available remedies if the Federal defence forces refuse to terminate their mission despite the successful arrest of the deteriorating security situation in the region? The immediate and easy remedy is to request the Prime Minister to terminate the mission. In addition to this, the region may bring the issue to the House of Federation and the House of Peoples' Representative for a remedy.²⁴⁴

ii) Procedure for intervention on the second ground

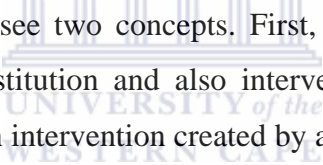
Intervention based on the second ground is to be initiated by the HPR. Accordingly, when the House gets information about such situation, it may either send a team composed of its members to the region or may request for a joint session with the House of Federation (HF) to discuss the matter.²⁴⁵ When a team is sent to the region, a joint session will be made after

²⁴⁴ FDRE Constitution, Art.55 (17) & Art.62 (1).

²⁴⁵ Proclamation No.359/2003, Art.8 (1) & FDRE Constitution, Art.55 (16).

the report by the team is heard and only if the HPR considers that the situation warrants intervention.²⁴⁶

The mandate of the team and contents of its report should be determined by law as the act of the team by itself is an intervention into a region. It has implications on the autonomy of the region. That is why, it seems, the mandate of the team is clearly specified under the federal law. The mandate of the team is to go to the region in which the alleged acts of human rights violations have occurred, gather information, prepare a report and submit the report to the HPR.²⁴⁷ The contents of the report are also regulated under the law. The report 'shall specify concrete evidence that describes the act of the violations of human rights in the region, the sources of the problem and persons responsible for it, efforts made and measures taken by the region to arrest such violations of human rights and whether or not such region will be able to arrest the act.'²⁴⁸



At this point, it is surprising to see two concepts. First, there is no any concept of team formation under the FDRE Constitution and also intervention by such team. This is the creation of the federal law. It is an intervention created by a subsidiary law and is as intrusive as the intervention that involves deploying Federal defence forces, for instance. Therefore, the constitutionality of such provision under the law is suspect. But it may be argued that all members of the HPR are not expected to examine the situation and practicality dictates team formation. Second, it is not up to the team to decide on whether the 'Region will be able to arrest the act.' The FDRE Constitution provides that intervention, which reasonably includes sending a team to investigate, must not be initiated before the House of Peoples' Representatives has, at least, reasonable belief as to the inability of a region to arrest alleged human rights violations.²⁴⁹

²⁴⁶ Proclamation No.359/2003, Art.10 (1).

²⁴⁷ Proclamation No.359/2003, Art.9 (1).

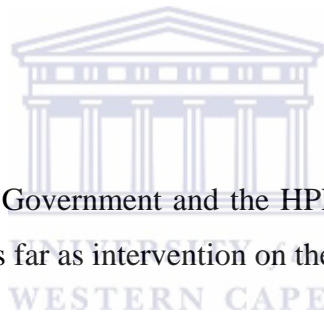
²⁴⁸ Proclamation No.359/2003, Art.9 (2).

²⁴⁹ One may argue that the report is a recommendation. But it is a matter of fact that it greatly influences the decision of the House.

When there is a team involved, the joint meeting of the two federal houses will be made if and only if the HPR found intervention necessary. The latter House presents the issue together with the report and justifications for intervention and decision will be made after consideration of same.²⁵⁰

As far as the measures to be taken are concerned, the law is not clear. It provides that the joint meeting of the two Houses will pass a decision and gives 'directives to the region to arrest the acts of violations of human rights, and brings those who violated such human rights and take other measures as may be...necessary.'²⁵¹ It simply authorizes the two Houses to decide upon the necessary measure on a case by case basis. Such measures may include deploying federal forces, ordering correction of policy directions that cause violation of human rights.

Finally, the role of the Regional Government and the HPR, and termination of intervention are not dealt with under the law as far as intervention on the second ground is concerned.



iii) Procedure of intervention on the third ground

Intervention on the third ground is decided by the HF.²⁵² The House may intervene in two alternative ways. It may intervene by its own initiative or when it gets information on such act from any person, juridical or physical, including the House of Peoples' Representatives.²⁵³ The House of Federation is empowered to seek for further investigation on any information it obtained concerning the act that endangers the constitutional order

²⁵⁰ Proclamation No.359/2003, Art.10.

²⁵¹ Proclamation No.359/2003, Art.11.

²⁵² FDRE Constitution, Art.62 (9).

²⁵³ Proclamation No.359/2003, Art.13 (1).

committed in a region. If it believes there is a need for such investigation, it may order ‘the Council of Ministers or other government organs to investigate and report to it in order to decide whether there is danger.’²⁵⁴ The report is required to be capable of showing not only the existence of danger to the constitutional order but also indicating ‘that the peaceful means to settle the causes...has been left out and the conditions’ that constitute the acts deemed to endanger the constitution existed.²⁵⁵ Based on the report, if any, the House of Federation may order federal intervention based on the findings of the report where it finds the situation warrants such intervention and is necessary to do so.²⁵⁶ The House is expected to make its decision not only on whether to intervene but also the type, level and timing of the intervention.²⁵⁷

Finally, it is important to see that the Council of Ministers has been empowered by the federal law to carry out investigation in a region whenever it gets information about the commission of an act that endangers the constitutional order.²⁵⁸ This does not require an authorization from the HF as this is not stipulated under the FDRE Constitution. This puts a question mark on the constitutionality of the federal law. This act of investigation may not even be communicated to the HF. This is because the Council is not obliged to report about such investigations unless the Council concludes there is an act that endangers the constitutional order and intervention is necessary.²⁵⁹ This is clearly against the autonomy of the regions. It allows the Federal Government to act in a manner not provided under the Constitution.

²⁵⁴ Proclamation No.359/2003, Art.13 (1).

²⁵⁵ Proclamation No.359/2003, Art.13 (3).

²⁵⁶ Proclamation No.359/2003, Art.13 (4).

²⁵⁷ Nahum 1997, 76.

²⁵⁸ Proclamation No.359/2003, Art.13 (2).

²⁵⁹ Proclamation No.359/2003, Art.13 (2).

Whenever the HF is convinced about the existence of the alleged act, constituting danger to the constitutional order, intervention will be ordered.²⁶⁰ The order must be clear about the nature and time of the measures to be taken by the Federal Government. The HF is provided with possible measures that might be taken. The principle, however, is that the measures must be capable of arresting 'the situation that has endangered the constitutional order.'²⁶¹ This principle is in line with the assumption that 'federal intervention, if and when it comes, would be of a limited character and with specific goals, to avert the unfolding constitutional crisis' as the autonomy of the regions should be preserved at all times and to be infringed to the least possible level only.²⁶² The House may order the deployment of the Federal Police or the national defence force or both.²⁶³ The mission of these forces is to arrest the danger in the Region.²⁶⁴ Which force to deploy is determined based on the seriousness of the situation.²⁶⁵ Included in the list of possible measures that can be taken by the House is the suspension of the Regional Council and the highest executive organ of the region and establishing a provisional regional administration directly accountable to the Federal Government.²⁶⁶ But, it is not clear whether these measures should be taken alternatively or cumulatively. No conjunction is used by the law, making it open for the debate whether the law allows for alternative or cumulative measure. This study holds that the measures are accumulative. The possibility of arresting the situation by deploying the Federal Police or the national defence force or both without suspending the Regional Council and the highest executive organ of the Region would be practically difficult. By the same token, suspension of the Regional Council and the highest executive organ of the region without the deployment of such forces is difficult as the Regional Police is likely to go out of business with the suspension of the regional executive. Consequently, the situation in the region will go from bad to worse unless the deployment of federal forces is coupled with a measure to suspend the Regional Council and the highest executive organ of the region.

²⁶⁰ Proclamation No.359/2003, Art.13 (4).

²⁶¹ Proclamation No.359/2003, Art.14 (1).

²⁶² Nahum 1997, 75-76.

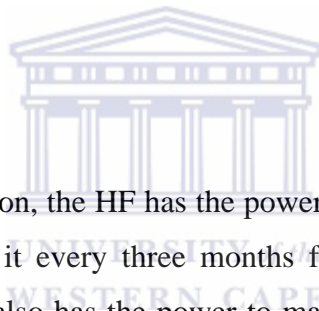
²⁶³ Proclamation No.359/2003, Art.14 (2) (a).

²⁶⁴ Proclamation No.359/2003, Art.14 (2) (a).

²⁶⁵ Proclamation No.359/2003, Art.14 (2) (a).

²⁶⁶ Proclamation No.359/2003, Art.14 (2) (b).

In relation to such kind of intervention, it is important to raise two issues. First, what is the mandate of federal forces and the provisional administration? The mandate of the federal forces is to take any measures ‘proportionate to enable to arrest the situation that has endangered the Constitutional order.’²⁶⁷ The provisional administration has the following mandates: It has the power to ‘take measures that enable to arrest the situation that has endangered the constitutional order;’ ‘[t]o bring to justice the Regional Government officials, appointees, officials elected by the People, members of the police and security force, and other persons responsible for the danger of the constitutional order; [t]o speedily facilitate conditions for the regional Government to resume its office by restoring the constitutional order.’²⁶⁸ It also assumes all the powers and duties of the regional administration, and replaces the executive organ of the region.²⁶⁹ In principle, the Provincial Government is to stay in the region for not more than two years.²⁷⁰ Exceptionally, however, it may stay for additional six months.²⁷¹



Second, in case of such intervention, the HF has the power to follow up the intervention. The Prime Minister has to report to it every three months from the intervention or wherever requested by the HF.²⁷² The HF also has the power to make its own independent evaluation

²⁶⁷ Proclamation No.359/2003, Art.14 (5).

²⁶⁸ Proclamation No.359/2003, Art.14 (3).

²⁶⁹ Proclamation No.359/2003, Art.15 (2). ‘[A]nd shall in particular; (a) lead and coordinate the executive organ; (b) assign the Heads of the Provisional Administration; (c) ensure the enforcement of law and order; (d) facilitate conditions for conducting election in the Region in accordance with relevant law; (e) approve a plan and budget of the Region; (f) carry out other duties to be entrusted to it by the Federal Government.’ Proclamation No.359/2003, Art.15 (2).

²⁷⁰ Proclamation No.359/2003, Art.15 (3).

²⁷¹ Proclamation No.359/2003, Art.15 (3).

²⁷² Proclamation No.359/2003, Art.16 (1) (2).

on the intervention and make the necessary directives to the Prime Minister.²⁷³ Furthermore, the HF and the Prime Minister are required to make the publication public.²⁷⁴

4.3 Conclusion

The Federal Government of Ethiopia exercises supervisory power over the regions. It has been monitoring the regions pursuant to subsidiary legislations despite the absence of clear constitutional provision. It exercises its monitoring power through the different Ministries and Authorities. Therefore, it employs a sort of sectoral monitoring. In addition, the extent and manner of federal monitoring is not regulated by law. Whether federal monitoring should be implied from the intervention power is also not clear. Monitoring over exclusive regional matters is not clearly provided except in the case of implementation of federal land law and policies.

As far as intervention is concerned, the FDRE Constitution uses the concept of intervention in a liberal manner. It uses it to signify interference of the Federal Government into regions regardless of the latter's consent. Furthermore, the FDRE Constitution considers interference into concurrent powers by the Federal Government due to the failure of the regions to exercise such power as intervention. Finally, the rationales for intervention in Ethiopia could be taken to include assisting regions in case of security deterioration, and protecting human rights violations that can not be arrested by Regional Governments and the constitutional order.²⁷⁵

²⁷³ Proclamation No.359/2003, Art.16 (3).

²⁷⁴ Proclamation No.359/2003, Art.17. '1.The House of the Federation and the Prime Minister shall issue statements to the public about the situation that endangered the Constitutional order, the order given by the House of the Federation and current situation of the Region; 2. Without prejudice to Sub-Article (1) of this Article, a forum shall be held periodically to enable the public within the Region to have access to information about the situation and give opinions thereon. The public opinions expressed on such forum shall be compiled and submitted to the House of the Federation and the Council of Ministers.' Proclamation No.359/2003, Art.17.

²⁷⁵ See the discussion under Sections 3.2.3 & 4.2.3.2.

Chapter Five

Conclusion and Recommendations

From the discussion in the previous chapters, it is possible to see that; first, supervision consists in acts of monitoring and intervention. It is also an ‘on-going process.’ It may be devised for different reasons. Under the SA Constitution, it has been said that intervention is expressly provided for but monitoring is implied from the intervention power of the National Government.²⁷⁶ In Ethiopia too, the FDRE Constitution provides for intervention only. Whether monitoring is implied in this power or not has not been settled. The practice and subsidiary legislations, however, show that the Federal Government monitors regions.

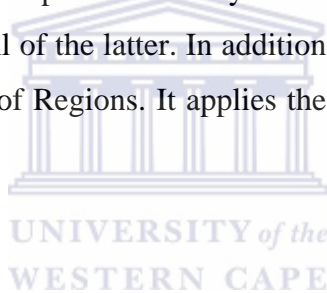
As far as monitoring with respect to matters for intervention explicitly provided under the FDRE Constitution, and implementation of federal land and environmental laws is concerned, it may be implied as such powers may not otherwise effectively exercised. For instance, intervention due to ‘human rights violations’ and ‘activities that endanger the constitutional order’ seems practically difficult without monitoring. In relation to such monitoring, the FDRE Constitution should address issues arising from such monitoring power, particularly who monitors and how should monitoring be made. With respect to monitoring in other areas is concerned, it lacks a constitutional basis.

In addition, the scope of those implied monitoring is not determined. For instance, monitoring implementation of federal land laws may be regarded as monitoring of implementation of federal laws and policies. Monitoring, be it in the implementation of federal laws or policies, need to be regulated through specific laws as suggested in relation with South African legal system or elaborated provisions in the already existing laws through amendment. Therefore, it is commendable for Ethiopia to share such experience. This issue should not be left unaddressed as it compromises regions’ autonomy. The constitutional basis for laws authorizing monitoring should be assessed and remedied as it is otherwise be open to abuse. Furthermore, such monitoring, if constitutional, should be properly regulated. Entrenching

²⁷⁶ Chapter Three, Section 3.2.2.1.

the constitutional principle in this respect may be advisable at that would be stronger guarantee for regions' autonomy as it can not be changed but through constitutional amendment. Moreover, like said with respect to South African legal system, it is commendable for Ethiopia to set key indicators, and system of information collection, recording and analysis with regard to monitoring with a view to inform effective service delivery.

Secondly, it is possible to see that the concept of intervention in the SA Constitution and the FDRE Constitution are different.²⁷⁷ To begin with, the former employs intervention in its strict sense, i.e. when there is a 'unilateral interference of one sphere of government into the exclusive power areas of the other;' whereas, the latter uses intervention in more general sense, i.e. to both acts of unilateral interference and interference through the region's consent.²⁷⁸ The latter focuses on the presence of any interference by the Federal Government into Regions regardless of the will of the latter. In addition, it does not limit intervention into interference into exclusive areas of Regions. It applies the concept to interference into areas of concurrent powers too.



Moreover, the SA Constitution allows national intervention only where there is failure on to fulfil any 'executive obligations',²⁷⁹ whereas, the FDRE Constitution allows intervention only in limited instance. It allows intervention only in case of 'deteriorating security situation' in regions and such situation can not be arrested by the Regional Governments, where there is a 'threat that endangers the constitutional order,' and where there is 'human rights violations' in regions and the Regional Governments are unable to arrest such violations.²⁸⁰ This writer recommends for inclusion of intervention in case of region's failure to fulfil 'executive obligations' in order to realise equal development of regions, which is one

²⁷⁷ Chapter Three, Section 3.2.2 & Chapter Four, Section 4.2.3.

²⁷⁸ The same as above.

²⁷⁹ Chapter Three, Section 3.2.2.2, (i).

²⁸⁰ Chapter Four, Section 4.2.3.2, (i) (ii) & (iii).

of the rationales of federalism in Ethiopia,²⁸¹ as supervision is one of the acceptable tools to overcome unequal development of sub-national states. In addition, supervision of fulfilment of executive responsibilities may help in the realisation of one of the fundamental rights and freedoms guaranteed under the FDRE Constitution, i.e. equal access to public service by Nation, Nationalities, and Peoples of Ethiopia.²⁸² In the absence of supervision in respect to executive obligation, it seems difficult to provide public service in regions and this would deprive people of their rights. Moreover, supervision is required to improve service delivery and effective or ‘responsive’ governance, which are among the reasons of federalism in Ethiopia.²⁸³

In addition, the SA Constitution governs not only substantive but also procedural aspects of national intervention.²⁸⁴ Hence, it lifts procedure of intervention up to constitutional level. The FDRE Constitution, on the other hand, neither regulates the procedure of intervention particularly in respect of intervention due to ‘human rights violations’ or ‘activities endangering the constitutional order’ in regions nor authorizes determination of same by subsidiary laws. However, the Federal Government has promulgated a law that regulates the system of intervention enshrined under the FDRE Constitution.²⁸⁵

Furthermore, the FDRE Constitution obliges the Federal Government of Ethiopia to ensure devolution of government power to the lowest tier of government in order to bring governance near to the people.²⁸⁶ The relevant bodies in Ethiopia should address the issue how would the Federal Government ensures the devolution of power to the lowest tier of government. The Federal Government is engaged in act of monitoring Regional Governments with respect to such devolution efforts. But, there is no law governing how such supervision

²⁸¹ Federal Democratic Republic of Ethiopia, Ministry of Capacity Building (MCB) 2005, 21-22.

²⁸² FDRE Constitution, Article 41 (3) (4).

²⁸³ MCB 2005, 21-22.

²⁸⁴ Chapter Three, Section 3.2.2.2, (ii).

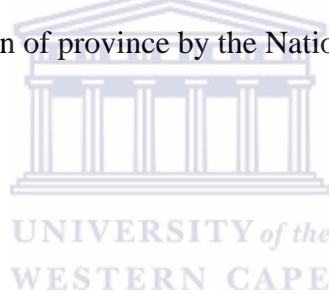
²⁸⁵ Proclamation No.359/2003.

²⁸⁶ FDRE Constitution, Art.50 (4).

should be made. Therefore, legislation on this matter is required to establish clear rules for the Federal Government and protect autonomy of Regional Governments.

In addition, the FDRE Constitution provides for supervision with respect to subsidies to developing regions.²⁸⁷ But the supervision is carried out by regions themselves.²⁸⁸ The constitutionality of this practice is disputable. This writer believes that the FDRE Constitution authorizes the Federal Government, not regions, to supervise use of such subsidies. It does not also accord to the meaning of supervision, which is an act of monitoring of and intervention into regions by the Federal Government.

Finally, intervention strategies of the SA Constitution and FDRE Constitution differ. At least theoretically, the Ethiopian system reflects more federal system. The South African system gives a wider room for supervision of province by the National Government.



²⁸⁷ FDRE Constitution, Art.94 (2).

²⁸⁸ The same as above.

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