Umpiring Federalism in Africa: Institutional Mosaic and Innovations

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Abstract: Federalism institutionalizes the division of powers and creates the circumstances that render inter-governmental disputes almost inevitable. It is therefore necessary that federal constitutions establish mechanisms for the peaceful umpiring of such disputes. This article explores the institutional and normative innovations in relation to the umpiring of federalism disputes - disputes between the federal and state governments—in the three prominent federal states in Africa, namely Nigeria, South Africa and Ethiopia. It argues that the political safeguards theory is unsuitable in the context of federal states in Africa. Federal states in Africa have established both political and judicial or quasi-judicial safeguards of federalism. However, the organs in charge of resolving federalism disputes are different in each of the federal states. Nevertheless, the constitutional review of disputes between the different levels of government is centralized. The jurisdiction of the constitutional adjudicator extends to both state and federal legislative and executive decisions. The level and form of participation of the states in constituting the constitutional adjudicator varies. In terms of access to the constitutional adjudicator, the federal constitutions are not clear on which organ of each level of government may submit inter-governmental disputes to the constitutional adjudicator.

Introduction

More than 50 percent of the world's population live in countries that are considered federal.[1] In the African context, while some have argued that federalism has the potential to accommodate ethnic, religious, and racial diversity, others, including most of Africa's independence heroes, have posited that federalism exacerbates division and enmity leading to fragmentation and ultimately the collapse of the nation state. However, it is debatable whether federalism may in and of itself contribute to accommodating diversity or exacerbating antagonism.[2] It appears that, mainly due to the nationalism fervor that characterized post-independence Africa, the view that federalism is unnecessary and undesirable in the context of Africa has won the day.[3] Although government power is decentralized to different levels in many states, the overwhelming majority of African countries have rejected a constitutionally sanctioned federal structure of government.[4]

Despite the fact that most African states demonstrate high levels of linguistic, ethnic and religious diversity, governments have generally been reluctant and even hostile to the idea of establishing a federal form of government. Federalism has been and continues to be an outcast. For example, Mazrui observes that "the word federalism has been anathema almost everywhere [in Africa]."[5] Indeed, Africa has been a "virtual graveyard of federal

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experiments."[6] There is a particular distaste for and hostility towards ethnic- or identity-based federalism. Ethnic politics in Africa has been "remarkably subdued."[7] Currently, the only African country that practices ethnic-based federalism is Ethiopia, the success or failure of which is hard to assess and even harder to attribute to the ethnic basis of the federation. In contrast to the fact that many federal states in Europe, such as Belgium, Switzerland, and Spain, are drawn mainly along linguistic and ethnic lines, ethnicity is seen as divisive and antithetical to the state formation and building aspirations of African nations.[8]

The focus of this article, however, is not whether federalism provides multinational African states a superior form of government structure compared to a unitary, or a merely decentralized, form of government, or whether federalism contributes to solving or exacerbates the challenge that ethnic, racial, and religious diversity poses. Rather, it focuses on African countries that have opted for a federal form of government structure. The two most populated states, Nigeria (since 1960) and Ethiopia (since 1991), are federal states. Also, although the 1996 Constitution does not explicitly declare South Africa, the economic powerhouse of the continent, a federal state, it actually establishes a federal form of government.[9] The South African Constitution embodies the main features of federalism: entrenched vertical division of powers, the representation of the provinces in the center, and a Constitutional Court to decide on disputes between the different levels of governments.[10] Also, one of the smallest states, The Union of Comoros, is a federal state. In addition, Sudan, South Sudan, the Democratic Republic of Congo (DRC), and the transitional government of Somalia may be characterized as federal states. Tanzania may also be seen as a peculiar federation between mainland Tanganyika and the island of Zanzibar.[11]

The purpose of this article is to assess the normative and institutional mosaic and innovations in relation to the adjudication of federalism disputes in the three main federal African states, namely, Nigeria, South Africa, and Ethiopia.[12] It explores the extent to which their constitutions have built in political as well as judicial safeguards of federalism. With a view toward providing a theoretical background to the institutional choices for umpiring federalism disputes in Africa, section two discusses the different arguments on the sufficiency or insufficiency of political institutions for safeguarding and complementing federalism. Section three presents the reasons why the political safeguards theory is less relevant in the context of federal states in Africa. This section notes that institutional variations and domestic realities impact the appropriateness and strength of theoretical explanations. With the purpose of unearthing the institutional maze in relation to the resolution of federalism disputes in Africa, the following three sections address the judicial and quasi-judicial safeguards of federalism in three selected countries. The conclusion summarizes the main features of the judicial safeguards in African federal states.

A constitution that establishes a federal state has to address aspects of constitutional design such as the vertical and horizontal division of legislative, executive and judicial power, fiscal and resource distribution, the number and character of the constituent units, inter-governmental relations, and so forth.[13] Another important concern is the peaceful resolution of disputes between the federal government and one or more of the constituent units, or amongst the constituent units, which is the focus of this article. One of the distinctive features of a federal constitution is the creation of multiple levels of government in a single polity, the establishment of "divided" or "shared" sovereignty.[14] The existence of layers of government and the formal division of powers elevates the likelihood of jurisdictional disputes between the different levels of government.[15] Therefore, one of the main challenges that should confront drafters of federal constitutions is how best to resolve

federalism disputes, disputes that arise vertically between the federal/central government and the states/regions/provinces/cantons, and horizontally between the states. A constitution that establishes a federal form of government should establish mechanisms to maintain and safeguard the vertical division of powers as well as regulate the horizontal interaction between the states. Institutionalized dispute resolution mechanisms are necessary for the harmonious existence and continuity of a federal system.

Constitutional provisions are deliberately broad, often ambiguous, at times contradictory and inevitably incomplete.[16] Constitutional provisions are "never precise enough to cover all eventualities. . . . The authors cannot foresee all the contingencies that an effective system of governance must confront."[17] The problem of incompleteness is particularly acute in constitutions that establish federal structures of government. Indeed, the "precise content of the federal bargain will necessarily be incomplete."[18] Similarly, "[c]onstitutions often fail to address crucial issues of federalism."[19] The establishment of mechanisms to facilitate the peaceful resolution of inevitable intergovernmental disputes is therefore imperative to any federal construction. The existence of different levels of sovereignty within a single polity creates a complex system that is in constant need of coordination and completion. A federal system of government structure "presupposes diversity and must cope with corresponding tensions."[20] Indeed, the fact that all the states that had an established constitutional review system prior to the Second World War (the United States, Australia, Austria, and Switzerland) were federal states indicates that federalism should be accompanied by mechanisms of resolving potential disputes between the different levels of government.[21]

Federalism disputes are bound to arise. It is therefore necessary to establish in advance institutional structures that can referee the constitutional division of powers. This much is uncontroversial. There is a general consensus that federalism needs safeguards. However, scholars have been divided on the exact institution that is most competent, legitimate and desirable to safeguard the vertical division of powers. Because the organ in charge of resolving federalism disputes is "critical," the question which institution should be empowered to settle federalism disputes is often contentious.[22] In the U.S. context, there has been and continues to be a scholarly divergence on which institution can best safeguard the states from the domineering powers of the federal government. More specifically, the argument has focused on the exact role of the U.S. Supreme Court in resolving federalism disputes. The "political safeguards" theory of federalism suggests that the representation of the states in the center is sufficient to safeguard the interests of the states and check and preclude any expansive ambitions of the central government. Some of these theorists have called on the Supreme Court to reject all federalism disputes as non-justiciable.[23] In contrast, the "judicial safeguards" theory argues that the U.S. Supreme Court has a role to play in arbitrating federalism disputes and should actively enforce the federal distribution of power.[24] The presence of political safeguards does not render the judicial safeguards irrelevant or otherwise redundant.

Research on the role of constitutional review in Africa has focused almost exclusively on the adjudication of constitutional rights. The adjudication of federalism disputes in Africa has been one of the most neglected dimensions of constitutional law.[25] The role of constitutional review in relation to federalism disputes in Africa remains, to put it mildly, understudied. Despite the fact that the issue of federalism in Africa has attracted scholars all over the world, the resolution of federalism disputes has not enjoyed the academic attention it deserves. This article is meant to serve as an introduction to the institutional contours for

the resolution of federalism disputes from a comparative African perspective. Nevertheless, the scope of this article is limited to providing an account of the institutional and procedural aspects of the resolution of federalism disputes. It does not look at the different informal and extra-constitutional arrangements and practices for the prevention and resolution of federalism disputes. Moreover, the reasons behind the choice of a particular institutional model for the resolution of federalism dispute are not addressed.[26] The article also does not explore practice in relation to the resolution of federalism disputes.[27]

The Political and Judicial Safeguards of Federalism

As pointed out earlier, there is a general implied academic consensus on the fact that federalism needs safeguards. However, there is considerable theoretical disagreement on whether the political process or constitutional adjudicators should be charged with safeguarding federalism. The disagreement has particularly focused on whether judicial safeguards are appropriate and necessary in defending the interests of states against federal encroachment. While the political safeguards theory questions the necessity and appropriateness of judicial safeguards, in contrast, the judicial safeguards theory emphasizes the insufficiency of political safeguards.[28] Geographically, the theoretical debate has almost exclusively been limited to the United States and has not managed to obtain the attention and support of academics and constitutional drafters, particularly in federal states in Africa. Scholars in other federal states appear largely uninterested in the theoretical debates, perhaps due to the fact that the judicial safeguards have explicit constitutional recognition, or exclusion as is the case in Switzerland, in these federal states. Yet, it is useful to summarize the theoretical debate as a background to the discussion of the institutional variations in the adjudication of federalism disputes in Africa. Readers will hopefully then be better able to understand and analyze the practical choices made by the drafters of federal constitutions in Africa. The discussion is particularly important with reference to Nigeria whose federal structure reflects considerable similarities with the institutional designs in the US.

In a nutshell, the political safeguards theory holds that various features of the American political system provide sufficient representation to the interests of the states.[29] It is argued that since all federal laws can only be enacted upon the consent of the House of Representatives and the Senate, and since each state has equal representation in the Senate, the federal government will not be able to encroach upon the competencies and interests of the states. Any federal attempt to arrogate and expand its power can, according to the theory, be resisted and aborted by the Senate. According to the theory, therefore, the Senate holds the "ultimate authority" to managing U.S. federalism and serves as "the guardian of state interests" as it is "intrinsically calculated to prevent intrusion from the center on subjects that dominant state interests wish preserved for state control."[30] In addition, the states have a crucial role in the nomination of the head of the executive, the U.S. President. The role of the states in the nomination process discourages the central government from unduly arrogating power. The working balance of federalism is maintained and nurtured primarily because of the strategic role of the states in the selection of members of Congress and the President. The "sheer existence of the states and their political power to influence the action of the national authority" is capable of limiting, and has limited, the "extent of central intervention."[31] As a result, the Supreme Court should have, and has had, a limited and subordinate role in managing federalism and in the resolution of federalism disputes.

Jesse Choper has perhaps put forth the strongest theoretical justification to and the most radical version of the political safeguards theory.[32] In what he calls the "Federalism Proposal," Choper argues that "the federal judiciary should not decide constitutional questions respecting the ultimate power of the national government vis-a-vis the states; the constitutional issue whether federal action is beyond the authority of the central government and thus violates 'states' rights' should be treated as nonjusticiable, with final resolution left to the political branches."[33] Theoretically, the political safeguards doctrine is based on the assumption that "national legislation affecting states' rights must have the widespread support of those affected [the states]. … Under these conditions, the need for judicial review is at its lowest ebb."[34] Based on this model, Choper distinguishes between the role of the Supreme Court in adjudicating federalism disputes and in determining human rights disputes. He argues that because human rights lack an established constituency within the political process and because human rights in the U.S. context are about what any government, not which level of government, cannot do, the Court has a decisive role in their enforcement. In contrast, federalism disputes are not really about what the government cannot do. They are rather about which level of government can and should perform a particular task. Since the political process ensures the representation of the states in the center, it sufficiently safeguards the interest of the states.[35] The existence of political safeguards obviates the need for the judicial enforcement of states' claims against potential federal intrusion or encroachment. In short, in the presence of political safeguards, judicial safeguards are seen as redundant, and even undesirable to the enforcement of states' claims. Choper therefore urges the Supreme Court to reject all federalism disputes and rather focus its (exhaustible) institutional capital and legitimacy on enforcing human rights claims. He further argues that the federalism proposal is beneficial to the judiciary in that "by removing one class of constitutional issues from judicial consideration, the Proposal would husband the Supreme Court's scarce political capital, and thus would enhance the Justices' ability to act in support of personal liberties."[36]

Although Larry Kramer agrees with the basic proposition that the political safeguards theory, he bases his arguments on the informal structure and operation of political parties rather than the formal representation of states in the federal government.[37] The dependence of federal officials on party support at the state and local levels provides states with the leverage to fend off federal incursions. The "mutual dependence on decentralized political parties" links the "political fortunes of state and federal officials" and "preserves the states' voice in national councils."[38] The mutual dependency induces "federal lawmakers to defer to the desires of state officials and state parties."[39] The politics of the party system renders the "Supreme Court's aggressive foray into federalism as unnecessary as it is misguided."[40] Kramer concludes that "the proper reach of federal power is necessarily fluid, and it may well be that it is best defined through politics."[41] He further posits that the political safeguards have "a longer pedigree and a stronger claim to constitutional legitimacy" than judicial safeguards.[42] As such, courts should not entertain federalism disputes.

It should be noted that the political safeguards theory does not oppose the judicial review of state legislation based on the federalism provisions of the U.S. Constitution, presumably because the federal government is not formally represented in the political institutions of the states, or because the decentralized structure of political parties only effectively protects the local against the federal, and not vice versa.[43] Basically, the theory gravitates towards the Swiss model where the Federal Supreme Court of Switzerland is only authorized to receive complaints alleging violations of federalism and other provisions of

the Constitution against state legislation.[44] The constitutional validity of federal primary statutes cannot be challenged in the Swiss Federal Supreme Court on any constitutional ground, including the federalism provisions.[45]

The judicial safeguards doctrine does not generally question the premises of the political safeguards theory. Both theories agree that political safeguards exist and that the political process provides some protection to the interests of states. However, while the latter theory generally sees very little or no role for the judicial enforcement of federalism provisions against federal laws (they consider judicial intervention in federalism disputes unnecessary, undesirable, misguided, and harmful), the former theory sees a role for constitutional adjudicators in enforcing federalism provisions.[46] In simple terms, the judicial safeguards theory only objects to the claims of exclusivity in the political safeguards theory. The judicial safeguards theory recognizes the relevance of "an important measure of reliance on the political process so long as some judicial review exists as an ultimate backstop."[47] Constitutional adjudication should provide the ultimate solution to federalism disputes.

The judicial safeguards theory asserts that the U.S. Constitution does not give the Supreme Court the right to pick and choose which subject areas of the Constitution to enforce, as implied in the political safeguards theory.[48] Granting the Court the discretion to select which constitutional provisions to enforce is unfounded and can be dangerous in the long term as the Court might as well abandon the enforcement of individual rights provisions.[49] The Supreme Court has the "institutional *obligation*" [emphasis added] to draw the line between federal powers and state sovereignty.[50] The drafters of the U.S. Constitution as well as those who ratified the Constitution understood that judicial review would be used to enforce the limits of both federal and state authority.[51] As such, federalism disputes cannot be excluded from the jurisdiction of the Court, nor should they "receive second-class status before the courts."[52] In fact, questions of federal and state power should receive "the fullest – if not the primary – attention of the Supreme Court."[53]

Judicial review might not be a "core check." Nevertheless, it serves at least as "an important secondary mechanism for keeping the basic political safeguards in place."[54] The judicial enforcement of limits on the powers of the federal government is necessary in "policing and maintaining the system of political and institutional checks that we ordinarily rely on to prevent or resolve most problems."[55] Judicial review therefore ensures that the structures that enable the political and institutional safeguards of state interests remain intact. The political and institutional safeguards of federalism serve the primary purpose of checking federal intrusion into state spheres. Nevertheless, judicial review still has a role to play in ensuring that the primary checks are not decimated or otherwise tampered with. This theory of judicial safeguards anticipates an equivalent of the "representation-reinforcing" theory of judicial review in relation to judicial review of constitutional rights issues.[56]

Beyond text and originalism, the judicial safeguards of federalism may be justified based on the idea that states' powers are granted not on behalf of the states but on behalf of the people. Because state officials are rational actors that work toward maximizing their own benefits, they might at times lack the proper incentive to protect and insist on the vertical division of power that is beneficial to the people.[57] This presents an inherent principal-agent problem where the agent simply acts in his or her or its interest, at times at the expense of the interests of the principal, especially when the direct control exercised by the principal is loose due to popular rational ignorance. The interests of citizens that federalism is intended to protect might not always converge with the interests of officials, both federal and state. In

such cases, the officials may acquiesce in the undermining of the federal division of powers and, with it, the interests of citizens that federalism is designed to protect. In fact, sometimes state and federal officials "have systematic political interests that often cause them to undermine federalism."[58] Judicial safeguards are necessary to ensure that the division of powers that is important to protect the rights and interests of the people is not undermined through the political process, which according to the political safeguards theory is supposed to reliably protect state interests. In short, judicial safeguards are necessary because office holders controlling the political safeguards may have the incentive to deliberately fail to protect the interest of the people that federalism is designed to advance.

In practice, regardless of the swing in the direction of the decisions of the Supreme Court, most scholars would agree that the role of the U.S. Supreme Court in the enforcement of the federal division of powers has been negligible. Many scholarly works have therefore focused on the exact level of deference that the Supreme Court has granted, and should grant, to the political process and the outcomes it generates. While the political safeguards theory has been geographically limited to the U.S. and has not caught the attention of nor gained the support of academics and constitutional drafters with regard to building federal states in Africa the theoretical discussion in this section nonetheless serves to inform discussion about institutional possibilities for adjudicating federalism disputes in Africa.

The Relevance of Judicial Safeguards in the Context of Federal States in Africa

As indicated, the focus of the debate on the appropriateness of judicial safeguards of federalism has been geographically limited to the U.S. and within the U.S. academic and judicial circles. There is very little, if any, work that has addressed the relevance and validity of the different safeguards in, for instance, the context of federal states in Africa. This section argues that for different reasons the political safeguards theory cannot be used to validly exclude judicial safeguards in the institutional and political context of federal states in Africa.

First, the political safeguards theory in the U.S. context has its birth in the lack of a clear constitutional provision that either explicitly excludes or establishes the power of courts to review federal measures for compliance with the federalism provisions of the Constitution. It is defective constitutional design, perhaps emanating from the extremely concise nature of the U.S. Constitution, which has created the controversy. In fact, Kramer, one the main proponents of the political safeguards theory, notes in passing that "[o]ne might be willing to tolerate such decisions [of the Supreme Court restricting Congress's authority], for better or worse, were there a clear constitutional mandate demanding judicial intercession."[59]

In the context of federal states in Africa, however, there are clear constitutional provisions in relation to the organ that is charged with arbitrating federalism disputes. Section 232(1) of the 1999 Constitution of Nigeria grants original and exclusive jurisdiction to the Federal Supreme Court to resolve "any dispute between the Federation and a State or between States if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends."[60] Similarly, the South African Constitution is explicit on which organ is charged with resolving disputes between federal and provincial governments. The Constitutional Court has the first and final say on all "disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state."[61] The Ethiopian Constitution grants the power of constitutional adjudication to the House of Federation, the

upper chamber composed of representatives of "nations, nationalities and peoples" (essentially ethnic groups).[62] The power of the House of Federation extends to interpreting the Constitution in case of disputes on the content and consequences of federalism provisions. Because of the existence of these explicit constitutional provisions which empower the constitutional adjudicators in the respective countries with the power to resolve federalism disputes, the political safeguards theory, which purports to exclude constitutional review from the resolution of federalism disputes, is untenable in the context of federal states in Africa.

Secondly, the political safeguards theory is less relevant in states where the formal representation of the states at the center is weak. Without state representation at the center, the political process cannot be relied on to ardently protect the interest of the states. In some of the federal states in Africa, the representatives of the internal states in the upper chamber do not have veto powers to preclude the enactment of some or all federal legislation by the lower chamber (composed of elected representatives of the people). For instance, the second/upper chamber in Ethiopia, the House of Federation, does not have any role in the making of federal laws. The House of Peoples' Representatives, which is composed of directly elected members representing the people, enact all federal laws. Also because of the parliamentary system the Constitution establishes, there is no presidential or executive veto on the law-making powers of the House of Peoples' Representatives. The states are not formally represented in the federal law-making process. In addition, it is not the states as such that are represented in the House of Federation. It is rather ethnic groups. There is therefore no formal political safeguard that can adequately protect state interests against possible federal encroachment in Ethiopia.

In South Africa, a bill "affecting provinces" can only come to effect with the approval of both the National Assembly and the National Council of Provinces.[63] The Council of Provinces has veto power only in relation to matters affecting provinces.[64] However, in cases where the Council of Provinces rejects a bill approved by the National Assembly, the National Assembly can reenact it with a two-third majority vote.[65] As such, theoretically the National Assembly can ultimately ignore the decisions of the Council of Provinces. The role and legislative powers of the upper chambers in Ethiopia and South Africa are therefore substantially different from the role of the U.S. Senate. In these circumstances, the political process cannot be expected to protect adequately the interests of the states.

Perhaps two other factors militate against the political safeguards theory are the dominance of both the federal and provincial levels of government by a single party, and the centralizing tendency of African governments. Kramer bases his argument for the political safeguards theory on the decentralization of political parties and the dependence of the central party officials on their state counterparts as the energy that powers the political safeguards. However, the dominance by a single party of both levels of government in a federal state can have an exact opposite effect. In the case of one-party dominance, state officials may be willing to tolerate federal incursions due to party loyalty and the disproportional influence that the highest echelons of the party wield. In the Ethiopian and South African context, for instance, the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) and the African National Congress (ANC), which are the ruling parties, control both the state legislative councils as well as the federal legislature. As a result, the policy variations and experimentation that federalism was supposed to breed has largely been absent. In Ethiopia in particular, the one-party dominance has led to the centralization of power in spite of the clear constitutional intention to decentralize power to the states.[66]

In addition to the one-party dominance, African governments have historically shown a general tendency to centralize power. In fact, that tendency is one of the reasons why there are very few federal states, despite the fact that African states demonstrate high levels of diversity. The judicial review of federalism disputes can partly contribute to taming the rampant centralizing tradition in African politics.

Moreover, unlike U.S. states, which collect more than half of their revenue from their own sources of taxation and other revenues, the states in African federal countries are highly dependent on disbursals in the form of subsidies and loans from the central government. This dependency on federal subventions undermines their capacity to resist federal incursions. The states within African federal countries have an inferior bargaining power compared to U.S. states. This weakens the importance of the political process as a reliable tool to maintain the federal balance.

Another general scenario where the political safeguards theory will be defective is in cases where there is a clear line of difference between the constituent states. In South Africa, for instance, the interests of the Western Cape Province, which is currently (since 2009) the only province that is governed by the opposition Democratic Alliance (DA), can be legitimately considered to be different from the other provinces. Hence, despite the fact that all the provinces are represented in the federal government, the central government and the eight other provinces might collude to undermine the interests of the Western Cape. Precisely, wherever the interest of the majority of the provinces is in conflict with the interest of one or few provinces, the political safeguards theory cannot be relied on to equitably protect the pariah state/s, i.e., those that are governed by the opposition party.

In summary, for several reasons, some applicable generally to all states, others specific to one or more federal states, the political process cannot be relied on as an exclusive safeguard of federalism in the context of Africa. Indeed, the three federal states under study have crafted both political and judicial or quasi-judicial safeguards of federalism. The discussions in this section reveal that theoretical objections and justifications should take into account variations in institutional design for the resolution of federalism disputes and the practical realities in a particular jurisdiction. The next section looks at the normative and institutional mosaic in relation to the resolution of federalism disputes in federal states in Africa.

The Resolution of Federalism Disputes in Africa: The Institutional Mosaic

As it was indicated above, most federal states establish formal mechanisms through which federalism disputes can be resolved. This is of course in addition to other informal dispute resolution mechanisms such as inter-governmental negotiation. Together with the political safeguards of federalism, constitutional adjudicators share the responsibility of sustaining, completing, adapting, and reconciling federalism's working balance. The resolution of conflicts of jurisdiction through political negotiation and compromise is both necessary and desirable. Political negotiation and coordination is particularly important where there is extensive jurisdictional overlap (concurrent powers) between the different levels of government.[67] However, political safeguards and negotiation are not sufficient. Due to the potential coalescing of interests between the federal government and the states, officials at a particular time may undermine the vertical division of powers. The federal government or the states or both may disregard structural federalism out of political convenience or personal or party interest. When political safeguards and negotiation are unable or

unwilling to protect the federal division of power and resolve federalism disputes, constitutional adjudication provides a potent alternative to enforce federalism provisions.

In addition, although cooperation and collaboration between the federal and state governments should be expected and encouraged, it does not mean that the two levels of government will always agree on the constitutional divisions of power. Negotiations do not always succeed. The different levels of "[g]overnments cannot always be counted on to agree."[68] And even when negotiations result in a deal, there might be groups that believe that the constitutional template has been undermined either by the process or outcome of the negotiation. Sometimes, the states may have contradictory interests, such as in relation to the distribution of income from geographically concentrated natural resources. Constitutional adjudication is important when the political actors fail to agree on the exact balance anticipated and established under a constitution. In such cases, constitutional review becomes relevant to test the legitimacy of and ratify the negotiated scheme. To this extent, constitutional review of federalism disputes serves as an alternative and complementary mechanism to soothe political gridlock and to preclude possible institutional instability.[69]

The constitutions of federal states in Africa establish both political and judicial safeguards of federalism. As indicated above, there are clear provisions that empower the constitutional adjudicators in each country to resolve, among others, federalism disputes. The following three sections look at the institutional and procedural mosaic in the adjudication of federalism disputes in the three federal states of Nigeria, South Africa, and Ethiopia. Each country section approaches the issues systematically. First, it discusses the organ in charge of constitutional adjudication. Second, it examines the appointment process of the members of the adjudicator with a view toward determining the extent to which the states/provinces within the country are involved in constituting the constitutional adjudicator. Third, each section assesses whether the jurisdiction of the constitutional adjudicator extends to scrutinizing both federal and state legislation based on the federalism provisions. Lastly, the issue of access to the constitutional adjudicator is explored with a view to determine the entities that have the standing to initiate complaints based on federalism provisions before the constitutional adjudicator. The underlying purpose of these sections is to determine the extent to which the constitutional adjudication process reflects the federal character of the states.

The Resolution of Federalism Disputes in Nigeria

Nigeria is the oldest and most established federal state in Africa.[70] Since 1996, the federation has been composed of thirty-six constituent states and a Federal Capital Territory, Abuja. Although a single ethnic and linguistic group dominates some of these states, most are multiethnic. Federalism has since independence been accepted as a viable tool to accommodate the diversity of the Nigerian nation and to appease and tame centrifugal forces. Many consider Nigerian federalism as extremely centralized, a trait bequeathed from the hyper-centralization tendencies of the military authoritarianism that dominated the lifespan of post-independence Nigeria. This centralization is still reflected in the 1999 Constitution, particularly in relation to fiscal federalism and revenue distribution.[71]

The 1999 Constitution anticipates disputes between the different levels government and establishes institutional structures for the peaceful resolution of such disputes. The Constitution grants the power to adjudicate disputes between the federal government and the states and amongst the states to the Supreme Court of Nigeria.[72] In fact, since 1999, the

Supreme Court has rendered several politically and economically significant decisions on the division of competencies between the central government and the states.[73] It is interesting to note that, although the Constitution generally follows the diffused model of constitutional review, the Supreme Court has original and exclusive jurisdiction in relation to federalism disputes.[74] It should also be noted that the jurisdiction of the Supreme Court is not limited to scrutinizing the constitutionality of state legislative, executive, and judicial action. Unlike Switzerland, even federal primary statutes can be challenged based on the federalism provisions of the Constitution.

The Federal Supreme Court is composed of a Chief Justice and a maximum of twenty-six other Justices as determined by an Act of the National Assembly, which consists of the Senate and the House of Representatives.[75] The Senate is composed of three representatives from each state and one from the federal territory of Abuja.[76] The House of Representatives has 360 members representing constituencies of nearly equal population.[77] The appointment process of the Chief Justice and the Justices of the Supreme Court involves three main actors. The Justices are nominated by the President of Nigeria on the recommendations of the National Judicial Council and upon confirmation by the Senate.[78] Both the federal government represented in the person of the President and the states represented through the Senate are involved in the appointment of members of the Supreme Court. The composition of the National Judicial Council similarly reflects the federal character of Nigeria and the vertical division of powers. To ensure the representation of the state judiciary, the National Judicial Council consists of five Chief Judges of States.[79] The fact that both the federal and state governments are involved in the appointment of members of the Supreme Court that has jurisdiction to entertain federalism disputes is ideal as it enhances the neutrality and legitimacy of the Court and its decisions. The balance can potentially play a role in ensuring that there is no systematic judicial bias either towards the federal government or the states.

Although the Constitution is not clear on which entities and persons have the power to submit federalism disputes to the Supreme Court, it appears that only the federal government, the governments of the states, and perhaps local governments can do so. Section 232(1) only specifically refers to disputes in which the parties are the central government and a state/s and disputes between the states. However, it is not clear whether only the legislative councils of the states or the executive of a state concerned or both can launch the application. As a result, there are no provisions on what will happen if the executive and the legislature of a particular state have different views on a constitutional issue. Similarly, it is not clear whether the executive arm of the federal government, the Senate or the House of Representatives or any one of them may challenge the constitutionality of a measure taken by a state government based on the vertical division of powers. So far, in practice it is the attorney general of the central government and the attorney generals of the states who submit disputes on the division of powers to the Supreme Court. In any case, the Supreme Court will consider a federalism dispute only if "that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends."[80] The Supreme Court will not entertain disputes that do not have implications to the legal rights of either level of government.

It appears that the federal character of the Nigerian state is reflected in the adjudication of federalism disputes. Both levels of governments have a role in constituting the Supreme Court, the jurisdiction of the Court includes challenges to both federal and state legislation and each level of government has access to the Court in challenging decisions of the other

level of government. In many respects, the Nigerian constitutional review system reflects the constitutional review system in the U.S. In terms of political safeguards as well, the Nigerian Senate should approve all bills approved by the House of Representatives before the bills are finally sent to the President for his or her assent.

The Resolution of Federalism Disputes in South Africa

One of the most important achievements of the new constitutional system in South Africa is the replacement of the notion of parliamentary sovereignty, which was a paradigmatic feature of the apartheid regime, with the idea of constitutional democracy under the custodianship of the South African Constitutional Court. Also in contrast to the unitary and highly centralized apartheid government, post-apartheid South Africa is highly decentralized. In fact, eight of the thirty-four basic principles that guided the drafting of the final Constitution related to the vertical devolution of power.[81] The entrenchment of the vertical division of powers in the 1996 Constitution was designed mainly to satisfy the demands of the combined Coloured and white electoral majority in Western Cape and the dominant Inkhata Freedom Party in KwaZulu-Natal. As indicated above, although it does not specifically designate South Africa as a federal state, the 1996 Constitution clearly embodies the principles and basic features of federalism. The provinces have powers that the central government cannot infringe and vice-versa except through a constitutional amendment. Moreover, the provinces have permanent representation in the central government through the Council of Provinces. In addition, any dispute between the central government and the provinces is subject to the original jurisdiction of the South African Constitutional Court. These features clearly qualify South Africa as a federal state.

In South Africa, all courts have the power to scrutinize the constitutionality of laws and practices.[82] Any declaration of invalidity of a law or practice by a lower court based on the Constitution has to be certified or confirmed by the Constitutional Court, which is the highest court in all constitutional matters.[83] However, certain constitutional matters may only be decided by the Constitutional Court.[84] For instance, federalism disputes fall within the original and exclusive jurisdiction of the Constitutional Court.[85] According to section 167(4)(a), only the Constitutional Court may "decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state."[86] As such, any dispute between the different spheres of government has to be referred directly to the Constitutional Court. Similar to the Nigerian Constitution, the constitutional adjudication of federalism disputes is centralized. Also there is no exception from the constitutional jurisdiction of the Constitutional Court. All decisions, including federal primary statutes, can be challenged based on the federalism provisions of the Constitution.

The Constitutional Court has eleven members, including the Chief Justice and the Deputy Chief Justice.[87] The President of the Republic appoints the Chief Justice and the Deputy Chief Justice upon consultation with the Judicial Service Commission and the leaders of the parties represented in the National Assembly.[88] The other nine judges are appointed by the President after consulting the Chief Justice and leaders of the parties represented in the National Assembly.[89] The President has to pick the judges from a list prepared by the Judicial Service Commission that should carry three more nominees than the total number of appointments to be made. Unlike in Nigeria, members of the Constitutional Court are appointed by the central government alone without any formal

involvement of the provinces, directly or through the Council of Provinces. However, it should be noted that the Council of Provinces has four permanent delegates in the Judicial Service Commission.[90] The delegates have the potential to play a role in ensuring that the views and interests of the provinces are represented in the nomination process.

The South African Constitution is clear on who may approach courts alleging that a right in the Bill of Rights has been infringed or threatened.[91] However, in relation to federalism disputes, there is very little guidance on which entities have the standing. It is clear that the original and exclusive jurisdiction of the Constitutional Court relates to disputes between government organs in the national and provincial sphere. As such, only the two levels of government can submit disputes directly to the Constitutional Court. It is not clear, however, which organ of the central or provincial government, that is, whether the executive or the lawmakers, may institute proceedings. There is also no clear answer on what will happen if different organs of the same level of government are divided on whether to submit a dispute to the Constitutional Court.

The Resolution of Federalism Disputes in Ethiopia

Article 1 of the 1995 Constitution establishes the Federal Democratic Republic of Ethiopia. In stark departure from its predecessors, which were characterized by a unitary and centralized form of government, this Constitution establishes a federal form of government. The boundaries of states are delimited "on the basis of the settlement patterns, language, identity and consent of the people concerned."[92] Ethnicity and linguistic identity play an important role in the Ethiopian federation. In fact, Ethiopia is the only country in Africa that has been assiduously experimenting with ethnic-based federalism. Currently, there are nine states, and a Capital City, Addis Ababa, under federal administration.[93] Any ethnic group located within any of the states is granted the right to create its own state upon approval by two-thirds of the legislative council of the state concerned and if the majority of the ethnic group concerned supports the creation of a new state in a referendum.[94]

Another unique feature of Ethiopian federalism is the composition and role of the upper chamber, the House of Federation. Unlike in all other federal states that have second chambers where the second chamber is actively involved in federal law-making, the House of Federation is not involved in the making of laws. All federal laws are enacted by the House of Peoples' Representatives alone. Although the House of Federation is considered as a parliamentary organ, it barely has any legislative powers.[95] Secondly, unlike other federal countries where the upper chamber is composed of members that represent the constituent units of the federation, the House of Federation is composed of representatives of nations, nationalities and peoples (ethnic groups). Thirdly, ethnic groups are not represented equally. The House of Federation is a majoritarian entity where the largest ethnic groups have proportionately higher representation. Each ethnic group has at least one representative and an additional one more for every one million members of the ethnic group. For example, an ethnic group that has twenty million people will have twenty-one representatives. Currently, the House of Federation has 135 members representing seventy-six ethnic groups. The large majority of the ethnic groups have only one representative.

Fourthly and most importantly, the House of Federation (HoF) serves as a constitutional adjudicator in relation to "all constitutional disputes," including disputes between the federal government and the states and between the states.[96] Since members of the HoF are

not legal technocrats, the Constitution establishes the Council of Constitutional Inquiry (Council), composed predominantly of legal experts, to assist the HoF in determining whether there is need for constitutional interpretation and, if so, to provide recommendations to the HoF for final decision.[97] The role of regular courts in the constitutional adjudication process is largely limited to referring constitutional issues to the Council. Whenever a constitutional issue arises in judicial proceedings, courts must stay the proceeding before them and refer the constitutional matter to the Council. If the Council rules that there is indeed a constitutional issue, it passes its recommendations to the HoF for a final decision. The HoF is not bound by the recommendations of the Council. If the Council rules that there is no constitutional issue involved, it sends the matter back to the court that referred the matter.

The HoF has the power to scrutinize the constitutionality of both federal and state legislative, executive and judicial measures. However, unlike in South Africa where the provinces do not have any role in the appointment of the members of the constitutional adjudicator, the members of the HoF are entirely nominated by the legislative councils of the states. Although the members of the HoF are intended to represent ethnic groups, they are chosen by the legislative councils of the states. The Constitution allows the states the option to organize elections to select representatives to the HoF. However, elections have never been organized for purposes of electing the representatives. The federal government is involved in the composition of the constitutional adjudicator only through the appointment of some members of the Council. The House of Peoples' Representatives appoint eight out of the eleven members of the Council. However, the Council is only an advisory organ to the HoF. As such, in contrast to South Africa where the federal government dominates the appointment of the members of the Constitutional Court, the representatives of the states dominate the constitutional adjudication system in Ethiopia.

Another interesting aspect of the resolution of disputes between the different levels of government in Ethiopia is the duty to negotiate in good faith to resolve "disputes and misunderstandings" between the different levels of government under the auspices of the House of Federation.[98] It is only when negotiations and discussions have failed that a dispute might be submitted by one or all parties to the HoF for final resolution. Even after the dispute has been submitted to it, the HoF should still strive to facilitate further discussions. This indicates the priority given to the political resolution of disputes between the different levels of government. However, given that federalism disputes are constitutional disputes, it might be argued that the duty to negotiate only applies to extra-constitutional disputes and misunderstandings. As such, disputes based on the federalism provisions of the Constitution may be submitted directly to the Council or the HoF.

Just as in South Africa and Nigeria, the Ethiopian Constitution is not clear on who can submit disputes between the different levels of government to the Council or the HoF. However, the Constitution refers to disputes between the federal government and the states and amongst the states implying that only these entities can be parties to federalism disputes. Due to the parliamentary form of government the Constitution establishes, conflicts between the executive and the legislature at the central or regional level on whether to submit federalism disputes to the constitutional adjudicators are unlikely to arise. In any case, the Council is empowered to receive applications for constitutional interpretation in relation to matters that cannot be handled by courts, such as federalism disputes, if such application is supported by at least one-third of the members of the House of Peoples Representatives or the legislative councils of the states, or the federal or state executive

organs.[99] As such, either the legislative or the executive may submit the case, even though they do not agree on the need to refer the matter to the Council of Constitutional Inquiry.

Conclusion

Federalism clearly needs safeguards. The demand for stability and flexibility in any federal arrangement requires the operation of a fine mix of political and judicial, formal and informal mechanisms for the prevention, management, and resolution of federalism disputes. The main purpose of this article is to look at formal judicial resolution mechanism. Despite the prominence of theoretical objections to the judicial safeguards of federalism, the constitutions of federal states in Africa have clear provisions empowering the constitutional adjudicator to ultimately resolve federalism disputes. All the constitutions considered here establish constitutional adjudication mechanisms in addition to the political safeguards and other informal dispute resolution mechanisms.[100] To that extent, the constitutional adjudicators have an enormous potential to shape the contours of the federal distribution of powers. Judicial safeguards are important and perhaps necessary. Political safeguards and other informal dispute prevention and resolution mechanisms may reduce, but cannot eliminate, the number of conflicts that reach the constitutional adjudicator. Judicial safeguards help to resolve at least those disputes that elude the other safeguards and lead to intergovernmental deadlock. However, the article does not imply that the judicial safeguards of federalism are superior to political and other informal safeguards. In fact, judicial safeguards should generally be used as a final resort and courts should encourage and facilitate negotiated political settlements to resolve disputes between the different levels of government to the extent permitted by the relevant Constitution and the values underlying it.

It is interesting to note that the institutional choices in the judicial resolution of federalism disputes in federal countries in Africa are quite diverse.[101] In Ethiopia, the formal political safeguards are weak. In Nigeria, the political safeguards appear strong. In fact, the Nigerian system of constitutional review in relation to federalism disputes is in many respects a replica of the U.S. system. The constitutions considered here, except for Ethiopia, have adopted judicial safeguards in addition and complementary to any political safeguards. In Ethiopia, the power to decide on disputes between the central and regional governments is granted to the HoF, which is composed of representatives of ethnic groups. To the extent that the HoF exercises the power of constitutional review, the political and judicial safeguards have been conflated.

All the countries have adopted a centralized form of constitutional review in relation to the adjudication of federalism disputes. In Nigeria, the power to resolve federalism disputes rests only with the Federal Supreme Court; in South Africa only with the Constitutional Court; and in Ethiopia only with the HoF, with the advisory support of the Council of Constitutional Inquiry. This tendency to centralize the constitutional review of federalism disputes is also visible in established federal countries such as the U.S., Germany, and Switzerland.[102] Clearly, the premiums on federalism disputes are high. Such disputes are also politically salient. Most importantly, there is need to ensure that disputes are resolved promptly to avoid delay and government inefficiency and stagnation that the normal appellate process could often have entailed. As such, the constitutions have granted direct and original jurisdiction to the final constitutional adjudicator to resolve federalism disputes.

Given the fact that the different levels of government exercise shared sovereignty, any organ in charge of resolving disputes between the different levels of government should ideally have a federal character in its composition, jurisdiction, and accessibility.[103] The participation of the states in setting up the constitutional adjudicator ensures the balancing of influence of the different levels of governments. In Nigeria, the states are involved in the appointment of the members of the constitutional adjudicator.[104] The representation of the states is indirect in Nigeria where the chamber composed of representatives of the states has to approve nominations by the head of the national executive. In South Africa, the central government dominates the appointment of the members of the Constitutional Court without any formal involvement of the states.[105] The Constitutional Court of South Africa does not as such have a federal character. This reflects the highly centralized nature of the South African federation. In contrast, in Ethiopia, the members of the House of Federation are chosen by the legislative councils of the states. The central government does not have any formal role in constituting the constitutional adjudicator. This might breed an opportunistic tendency on the part of the states to arrogate more powers and weaken the federation.

The jurisdiction of the constitutional adjudicators highly reflects the federal character of the states. Each level of government is granted the power to challenge the constitutionality of legislation adopted by the other level of government. As such, the Swiss model where the constitutional adjudicator is excluded from scrutinizing the constitutionality of federal primary statutes has been explicitly rejected by the three federal states in Africa.

Given that federalism disputes relate to disputes between the different levels of government, the standing to submit such disputes is limited to relevant state organs. However, the constitutions considered here are not clear on which organ, whether the executive or the legislature, can submit such disputes to the constitutional adjudicator. This can create a problem where two organs of one level of government may disagree on whether to submit a complaint to the constitutional adjudicator. The standing of local governments to challenge the constitutionality of federal and provincial measures has not been explicitly addressed. Moreover, the extent to which non-state entities such as individuals and organizations are entitled to challenge the constitutionality of state or federal legislation based on the vertical division of power (the federalism provisions of the Constitution) is also not clear.[106] There are no specific rules on whether an individual or legal entity can challenge the constitutionality of, for instance, a federal law only based on the fact that the federal government does not have jurisdiction to enact such law. In comparison, the constitutions are often clear on the circumstances under which a person may institute proceedings to challenge the constitutionality of laws and other decisions based on human rights provisions.

In conclusion, this article has explored the institutional structures for the umpiring of federalism disputes in federal states in Africa. However, it does not explore in detail the role of the umpires in practice. Due to the absolute dominance of a single party in all levels of government in Ethiopia, there have not been any disputes between the regional and the central governments that were resolved by the House of Federation. In the few federalism disputes that were formally presented to it, the Constitutional Court of South Africa has shown a centralist and nationalist tendency. In contrast, the Nigerian Supreme Court has been quite active in resolving federalism disputes, and it has not shown any kind of judicial restraint or preference to either level of government. A detailed comparative study of the legal, political, and social circumstances to explain the behavior of the umpires should better be the subject of a subsequent work.

Notes

1 Bednar 2009, p. 2, footnote 1.

2 Davis 1978, pp. 211-12 has argued that federalism is not by itself directly related to the failure or success of a federal state, including in relation to the frequency and intensity of ethnic disputes. He observes that "[t]he truth of the matter is—and experience has been the teacher—that some 'federal' systems fail, some do not; some inhibit economic growth, some do not; some promote a great measure of civil liberty, some do not; some are highly adaptive, some are not—whatever their condition at any one time, it is rarely clear that it is so because of their federalness, or the particular character of their federal institutions, or the special way they practice federalism, or in spite of their federalness." Also Bednar 2009, p. 3, observes that "the very features that make federal structure appealing for a heterogeneous society—decentralization and regional semi-independence—also build in new opportunities for transgression."

3 Goldthorpe 1996, p. 154, observes that the modernizing elites of Africa considered "tribalism" and "ethnicism" as constituting backwardness.

4 In fact, there is an initiative at the African Union level to advance the idea of decentralization and local development. The Executive Council of the African Union decided during the January 2012 Summit to establish an Africa Day of Decentralization and Local Development on 10 August of every year and to draft an "African Charter on the Values, Principles and Standards of Decentralization and Local Governance." See Decision on the Report of the All Africa Ministerial Conference on Decentralization and Local Development Doc: EX.CL/692(XX).

5 Mazrui 1998, p. 1 (cited in Suberu 2009, p. 67).

6 Suberu 2009, p. 70.

7 Ottaway 1999, p. 305.

8 Neuberger 1994, pp. 231-35 obseres that African leaders attempted to create a unified state out of disparate groups.

9 Simeon 1998, p.3 observing that "while the word 'federalism' does not appear anywhere in the [South African] Constitution, the federal principle was to be deeply embedded in it."

10 Elazar 1987 emphasizes the first two characteristics as basic features of federalism. See also Rosenn 1994, pp. 5-6

11 Moller 2010, p. E-38. However, only Zanzibar has a local government, so to say. The mainland Tanzania is governed by the Union Government and there is no separate government structure for its administration.

12 These three are the main federal states in Africa. For different reasons, the article does not look into the other federal states in Africa, namely, the Union of the Comoros, Sudan and Tanzania. The Tanzanian federation is sui generis. Comoros and Sudan are left out mainly because of lack of information. The 2005 Interim Constitution of Sudan is outdated since South Sudan became a new state in July 2011.

13 On the issues that confront designers of a federal constitution, see Simeon 2009.

14 Lenaerts 1990, p. 263. See also Bednar 2009, p. 1: that "[a] federal constitution creates distinct governments endowed with different responsibilities."

15 Hogg 1985, p. 127 states that the division of power creates tension and breeds disputes.
16 Brudney 2003 p. 175 comments that "constitutional language is often imprecise or inconclusive, and the circumstances of its application often unanticipated or unforeseeable by its authors."
17 Baier 2006, p. 11.
18 Halberstam 2008, p. 143.
19 Rosenn 1994, p. 21.
20 Freund 1954, p. 561.
21 Hueglin and Fenna 2006, p. 275 observe that historically the development of federalism has "simultaneously meant the development of judicial review." See also Shapiro 2002, p. 149. Auer 2005, p. 427 similarly observes that "[f]ederalism was first in bringing theconstitution to the courts, long before civil rights and liberties did the same."
22 Rosenn 1994, p. 21.
23 Wechsler 1954, p. 543; Choper 1977; Kramer 2000.
24 Redish 1995; Yoo 1977; McGinnis and Somin 2004.
25 The author has identified two articles that deal with the jurisprudence of the Nigerian Supreme Court and the Constitutional Court of South Africa on federalism disputes. See Steytler 2009, p. 27-42; and Suberu 2009.
26 However, it appears that the Nigerian system for the resolution of federalism disputes replicates and has been enormously influenced by the American system. In Ethiopia, the disputes resolution mechanism reflects the saliency of ethnicity and the sovereignty of ethnic groups. The South African system is very similar to the system in Germany and reflects the generally centralized features of the overall federal system. The institutional arrangements for the resolution of federalism disputes therefore reflect a mixture of borrowings and innovations.
27 Steytler 2009 and Suberu 2009 both assess the experiences of the Nigerian and South African courts in in relation to the resolution of federalism disputes. However, they lack a comparative approach. Most importantly for this article, even in relation to Nigeria and South Africa, the Steytler and Suberu articles neither the institutional nor the procedural aspects of the resolution of federalism disputes and the role of the states in setting up the constitutional adjudicator.
28 Perhaps a third variant is what Mikos calls the "populist safeguards"' of federalism, which is broadly related to the political safeguards theory. Mikos 2007 argues that citizens may oppose Congressional efforts to expand federal authority vis-à-vis the states. However, most scholarly works conclude that the people care more about specific policy choices rather than the organ that is taking the choice. Moreover, there is a general understanding that ordinary citizens do not have a clear idea of what falls in the respective jurisdictions of the federal and state governments. For example, McGinnis and Somin 2004, p. 95 observe that the people are "know nothings" with little incentive to learn about, let alone "monitor … the federal state balance." More radically, Devins 2004, p 131, argues that "*even if* the American people were well informed about the benefits of federalism, they would still trade off those benefits in order to secure other policy objectives." Judicial safeguards are necessary because "no

one really cares about federalism."

29 The political safeguards doctrine was first systematically presented by Herbert Wechsler 1954, p. 543.

30 Ibid., pp. 543, 548, and 560.

31 Ibid., pp. 543, and 544.

32 Choper 1977; Choper 1980.

33 Choper 1977 p.1557. See also Choper 1980.

34 Choper 1977 p. 1570.

35 To this extent, Choper understands constitutional review as justifiable in protecting interests, individuals and groups that are not sufficiently and effectively represented in the political process. This is in line with Ely's (1980, 1978a, and 1978b) "representative-reinforcing" theory of judicial review.

36 Choper 1977, p. 1577. Cf Shapiro 2002 who observes that constitutional courts are indispensable in federal states and that they use their indispensability in relation to federalism disputes as a firm basis to expand their jurisdiction and establish aggressive jurisprudence on human rights issues. While Choper argues that the role of courts in adjudicating federalism disputes is dispensable in relation to federalism disputes but not individual rights (due to the problem of lack of representation), Shapiro observes that courts are dispensable in relation to human rights issues but not in relation to federalism issues.

37 Kramer 2000.

38 Ibid., p. 219.

39 Ibid., p. 378.

40 Ibid., p. 215.

41 Ibid., p. 292.

42 Ibid., p. 293.

43 Choper 1977, p. 1577.

44 This is in line with the observations of Justice Oliver Wendell Holmes 1920, pp. 295-96 that "[I]I do not think the United States would come to an end if we [Justices of the U.S. Supreme Court] lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States." In practice, as well, some authors (e.g., Bzdera 1993) have argued that constitutional adjudicators favor the federal government, that they are often "centralist and nationalist." As such, the constitutional adjudication of federalism disputes is argued to essentially recreate the Swiss model. In fact, Bzdera (p. 20) observes that the Swiss model, where the Federal Tribunal is forbidden by law to review federal primary statutes, represents the ultimate stage of constitutional review in the modern federal state. See also Shapiro 1981, p. 55: "constitutional review by the highest courts in federal systems has been a principal device of policymaking."

45 The constitutionality of federal primary statutes, treaties ratified by the federation, and federal decrees subjected to referendum cannot be questioned by the cantons in the Federal Supreme Court, even if they encroach upon canton powers. However, orders, regulations and other subordinate legislation of the federal government are subject to the jurisdiction of the Court.

46 Mikos 2007, p. 1719 observing that "there is no guarantee that judicial review does more

good than harm."

47 Young 2001, p. 1351.

48 See generally Redish 1995.

49 Redish 1995, p. 164.

50 Yoo 1997, p. 1312.

51 Prakash and Yoo 2001, p. 6 arguing that "the theory of the political safeguards of federalism remains fundamentally at odds with the Constitution's text." See also Yoo 1997, p. 1313 observing that judicial review of federalism disputes is supported by "the text, structure, and history of the Constitution."

52 Yoo 1997, p. 1313. See also Merritt 1988, p. 20 observing that "[i]f the Constitution forbids federal interference with state autonomy, then the courts cannot abandon their duty to enforce that limit simply because the political process appears to provide a tolerable substitute for judicial review."

53 Yoo 1997, p. 1313.

54 Young 2001, p. 1354.

55 Ibid., p. 1354.

56 Ibid. 2001, p. 1395. Young argues for "a doctrine of judicial review constructed to protect the self-enforcing nature of the federalism system." For the representative-reinforcing theory of judicial review, see Ely 1980.

57 McGinnis and Somin 2004.

58 Ibid. See also Devins 2001, pp. 1194-1200 showing how judicial enforcement of federalism helps to ensure that legislation serves the public good, not simply the political or private interests of transient officials.

59 Kramer 2000, p. 291.

60 Constitution of Nigeria 1999, section 232(1).

61 Constitution of South Africa, section 167(4)(a).

62 Federal Democratic Constitution of Ethiopia (FDRE) Constitution, articles 62(1) and 62(6). Note that the House of Federation is actually a political organ. Ethiopian courts do not have the power to invalidate any government measure based on the Constitution. As such, the distinction between the political and judicial safeguards does not really arise in the context of Ethiopia.

63 Constitution of South Africa, section 76. It should be noted that in relation to bills "not affecting provinces" the National Assembly will send an approved bill to the Council of Provinces which might approve, approve with amendments or reject the bill. However, the National Assembly can pass the bill with or without the amendment or modification proposed by the Council of Provinces, and can even pass bills that have been rejected by the Council of Provinces. See Constitution of South Africa, section 75(1).

64 This is similar to the practice in Germany where the *Bundesrat* has veto power only in relation to certain federal legislation. In contrast, in the U.S., the Senate has veto power over all federal legislation approved by the House of Representatives.

65 Constitution of South Africa, section 76(1)(a-i). However, before the National Assembly can reject amendments proposed by the Council of Provinces, the bill should have been referred to a Mediation Committee for consideration. A Mediation Committee is established in cases of disagreement between the Council of Provinces and the National Assembly. It is composed of nine members from the National Assembly, whose

composition must proportionately reflect the political party composition of the Assembly, and one representative for each of the nine provinces. See Constitution of South Africa, section 78. The National Assembly is not bound by the views of the Mediation Committee.

66 See generally Aalen 2002; 2000.

67 Ryan 2011.

68 Baier 2006, p. 162.

69 See Rubin 2008 arguing that judicial review provides a peaceful alternative to a violent exercise of the right to resist and revolutions.

70 Suberu 2009, p. 67: observes that "Nigeria's federal experience is outstanding in Africa, remarkable in the developing world, and important globally."

71 Ibid. 2009, p. 483 observing that Nigerian federalism still manifests "fiscal over-centralisation."

72 Constitution of Nigeria, section 232(1).

73 For a thorough discussion of the decisions of the Supreme Court on disputes between the central government and the states, see Suberu 2009.

74 In the diffused or American model of constitutional review, all levels of courts are empowered to review the constitutionality of legislative and executive measures. In the concentrated or European model of constitutional review, only the highest court of the land or a separate constitutional court or council is empowered to decide constitutional issues. In Nigeria, the High Court has original jurisdiction on all constitutional matters that are not explicitly excluded from its jurisdiction. Appeal from the High Court lies to the Court of Appeal and finally the Supreme Court.

75 Constitution of Nigeria, section 230 and sections 47-49. Currently, the Supreme Court has fifteen Justices, in addition to the Chief Justice.

76 Ibid., section 48.

77 Ibid., section 49.

78 Ibid., section 231(1 and 2).

79 The Federal Judicial Council consists of the Chief Justice of Nigeria, the next most senior Justice of the Federal Supreme Court, the President of the Court of Appeal, five retired Justices selected by the Chief Justice of Nigeria from the Supreme Court or Court of Appeal, the Chief Judge of the Federal High Court, five Chief Judges of States to be appointed by the Chief Justice of Nigeria from among the Chief Judges of the States and of the High Court of the Federal Capital Territory, Abuja in rotation to serve for two years; one Grand Kadi to be appointed by the Chief Justice of Nigeria, one President of the Customary Court of Appeal, five members of the Nigerian Bar Association appointed by the Chief Justice of Nigeria on the recommendation of the National Executive Committee of the Nigerian Bar Association, two persons not being legal practitioners, who in the opinion of the Chief Justice of Nigeria, are of unquestionable integrity. The Federal Judicial Council nominates candidates based on a list of names submitted to it by the Federal Judicial Service Commission (Constitution of Nigeria, Third Schedule Part I, Section I). The Federal Judicial Service Commission is composed of the Chief Justice of Nigeria, the President of the Court of Appeal, the Attorney General of the Federation, the Chief Judge of the Federal High Court, two legal practitioners recommended by the Nigerian Bar Association, two other persons, who

are not practitioners with unquestionable integrity. See Ibid., Third Schedule, Part I, Section E.

80 Ibid., section 232(1).

81 On the federal system in South Africa, see Van der Westhuizen 2005.

82 However, Magistrate Courts do not have the power to determine the constitutionality of primary statutes and the conduct of the President of the Republic. See Constitution of South Africa, section 170.

83 Ibid., section 167(3).

84 For a list of the matters on which the Constitutional Court has original and exclusive jurisdiction, see Ibid., section 167(4). Note that the Constitutional Court is, among others, empowered to decide "on the constitutionality of any amendment to the Constitution." See Ibid., section 167(4)(d). This is one of the unique features of the South African constitutional review system.

85 Initially, the drafters of the Constitution assigned the power of resolving federalism disputes to the National Council of Provinces (NCOP). However, the Constitutional Court ruled that this was incompatible with the separation of powers and other principles included in the thirty-four principles that guided the drafting of the final Constitution. Haysome 2001, p. 517 observes that "[t]he [Constitutional] Court seems to have accepted the proposition that it was a better guardian of provincial power than the NCOP would be. Yet there is good reason and comparative jurisprudence to believe that the opposite could be the case."

86 However, note that the Constitution imposes a duty on all organs of government to attempt to resolve disputes through intergovernmental negotiation. Section 41(3) provides that "[a]n organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute." Any court before which an intergovernmental dispute has been laid has the power to refer the dispute back to the disputants if it is not satisfied that the organs have not attempted to resolve their disputes as required in section 41(3). See section 41(4). As such, the political resolution of disputes is encouraged and the judicial resolution of intergovernmental disputes is a last resort.

87 Constitution of South Africa, section 167

88 Ibid., section 174(3)

89 Ibid., section 174(4).

90 Ibid., section 178(1)(i).

91 Ibid., section 38 includes a generous and progressive list of entities and individuals who have the standing to bring constitutional complaints alleging violation of constitutional rights.

92 FDRE Constitution, article 46(2).

93 Ibid., articles 47 and 49. The City of Dire Dawa has also been under federal administration since 1993 due to lack of agreement between the Oromia and Somalia states and also because the city is home to a diverse array of ethnic groups. However, there has not been a constitutional amendment or other legislative measure to legitimize and regularize the status of Dire Dawa.

94 Ibid., article 47(2 and 3). The referendum is conducted under the auspices

of the House of Federation, which is charged with the task of guaranteeing the right to self-determination of ethnic groups, including secession. However, so far no ethnic group has exercised its right to create a new state.

95 The principal legislative functions of the House of Federation include its role in constitutional amendment and its power to determine which civil matters should be under the legislative jurisdiction of the federal or the regional states. See Ibid., articles 62(5) & (8), 105(1)(c) & 105(2)(a). The House of Federation also decides jointly with the House of Peoples' Representatives on the exercise of powers of taxation on subject matters that have not been specifically provided for in the Constitution (article 99). In relation to all other issues except taxation, the states have residual power. The formula for the vertical division of taxation power is therefore different from the division in relation to other powers.

96 Ibid., articles 62(2) & 83(1);, article 62(6). Note that the latter provision refers only to disputes amongst the states. There is no explicit provision on the resolution of constitutional disputes between the states and the federal government. Nevertheless, the term "all constitutional disputes" in article 62 should be interpreted to include federalism disputes between the different levels of government. In addition, article 23 of the Consolidation of the House of the Federation and Definition of its Powers and Responsibilities Proclamation 251/2001 empowers the House of Federation to strive to resolve interstate or federal-state government disputes and misunderstandings.

97 See FDRE Constitution, articles 82–84. The Council is composed of eleven members: the President and Vice President of the Federal Supreme Court, six legal experts with "proven professional competence and high moral standing" appointed by the President of Ethiopia upon the recommendation of the House of Peoples' Representatives, and three others nominated by the House of Federation from among its members.

98 The Consolidation of the House of the Federation and Definition of its Powers and Responsibilities Proclamation 251/2001, articles 23-26. The South African Constitutional Court has a similar duty to encourage the political resolution of disputes between the different organs of government. See Constitution of South Africa, section 41(3).

99 Council of Constitutional Inquiry Proclamation No.250/2001, article 23(4).

100 This is in line with the observations of Bednar 2009, p. 9 that federalism needs all forms of safeguards, structural, popular, political and judicial, each providing a "trigger mechanism" to restrain violations of the division of powers.

101 Simeon 1998, p. 6 similarly observes that "there are as many variants of federalism as there are federations."

102 Hueglin and Fenna 2006, pp. 278-79 observe that most constitutional adjudicators in federal countries have direct or original jurisdiction.

103 Ibid., pp. 281-282. They note that "[i]n principle, one would imagine that a court sitting in judgment on the division of powers between two co-sovereign orders of government ought to be constituted in such a way as to ensure the necessary impartiality."

104 The conclusions of Suberu 2009 that the "[Nigerian Supreme] Court's federalism decisions were remarkably independent and reasonably balanced" may perhaps be partly attributable to the balanced role of the center and the states in the appointment of the members of the Court. Suberu p. 483 notes further that the neutrality of the decisions of the Court reflects "the Court's relative political insulation as well as its

composition on the basis of a judicious balancing of the criteria of merit, seniority and regional representation."

105 Perhaps this can partly explain Steytler's 2009, p. 37 conclusion that "the [Constitutional] Court has by and large leaned towards the centre."

106 In Germany, for instance, the constitutional complaints procedure allows individuals to directly access the Constitutional Court only in relation to allegations of violations of the human rights provisions of the Constitution. In relation to federalism disputes, only the federal government, the parliament, and the legislative councils of the states have direct access in abstract review.

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