Creating Federal Regions – Minority Protection versus Sustainability

Bertus de Villiers[*]

Abstract

One of the major challenges that face emerging federations is to create federal regions that could constitute the basis for second tier governments and representation in the second chamber of parliament. Young federations usually do not have agreed historical regions that should form the basis of regional government. In contrast to the older, more established federations,

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[*] BA Law, LL.B, LL.D, Member of the State Administrative Tribunal of Western Australia. He is a Visiting Fellow of the Law Faculty of the University of Western Australia. He is an inaugural Fellow of the Western Australian Institute of Dispute Management under the auspices of the Murdoch University and admitted as a legal practitioner in Australia and South Africa. He was closely involved during the constitutional negotiations in South Africa from 1990-1996. He recently acted as a foreign expert in the Forum of Federation's leadership training project in Ethiopia on federalism and intergovernmental relations.

young federations are formed from centralised, unitary arrangements. When the regions are created, there are often competing objectives at play, for example on the one hand the accommodation of ethnic living patterns so as to use the regions as an informal way of protecting ethnic groups, while on the other hand the desire to limit the number of regions for reasons of economic, financial and administrative affordability and practicality. It is not easy to balance the competing objectives. Young federations usually revisit the demarcation of regions after a few years. For example, India undertook a complete revision of its state boundaries soon after the forming of the federation; Nigeria has increased the number of its states from 3 to 36; and South Africa is debating the appropriateness of its current provincial arrangements. This article provides an overview of some of the experiences of emerging federations when creating their regions and concludes by making recommendations of the process that should be followed when regional boundaries are demarcated.

I. Introduction

One of the most challenging issues that emerging federations face is to create federal regions.[1] There are often several objectives to be met when new regions are created, of which some objectives may, at face value, seem to militate against the other. The following are examples of the objectives to be met when new regions are created:

Firstly, a balance must be struck between demands by minorities to have regions of their own, while ensuring at the same time that the number of regions is sustainable, practical and financially affordable.

Secondly, the outcome of the demarcation of regions must provide certainty as far as the boundaries of regions are concerned, while at the same time the process must allow some flexibility so as to adjust regional boundaries or even create new regions or amalgamate regions if necessary.

Thirdly, measures must be implemented to ensure the free flow of people, goods and services across the nation without impediment by regional boundaries, while at the same time regions should be encouraged to experiment and develop their resources and maximise their economic potential.

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[1] "Region" and "regional government" are used in this article when referring to the second level of government, except when a specific case study is referred to in which case the terminology used by that country will be followed, for example states, provinces, Länder or cantons.

Fourthly, measures to protect minorities within the respective regions must be considered so as to protect such minorities against abuse of powers by the dominant group within the region, while at the same time regional governments should be allowed autonomy to arrange for their internal governance institutions and processes.

To find a proper balance between these competing objectives is not easy. Even well established federations such as Switzerland, Canada and India have shown that it requires time to bring all the competing objectives into equilibrium.

This publication provides comparative insights in the experiences of a few young federations in the creation of regions. The federations considered are India, Nigeria, South Africa and Ethiopia. Specific consideration will be given to the relevance language, cultural and religious interests play in the demarcation of regional boundaries and the way in which those federations attempt to accommodate minority demands for "own" regions. Finally, recommendations will be made as to the factors to take into account when new regions are created. Recommendations are also made about the process that could be followed when new regions are created or when the appropriateness of existing regions is reviewed.

II. Relevance of Minorities when Creating Regions

One of the essential questions that young federations face when they create new regions is what criteria should be used to guide the demarcation of boundaries of the regions, and in particular what, if any, account should be taken of language, religious and cultural identities (jointly referred to as "ethnic groups") and living patterns of ethnic groups when boundaries of regions are determined.

Each of the four federations subject of this publication had to decide whether ethnicity is taken into account as a demarcation criterion and if so, what weight should be attached to it *vis-à-vis* other demarcation criteria such as geographical factors, economic resources and infrastructure.

On the one hand logic requires that where possible persons who share a common ethnic identity should, as far as it is practicable, be grouped together into the same region for purposes of self-government and decision-making over matters that affect their culture, language and religion most intimately. By drawing regional boundaries in a way that accommodates ethnic living patterns, the institution of regional governments can contribute indirectly to the protection of minorities, the language of administration

is simplified, government services are provided in predominately one language, place names reflect the local ethnic identities and issues related to mother tongue education can be accommodated. This is consistent with experiences of multi-ethnic, established federations such as Switzerland and Canada.

On the other hand, the reality is that no region in a federation can be absolutely and continuously homogenous; it is unlikely that each minority in a deeply divided society can be guaranteed its own region or even its own local government area; the sustainability of too many regions can become a serious issue due to the drain it places on financial, administrative and other resources; and in practice, there is always likely to be minorities within regions regardless of demarcation efforts to establish homogenous regions.

It is therefore essential for young federations when they create regions to keep three key principles in mind: firstly, the creation of regions in itself is unlikely to satisfy all the demands for self-government and power-sharing of all minorities; secondly, the creation of regions must be practical, socio-politically and economically sustainable and financially affordable; and thirdly, other formal and informal techniques for the protection of minorities must be pursued at all levels of government.

If the suggestion is made to ethnic groups, as is often done indirectly, that the *only* way for them to be heard and for their rights to be protected is if they had a region of their own, the very integrative and nation-building role of federalism, may be replaced with the seeds of discontent and secession.

While it is acknowledged that ethnic settlement patterns should be taken into account when regions are created, a balance must be struck with the application of other, non-ethnic, criteria for example economic viability, access to point of service; local government and traditional boundaries; infrastructure, geographical features, and administrative convenience.

If regions are created solely for the purpose of securing ethnic group-homogeneity, a federation may end up with a proliferation of unviable ethnic homelands and an ever spiralling process of adjustments to regional boundaries so as to accommodate the movement of people and to maintain the "purity" of the region. Nigeria, for example, has demonstrated how state creation can develop a life and momentum of its own once minorities become convinced that the only way for their protection is to secure an "own" state.

If, however, economic viability of regions is overemphasised when regions are created and no account is taken of the living patterns of ethnic minorities, the regions may fail to offer minorities the protection and accommodation they desire; demands for new regions may lead to protracted con-

flict; and administrative complexity of managing multi-ethnic regions may curtail the effectiveness of regional governments.

One can agree with the observations of *Watts*, who, after extensive comparative research, concluded that when the creation of regions is considered, "an important factor affecting the character of state governments is the degree to which the territories of the state coincide with the territorial concentration of historical, economic, linguistic, religious, cultural or social interests".[2]

Horowitz, after reflecting on the experience of Nigeria with state creation, observes that there may be benefits to divide, on purpose, concentrated majority groups into smaller sub-groups so as to create more competition between states and thereby reduce the pressure that one or two major groups may exert on the national government and the competition and conflict that may be caused as a result of the competition for power at the national level.[3] *Horowitz* observes that "a good deal of conflict from the all-Nigeria level" has been transferred to the states.[4]

Hale contends, with reference to India, Switzerland and South Africa, that the likelihood of a successful federation increases if there is no single region with a dominant ethnic group.[5] Although he does not go as far to suggest that regions should not take into account ethnic living patterns, he contends that if a single region is in a too dominant position it may destabilise the entire federal arrangement. In such a case it may therefore be preferable to split a large region into smaller regions so as to diffuse the risk of dominance.

III. India

The federation of India comprises 28 states,[6] a national territory and six other territories administered directly by the federal government.[7] Parlia-

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[2] *R. L. Watts*, Forward: States, Provinces, Laender and Cantons: International Variety Among Sub-national Constitutions, Rutgers L. J. 31 (2000), 943.

[3] *D. L. Horowitz*, Ethnic Groups in Conflict, 1985, 604.

[4] *D. L. Horowitz* (note 3).

[5] *H. E. Hale*, Divided We Stand: Institutional Sources of Ethnofederal State Survival and Collapse, Wld. Pol. 56 (2004), 181. He observes after an assessment of several federations that "(I)nitially, we see overwhelmingly that ethnofederal states lacking a core ethnic region are very resistant to collapse – in fact, this investigation did not reveal a single case of collapse among thirteen such states. Conversely, all cases of ethnofederal state collapse have taken place in systems that featured a core ethnic region.", 181.

[6] At independence India comprised 14 states and six union territories.

[7] a1(3) of the Constitution of India.

ment may by law create new states, admit new states into the federation or alter the boundaries of existing states.[8]

The size and population of the states reflect the complexity of the Indian federation, for example the largest state Rajastan is more than 90 times larger than the smallest state Goa. While the state of West Bengal has a population density of 903 persons per square kilometre, Arunachal Pradesh has a mere 13 persons per square kilometre.[9]

The states are very diverse not just in terms of size and composition of population, but also as far as the size of the territory, economic viability, resources and infrastructure are concerned. Many of the states are larger, with greater diversity of population than entire federations. As many as 1600 languages and dialects are spoken in India.[10]

Although India had pre-independence princely states and locally governed territories and regions, the federation ("Union of States" as it is called in the Constitution of India)[11] was created by way of decentralisation to newly created, democratically elected states.

Although linguistic considerations played a large role in the re-organisation of the states shortly after independence, there remains in all of the states language, cultural and religious minorities. The states are, in many regards, a microcosm of the Indian society and in several instances the states have greater diversity of minorities and population numbers than entire federations in other parts of the world.[12]

The drafters of the Constitution recognised that the creation of the states had to be flexible so as to allow for adjustments to the state boundaries to be made as time progressed. As a result, the Constitution provides for a mechanism for reorganisation of states.[13] The mechanism is the most centralised in favour of the national government of the four federations under discussion, and possibly of any federation in the world.

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[8] aa 2-3 of the Constitution of India.

[9] *B. Arora*, Republic of India, in: L. Moreno/C. Colino (eds.), Diversity and Unity in Federal Countries, 2010, 202.

[10] *A. Johnson*, Federalism: The Indian Experience, Series: Federalism Theory and Application, 1996, 62.

[11] a1 of the Constitution of India.

[12] For example, if the State of Uttar Pradesh was an independent country, it would be the world's 5th most populous country with its population of 200 million the size of Brazil. <www.economist.com/blogs/dailychart/2011/06/comparing-indian-states-and-territories-countries-0>.

[13] a3 of the Constitution of India.

1. Process to Change State Boundaries

The popularly elected house of the federal Parliament, House of the People (Lok Sabha), is clothed with the sole authority to create new states, to amend the boundaries of states and to do things in connection therewith.[14] For example, the Lok Sabha may create new states, combine states and change the names of states without the approval of the second house of Parliament, the Council of States (Rajya Sahba), or the governments or legislatures of the states or the population affected by the alteration.

In practice, however, the convention has developed that state boundaries are only changed after consultation with the legislatures of the affected state/s and if possible, their approval although at law the approval of the states is not required. This practice of consultation is, however, not legally enforceable and the federal Parliament can create states and alter state boundaries without the agreement of the affected states or the people concerned.

The legal power of the federal Parliament to reorganise states at its sole and sovereign discretion has been upheld by the Supreme Court.[15] Although the federal Parliament has to adhere to all constitutional provisions when state boundaries are altered, it leaves parliament in a very powerful position where, theoretically at least, it can alter the structure of the federation at its own volition. It is therefore not surprising that India has been described as "an indestructible Union of destructible units".[16]

The process for altering state boundaries requires that the President must recommend to the federal Parliament a bill in which the reorganisation of states is proposed. The bill may only be submitted to the federal Parliament after it had been referred to the legislatures of the affected states for those to express their view on the proposed alteration.[17]

Neither the President nor the federal Parliament are bound by the view, opinion or comments of the state legislature in regard to a proposal to amend its state boundaries, and no further consultation with the state legislature needs to be undertaken in reply to any comment or submission it may have made. The federal Parliament is therefore legally in total control of the process and its sovereign prevails at law.

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[14] a3 of the Constitution of India.
[15] *Mullaperiyar Environmental Protection Forum v. Union of India* (2006) 3 SCC 643, 653, AIR 2006 SC 1428 and also *State of Orissa v State of A.P.* (2006) 9 SCC 591, 595.
[16] *Raja Ram Pal v. Speaker, Lok Sabha* (2007) 3 SCC 184, 248, 291; 2007 2 JT 1.
[17] a3 of the Constitution of India.

The discretion of the federal Parliament to reduce the number of state or to create new states is unfettered to the extent that even if it amends a proposal that has already been commented on by a state legislature, there is no obligation on the federal Parliament to refer such an amendment back to the state legislature for further comment.[18]

In summary, the federal Parliament can make the decision to create a new state, to alter a boundary or to combine states by an ordinary majority.

Jain concludes that "the federal Parliament thus has plenary and comprehensive powers to pass legislation to reorganise the States and Territories and to deal with all problems – constitutional, legal, administrative – arising as a result thereof".[19]

2. Role of Language in State Reorganisation

At the time of the drafting of the Constitutions, there were competing arguments as to whether the states should be created on linguistic grounds.

The dominant Indian Congress Party was consistently supportive of territorial recognition of the vast array of linguistic and cultural identities in India.[20] In contrast with the views in South Africa and Nigeria at the time of drafting their first constitutions, the Indian Congress Party committed itself as early as the 1920s to the creation of linguistic states as a basis for the future stability of India. The Party accepted that in light of the diversity of India, minorities had to be accommodated by way of regional and local governments.

The decision of the Constitutional Assembly of India was, however, not to create states on linguistic grounds, but to enact procedures for redemarcation that would be flexible and within the legal domain of the federal Parliament. At the time of independence some states were predominantly homogenous, for example West Bengal and Orissa, while others such as Bombay and Madras were not. In some areas linguistic groups were divided in two or even more by state boundaries.

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[18] *Babu Lal Parate v. State of Bombay* AIR 1960 SC 51: 1960 (1) SCR 605.

[19] *M. P. Jain*, Indian Constitutional Law, 2011, 314.

[20] The Indian Congress defined its primary duty as follows: "Its [Indian Congress] duty as well as its fundamental policy to protect the religious, linguistic, cultural and other rights of the minorities in India so as to assure them in any scheme of government to which the Congress would be a party, the widest scope for their development and their participation in the fullest measure in the political, economic and cultural life of the nation." Quoted in *M. Subhash*, Rights of Religious Minorities in India, 1993, 56.

The Linguistic Provinces Commission (also known as the Dhar Commission), appointed in 1948 to make recommendations about the creation of states, was concerned that an over-emphasis of language would fuel sub-nationalism, encourage instability and prevent India from moving into modernity.

The Commission described demands for linguistic states as an example of "parochial patriotism"[21] and a recipe to undermine Indian nationalism. It cautioned that once linguistic states were created, it would fuel the demands by those groups who were not given statehood, for their own states. It cautioned that the creation of states along linguistic lines was "inadvisable".[22]

The Commission's main concern was that linguistic states would "set the ball rolling for the disintegration of the entire country".[23]

The Indian states as existing at independence were, according to *Watts*, the result of a "hasty integration" of the previously existing princely states for purposes of administrative convenience.[24]

Although the drafters of the Constitution were mindful of the risks of an over-emphasis of linguistic considerations in the creation of states, they also realised that the creation of the states at independence was unfinished business since such scant attention had been paid to linguistic concerns of minorities.

One of the issues that immediately after independence kept the state creation issue on the agenda was the question about the appropriate national and state official languages for India.

Language groups who had no state in which they formed the majority, expressed concern at being excluded from government and administration; that their members did not understand decision-making process since the language barrier made it difficult to understand policy debates; and that it was only by creating additional states that their concerns would be addressed.[25]

The organisation of the states at the stage of independence soon unravelled after the new Constitution commenced.[26] In fact, the first new state,

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[21] Report of the Linguistic Provinces Commission, 1948, 13.
[22] Report of the Linguistic Provinces Commission, 1948, 136.
[23] Report of the Linguistic Provinces Commission, 1948, 139.
[24] *R. L. Watts*, Multicultural Societies and Federalism, Studies of the Royal Commission on Bilingualism and Biculturalism, 1968, 110.
[25] *S. Choudhry*, Managing Linguistic Nationalism Through Constitutional Design: Lessons from South Asia, International Journal of Constitutional Law 7 (2009), 609.
[26] *J. Boundrant*, Regionalism versus Provincialism: A Study in Problems of Indian Unity, 1958.

Andhra State, was already created in 1953. This caused a "chain reaction of linguistic state movements".[27]

It was therefore not surprising that soon after independence the States Reorganisation Commission was appointed in 1955 to consider the re-organisation of the states and whether a greater emphasis should be placed on linguistic lines for purposes of state boundaries.[28]

The States Reorganisation Commission undertook extensive research and toured India at length to hear public submissions about a proposed reorganisation of the states. Although the Commission took into account several factors for the state reorganisation, at the forefront of its deliberations was the creation of states that were as linguistically homogenous as possible. In this sense the Commission differed sharply from the previous demarcation commission in as far as the primacy of linguistic considerations were concerned.

Although there are several hundred languages and dialects spoken in India, the main languages can be grouped into about 12-15 regional languages. India is therefore often referred to as an example of "linguistic federalism" where the constituent units derive from language groupings. Each main linguistic group does not necessarily have a state and within states there are often multiple smaller language groups. For example, of the 22 languages listed in the Constitution, four groups do not have a state in which they form the majority.[29]

In addition to the language groups that do not have a home-state, there are also in all states minority language groupings.

The creation of states on language lines was therefore only part of the solution to accommodate the diversity of India. India has always recognised that state organisation along linguistic lines is just part of the answer to the protection of minorities, and hence there are several other provisions in the Constitution to provide additional protections to minorities, for example mother tongue education, quotas, reservation of seats, and recognition of traditional leadership institutions.

On the basis of the States Reorganisation Commission's recommendations, the states were re-organised and new states were created.

All of the Commission's recommendations for new states were not accepted and it is particularly those areas that did not receive "state"-status at the time, that have been the subject of ongoing demands for statehood. Re-

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[27] *J. Boundrant* (note 26), 45.
[28] The creation of Pakistan had disposed of some of the Hindi-Muslim anxiety and this enabled India to consider, again, the basis for state organisation.
[29] Those languages are Nepali, Sindhi, Urdu and Sanskrit. *B. Arora* (note 9), 208.

fer for example to the creation of states such as Nagaland, Mizoram, Meghalaya and Arunachal Pradesh.

3. Ongoing Demands for More States

The state creation process in India is not yet complete.

In fact, only four years after the 1956 state re-organisation, new states were already created with Bombay being divided into Maharasha and Gujarat in 1960. That was followed by the creation of Haryana and Punjab in 1966. Since then several more states have been created and demands are strong for additional states.

The creation of states along predominantly linguistic lines was seen as a way to protect minorities, to build national unity within diversity, to make the government more understandable and bring it closer to the people and to improve efficiency in governance.

The Official Language Commission which reported in 1956, observed as follows in regard to the importance that language plays to make people feel close and relate to government and administration and how linguistically homogenous states could facilitate a better understanding of the government:

> "Language is the main or almost the sole instrument for inter-communication in a civilised society; modern Governments concern themselves so intimately and so extensively with all aspects of social and even individual existence that inevitably in a modern community the question of linguistic medium becomes an important matter of concern to the country's governmental organization. In the conduct of legislative bodies, in the day-to-day dealings with citizens by administrative agencies, in the dispensation of justice, in the system of education, in industry, trade and commerce; practically in all fields in which it has to interest itself in modern times, the State encounters and has to tackle the problem of linguistic medium."[30]

Since the 1956 demarcation several new states have been created.[31] In 2000 a major state creation exercise took place with three new states being

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[30] Report of the Official Language Commission, 1956, 11.

[31] For a general discussion of state creation refer to *J. Schwartzberg*, Factors in the Linguistic Reorganisation of Indian States, in: P. Wallace (ed.), Region and Nation in India, 1985, 155 et seq.

created.[32] The creation of those states was controversial and the States' Re-organization Commission made no proposal for them to be created.[33]

There are also ongoing demands and proposals for more states, for example for a state of the Greater Nagaland and for the creation of smaller states from the state of Assam, which contains 200 of India's 635 tribal categories.[34]

The most recent demand for statehood is that of Telangana in the northern part of the territory of Andhra Pradesh. The proposed new state has a population of 35 million. Reaction to the creation thereof, against the will of Andhra Pradesh, caused widespread public resistance[35] but it also caused amongst those in favour public action, such as resignations from the Parliament, to support the application.[36] This followed more than a decade of demands by separate groups within the new state for a separate state due to what they perceived as neglect by Andhra Pradesh.

Many demands for new states remain abound with at least ten areas demanding for new states to be created.[37]

An interesting element of the current demands for new states is that in some instances the emphasis has shifted slightly from linguistic considerations as the basis of such new states, to political and economic justification

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[32] Those states are Chhatisgarh, Jharkhand and Uttarakhand. *E. Mawdsley*, Redrawing the Body Politic: Federalism, Regionalism and the Creation of New States in India, Commonwealth and Comparative Politics 40 (2002), 34 et seq. *Upadhyay* cautioned at the time that even within the three newly created states there are serious ethnic and other differences which may, in time, give rise to demands for additional states to be created: "If one sees unity in the three newly formed states, it could only be a temporary phase as disputes are sure to arise when the question of sharing of power, privileges and status come up. Even in a small state like Uttaranchal, people belong to two distinctive divisions Garhwal and Kumaon and are linguistically separate groups and not a cohesive unit. With such inherent contradictions the territorial division of the existing three states on ethnic, linguistic and political considerations will hardly serve the national interest of the country." *R. Upadhyay*, Creation of New States: Need for a National Debate, 3.9.2000, South Asia Analyst Group, <http://www.southasiaanalysis.org/%5Cpapers2%5Cpaper142.html>.

[33] *T. V. Rajeswar*, The Three New States: Controversies Will Continue to Dog Them, Civ. & Mil. L. J. 23 (2000), 321.

[34] *B. G. Verghese*, India's North-east Resurgent: Ethnicity, Governance, Development, 1996, 3.

[35] Indian Lawmakers Oppose Creation of New Telangana State, 14.12.2009, BBC News, http://news.bbc.co.uk/2/hi/south_asia/8411207.stm.

[36] Reddy Meets PM, Presses for Creation of Telangana State, 8.6.2011, India Today, <www.indiatoday.intoday.in/site/story/jaipal-reddy-meets-pm-presses-for-creation-of-telangana-state/1/144085.html>.

[37] Demand for Creation of 10 New States before Home Ministry, 29.6.2009, The Times of India, <www.articles.timesofindia.indiatimes.com/2009-06-29/india/28154322_1_home-ministry-separate-state-gorkhaland>.

for new states as well as arguments that the new areas would be administratively more efficient and better managed.[38]

4. The Future of State Reorganisation

The creation of states in India since 1956 has been predominantly *ad hoc* and as a result of irrepressible public demand, conflict and even violence rather than a visionary grand scheme or a structured process according to agreed criteria to guide the creation of states, if any. In the absence of a constitutional or statutory framework to guide demands for state creation, the process remains mainly a political one.

In essence the state creation process was and remains a form of crisis management – if a minority could not be placated by any other constitutional or political means, they may as a final reward end up with a state of their own. There are signs that with demands for the creation of smaller states from the existing ones, issues of economic mismanagement and feelings of neglect in regional and rural areas are becoming the key motivations for a next round of major territorial reorganisation.[39]

The question is whether state creation is the best way of addressing such concerns.

The process of state creation in India has not been as prolific as that of Nigeria. India has relatively few states given the size of its territory and population.

One can concur with the observation of *Jain* that although India can benefit from having a few additional states so as to reduce the size of some of the really large states, this should not be done in an *ad hoc* manner but rather that a commission for state reorganisation should be appointed to review the entire federation and all states on the basis of criteria such as administrative convenience, geographic homogeneity, economic viability, and so forth.[40]

At the same time, however, *Rajeswar* cautions that India should "go slow" with the creation of new states due to the drain on resources and the costs that accompany the forming of new states.[41] The cost-benefit assess-

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[38] *V. S. Chand*, A Report on Demands for Creation of Small States in India, 4.1.2010, <www.scribd.com/doc/24760637/A-Report-on-Demand-for-Creation-of-Small-States-in-India>.

[39] *P. Kumar*, Demand for a Hill State in UP: New Realities, in: V. Grover/R. Arora, India Fifty Years of Independence, 1999, 63 et seq.

[40] *M. P. Jain* (note 19), 316.

[41] *T. V. Rajeswar* (note 33), 323.

ment of new states, the rationale for their creation and the costs associated with them should provide the basis for assessing demands for state creation.

Choudry applauds the role that state creation has played in India and observes that to India, federalism has been the solution and not the problem it was made out to be before independence[42] and that the reorganisation of the states along linguistic lines has spared India from a civil war.[43] He accepts that state creation is unfinished business, but at the same time it can, according to him, be seen as the flexibility of Indian federalism and its ability to deal with very challenging issues within the context of national unity.

IV. Nigeria

Nigeria has had to deal with similar challenges like India in regard to the creation of its states and the extent, if any, that ethnic residential patterns should be allowed to influence the creation and boundaries of the states.

In contrast with India where state creation has been done under democratic rule, most of the state creation in Nigeria was done under military rule. The state creation process in India may be very centralised, but the outcome is legalised and legitimised through a democratic parliamentary process, while the Nigerian state-creation efforts were principally undertaken by non-democratic means.

Nigeria, with its 140 million people speaking 200 languages and comprising about 250 ethnic groups, is the fifth most populous federation with deep language, cultural and religious divisions, a massive territory and widespread poverty.

Nigeria would probably, if it had not been for federal arrangements, not been in existence today. *Adamolekun* summarises the essence of federalism to Nigeria as follows:

"To keep Nigeria one, federalism is a necessity, not a choice."[44]

Nigeria as a country was in essence a creation of the British colonial government. In 1904 a British historian, Sir *Alan Burns*, observed as follows

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[42] *S. Choudhry* (note 25), 616.
[43] *P. Mehta*, Babbel of Babel, 2.11.2006, Indian Express.
[44] *L. Adamolekun*, The Nigerian Federation at the Crossroads: The Way Forward, Publius 35 (2005), 398.

about Nigeria: "... there is no Nigerian nation, no Nigerian language ... no Nigerian tradition."[45]

Nigeria in pre- and post independence history has been confronted with the demands of minorities for their own areas, be it territories, states or regions.

The historical absence of a national Nigerian-identity meant that since the first days of independence loyalties towards the nation started locally and not nationally. The "nation" of Nigeria therefore had to be built, against the background of severe ethnic mobilisation, and, in the beginning, an absence of a strong sense of national unity and patriotism.

Today, there is a strong Nigerian identity, but the local and regional identities remain very influential and often determine the actions and responses of citizens to political, social and economic issues.

The Federation of Nigeria currently comprises 36 states and demands for the creation of more states remain strong.[46] The process for the creation of new states under the 1999 Constitution has been made very much cumbersome and complex so as to curb state-creation, but the legal constraints have not dampened the enthusiasm of ethnic groups to agitate for their own states.

Although the main Nigerian linguistic groups can be combined into three major entities, there are at least 200 smaller sub-linguistic groups with very strong identities, languages and dialects, religions and customs.[47] This diversity does not mean the total absence of a strong national identity, but in a country where demands of scarce resource are intense, ethnic loyalties often determine political, economic and social choices made by individuals. It has been observed that although the "potential for group chauvinism is high, it is offset by an equally strong commitment to national identity".[48]

The 1958 Commission of Inquiry into Minority Fears[49] recommended that no additional states be created although it left room for more states to be created after independence since it was anticipated that demands for new states would increase. The Commission did, however, recommend the establishment of special areas for minority communities, with dedicated fund-

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[45] As quoted by *P. Okoh*, The Nation-state and Ethnopolical Conflict in Nigeria, in: G. Bachler (ed.), Federalism Against Ethnicity?, 2001, 150.

[46] Previously the states were referred to as "regions".

[47] World Fact Book "Nigeria", available at >https//www.cia.gov/library/publication/the-world-factbook>, 4.

[48] *L. Adamolekun/J. Kincaid*, The Federal Solution: Assessment and Progress for Nigeria and Africa, Publius 21 (1991), 177.

[49] Report of the Commission appointed to enquire into the fears of minorities and the means of allaying them, 1958.

ing and development plans for such areas.[50] The Commission foresaw that such special areas may in time be phased out as the need for their continued existence has reduced.

1. From Three to 36 States

At the time of independence in 1960 the Federation had three regions with an additional region being added 1963.[51]

The three initial regions were the Northern Region (Hausa-Fulani dominated); the Western Region (Yoruba dominated) and the Eastern Region (Ibo dominated). The influence of the original Northern Region which was dominated by the Hausa and contained 55 % of the nation's total population, was a major reason behind the civil war which lasted from 1967-1970.

According to *Hale*, federations with such a dominant "core ethnic region" such as Nigeria had in its First Republic, are more likely to fragment than those where core ethnic areas are split into different, smaller states.[52] He therefore recommends, as Nigeria has done since its First Republic, to break a major region into several smaller ones so as to prevent a situation where a single group can exert so much influence over other regions and the entire federation that it dominates policy decisions. *Elaigwu* also observes that the increase in the number of states has reduced the oil-power of the previously large states and thereby facilitated control of the central government over the states.[53]

While the creation of additional regions from the original three regions may have contributed to greater stability in Nigeria, such a break-down of larger ethnic groups into smaller entities is subject to limitations since it could encourage an ever-evolving process where smaller and smaller groups find a rationale to demand an own state. In a country with so many ethnic identities as Nigeria, there will always be groups that find a rationale for defining themselves separate from other ethnic groups and demanding a state of their own.

The notion of "federal character" which was introduced into the 1979 Constitution of Nigeria, is meant to signify the pluralist and conciliatory

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[50] Report of the Commission appointed to enquire into the fears of minorities and the means of allaying them, 104.

[51] *M. Dent*, Ethnicity and Territorial Politics in Nigeria, in: G. Smith (ed.), Federalism: The Multiethnic Challenge, 1995, 3.

[52] *H. E. Hale* (note 5), 188.

[53] *I. Elaigwu*, Federalism: The Nigerian Experience, Series: Federalism Theory and Application, 1996, 30.

nature of Nigerian federalism. The notion of "federal character" was introduced to "dilute[e] fears and suspicions of ethnic and geoethnic domination in the public service of the federation and giving the various Nigerian groups a sense of belonging to the nation".[54] Nigeria has gone through civil war, serious upheavals and violence but, perhaps surprisingly to many, it has retained its "federal character" and unity.[55]

According to *Suberu* the breaking up of the three independence regions into a "union of multiple, smaller constituent units" has helped to "crosscut major ethnic identities, promote inter-group equilibrium, enhance interregional integration" and generally to ensure the survival of Nigeria as a single political community.[56]

The first major region-creation took place under military rule when in 1967 the number of regions increased to twelve.[57] At the time, five main principles were used to justify the creation of the additional states, namely removal of dominance of one state over the central government; each state should form a compact and integrated area; administrative convenience so as to improve the management of states; effectiveness of each state to discharge its allocated functions; and states should be created simultaneously to provide certainty and stability.[58]

The primary motivation for the creation of additional regions was given by *Yakubu Gowon* the military head at the time of the collapse of the First Republic:

"The main obstacle to future stability in this country is the present structural imbalance ... while the present circumstances regrettably do not allow for consultation through plebiscites, I am satisfied that the creation of new states as the only basis for stability and equality is the overwhelming desire of the fast majority of Nigerians. To ensure justice, these states are being created simultaneously."[59]

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[54] *I. Elaigwu* (note 53), 44.

[55] "Federal character" has become a hallmark of Nigerian federalism. It emerged from the 1979 Constitution and in essence calls for the distribution of federal appointments on the basis of the heterogeneity of the Nigerian nation. *P. P. Ekeh/E. E. Osaghae*, Federal Character and Federalism in Nigeria, 1989.

[56] *R. T. Suberu*, "Nigeria", in: L. Moreno/C. Colino (note 9), 228.

[57] For a copy of the speech given by General *Gowon* on 27.5.1967 in which the creation of the additional states is announced and justified, refer to <http://www.dawodu.com/gowon.htm>.

[58] *H. E. Alapiki*, State Creation in Nigeria: Failed Approaches to National Integration and Local Autonomy, African Studies Review 3 (2005), 58.

[59] *U. Okpu*, Ethnic Minorities and Federal Character, in: P. P. Ekeh/E. E. Osaghae (eds.), Federal Character and Federalism in Nigeria, 1989, 357.

The second state-creation took place in 1976 when the number of states increased to 19. In the 1976 review of states further criteria were announced to justify the creation of more states, namely the demand for even development among the states; the need to preserve the federal structure of government; the need to bring harmony; the need to minimise minority conflicts and the need to bring government closer to the people.[60] In this process the main linguistic groups were subdivided to accommodate smaller sub-groups (while at the same time leaving even smaller groups within the new states frustrated at the fact that they did not have a state of their own).

The Irkefe Panel which reported in 1976 on the functioning of the Federation operated within the realm of military rule when it was required to make recommendations in regard to further state creation. The Panel made the following concluding remarks in its report, justifying the creation of more states:

"1. The political stability of Nigeria cannot be guaranteed unless more states are created.

2. More states would strengthen the principles of federalism and produce a balanced and stable federation.

3. The economic and political result to be gained from the exercise [of creating more states] will, in fact, encourage unity.

4. The creation of more states will go a long way in assuaging the fears of minorities."[61]

The motivation to create additional states was influenced by various considerations, such as a more equal balance of population; break-up of the large ethnic blocks into smaller sub-units; and more equitable distribution of revenues on a regional basis.[62] The Panel did not propose how minorities that remain within the newly created states should be dealt with as far as their rights and interests were concerned. The proliferation of states was also pursued by the military in an effort to more effectively consolidate its control at the centre over the regions, and to diffuse the centrifugal forces that had threatened the Federation. With more states the ability of the military to consolidate central control was therefore enhanced.

Under military rule, from 1984 to 1999, the number of states was further increased to the current 36.[63] Although the creation of the additional states was according to *Elaigwu* "quite effective", it inevitably created the new

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[60] *H. E. Alapiki* (note 58), 59.
[61] *U. Okpu* (note 59), 356 et seq.
[62] *R. T. Suberu* (note 56), 232.
[63] *R. T. Suberu* (note 56), 230. The states were increased to 21 in 1987; then to 30 states in 1991; and the current 36 states in 1996.

minorities within those new states. The new majorities who now had control over their own state "were seen as domineering in their relations with others, while in other cases complaints of neglect, discrimination, intolerance and arrogance are levelled against some minority groups in power, usually seen as dominant minorities".[64]

According to *Okoh* the fact that minorities without a state had little protection within states and had to suffer discrimination and neglect often further stimulated their desire for statehood. He observes that the "disadvantages which the ethnic minorities suffered in the newly independent Nigeria were severe. They were forced to live in the midst of other people who differed from them in language, culture and historical background. In the competition for power the ethnic minorities in each region began to group against the major ethnic groups, to challenge their dominance, and to assert their own rights."[65]

Nigeria can never accommodate all its minority groups by way of different forms of territorial autonomy. Additional mechanisms may be required to protect minorities, especially minorities that find themselves within a state dominated by another group.

While in terms of its general organisation of powers and functions Nigeria is a federation, the states often operate internally in a way akin to unitary systems. This is not unique to Nigeria. Many states in federations operate on the basis of federal principle to the national government, but on the basis of unitary principles within the state. Decision-making processes within the states are therefore often centralised, with little or no protection of minorities, interference with the decisions of local governments are common, and there is often a lack of minority involvement at the level of the state policy and decision-making process.

The irony is that the same complaints that states often raise in relation to the treatment they receive by the federal authorities, are often heard from local governments and minorities against the dominating state governments. The unitary-style of the respective states of Nigeria stimulates the desire by minorities within the states for an own state where they could in turn dominate and control public policy to their own advantage.

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[64] *J. I. Elaigwu*, The Politics of Federalism in Nigeria, 2005, 179 et seq.
[65] *U. Okpu* (note 59), 152.

2. The Future

Demands for the creation of additional regions continue and it has been reported that up to ten additional states may soon be created.[66] The constitutional requirements for additional regions to be created are very complex and cumbersome and it is unlikely that many more states will be created unless there is wide consensus for the increase of states.

In contrast with India where the creation of regions require parliamentary approval (albeit in the case of India by a normal majority in the lower house of the Parliament and not a special majority), the creation of states in Nigeria thus far took place mainly by undemocratic means. The process was therefore void of the normal checks and balances, public consultations and investigations that one would expect to characterise such a major state reorganisation.

The creation of states has, arguably, prevented much more extensive conflict and the possible break-away of part of the country, but simultaneously it has rewarded groups who used violence or the threat of violence with states of their own. *Alapiki* describes the consequences of state creation as follows:

> "Despite the announced intention, each state creation exercise in Nigeria, significantly, was accompanied by attendant effects that actually exacerbated preexisting interethnic and intergroup conflicts rather than relieving them. The August 27, 1991, events are particularly interesting in this regard. First, they demonstrate clearly the low level of political integration among the various peoples and communities that make up Nigeria. Second, the exercise was greeted with violence, rampages, and public demonstrations unsurpassed in the history of state creation in Nigeria. Third, the displacement of 'non-state indigenous persons' and the subsequent 'asset-sharing' controversies among affected state governments were unprecedented. Instructive, too, is the fact that the violence and public demonstrations took place in all the geopolitical zones of Nigeria, that is, the former Northern, Eastern, and Western regions."[67]

The current Constitution seeks to provide more legal security and certainty to the existence of the states in order to prevent a repeat of state creation through non-democratic means.

The states are constitutionally protected and an amendment to the Constitution to create more states can only be made if the following very stringent requirements are met: (a) a request for the creation of a new state must

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[66] <www.odili.net/news/source/2010/apr/29/309.html>.
[67] *H. E. Alapiki* (note 58), 58.

be approved by at least a two-thirds majority of the members of the senate and house of representatives, the house of assembly and the local governments from the area seeking to become a new state; (b) approval by way of a referendum of at least two-thirds of the population of the area that seeks to become a new state; (c) the request for the new state must be approved by a majority of all the existing States as well as a majority of the Houses of Assembly; (d) the proposal is approved by a two-thirds majority of each of the houses of the National Assembly.[68]

These constitutional safeguards may only be amended by a majority of four-fifths of the members of both houses on the federal Parliament as well as a majority of the Houses of Assembly of two-thirds of the states.[69]

This is a very high threshold and unless there is widespread consensus, it is unlikely that new states could be created at the whim of the federal government.[70]

The Nigerian process of state creation never had a visionary, normative policy or legal framework according to which the state reorganisation occurred. State creation was principally done under military rule and as a form of crisis management. State creation became in effect the main mechanism to accommodate demands by minority groups for protection. Practice has shown, however, that for each new state there were new minorities demanding more states.

According to *Okoh* the creation of states in Nigeria therefore became an "instrument for ethnic domination instead of being used to resolve the burning issue of political emancipation of ethnic minorities".[71]

A positive outcome of the state creation process has been that, in contrast with the earlier days of independence, no state is currently large enough to dominate the federation, to pose a threat to federal authorities or to dominate other states.[72] This in itself has brought more stability and equilibrium to the Federation.

The creation of the additional states is therefore seen by *Hale* as one of the key elements why Nigeria has been able to withstand the pressure of

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[68] a8(1) of the Constitution of Nigeria 1999.

[69] a9 of the Constitution of Nigeria.

[70] It was announced in 2010 that a possible 10 additional states may be created but this has not yet eventuated. *G. Nyan*, New States Creation in Nigeria, 5.9.2010, Africa Political and Economic Strategic Centre, <www.afripol.org/gideon-nyan/item/148-new-states-creation-in-nigeria.html>.

[71] *P. Okoh* (note 45), 157.

[72] For example, with independence the Northern Region comprised 54 % of the national population and more than 66 % of the nation's territory. Today, the two largest states (Kano and Lagos) each contain less than 8 % of the national population. *R. T. Suberu* (note 56), 232.

ethnic mobilisation and why it has been able, despite many other problems, to accommodate the aspirations of minorities.[73]

Suberu also describes the "political fragmentation" of the three large ethnic groups by way of state creation as "remarkable" since these groups at a cultural level retain their common cultural, language and religious bonds, but at a practical and political level of governance the groups have been subdivided into at least five states and as such find themselves competing rather than cooperating. The state creation has therefore diluted the potential of violent ethnic separatism and replaced it with inter-state competition and mobilisation which has not destabilised the Federation in the way that happened with the Biafra conflict.[74]

Horowitz concurs with the positive consequences of the state creation in Nigeria. He emphasises that the dividing up of the original Hausa region "diverted the most active political entrepreneurship from identity-battles at the federal level to more local disputes based on accentuating more local identifications".[75]

The creation of 36 states in Nigeria has not resolved all minority concerns and it has not addressed all aspirations for further state creation to take place. As in the case of India, state creation is increasingly being demanded not only on ethnic considerations, but also in regard to demands for greater accessibility to government, more accountability of government and better access to and allocation of resources. *Yamma* describes the public support for more states to be created as follows: "One of the major objectives of state creation is to bring development nearer to the people. It is for this reason that agitations for creation of more states in Nigeria will continue to prevail."[76]

State-creation therefore remains on the agenda of Nigeria and several groups are agitating for statehood. The political rationale for minority groups in Nigeria to have an "own" state becomes even more important when the revenue sharing formula of Nigeria is taken into account and the way in which a minority group can benefit or lose out depending on the ability of such a group to control a state politically.

State creation has in many instances been a way to riches for many groups and individuals within those groups and it is therefore not surprising that more groups and leaders are clamouring for a state of their own. Resulting from the economic growth in the oil-producing states, is also the

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[73] *H. E. Hale* (note 5), 189.
[74] *R. T. Suberu* (note 56), 233.
[75] *D. L. Horowitz* (note 3), 612.
[76] *A. M. Yamma*, Support for Creation of Edu State, Daily Trust, 14.7.2011.

consequential increased migration from other Nigerian states to those states where there is strong economic growth. The internal migration numbers in Nigeria are therefore very high and associated therewith are the rights of those minorities that have not traditionally lived in a state but who are now present in sizeable numbers.

Nigeria has so far not successfully pursued the range of other territorial and non-territorial minority protection mechanisms that India has implemented at the national, regional and local levels so as to widen the scope of minority protection outside the limitations of territorial responses. By expanding minority protection mechanisms outside the limits of territorial control, Nigeria may be able to bring some satisfaction to minorities who are demanding improved protection through territorial dominance.

In summary, state creation in Nigeria has had the benefit of breaking up excessively large states in order to bring greater participation, competition and democratisation within the Federation, to remove the dominance of one state over other states and over the federal government, and to increase competition between states. The focal point of conflict and competition was therefore effectively decentralised from the federal to the state level.

The state creation process was principally driven by the military as a form of crisis management and therefore took place in the absence of transparent public participation; democratic legitimation or a clear vision to guide the process.

Due to the *ad hoc* nature of state creation, the (unintended) precedent set in Nigeria is that the only or most effective way for a minority to participate fully at the state or federal level in public policy or to receive economic benefits, is by demanding its own state. In contrast with India, Nigeria has taken few other measures to protect minorities at a state level other than by way of territorial solutions. As a result, demands for new states will probably remain on the agenda for some time to come.

V. South Africa

South Africa and Ethiopia drafted their constitutions in the early 1990s. A key requirement of the constitution-drafting process in both countries was to create regions upon which the respective federal-type systems could be built.

Both countries had the benefit of the experiences with the state creation processes in India, Nigeria, Germany and other countries.

There is, however, little evidence in literature or in the records of the constitutional or political debates of the time that the two countries made extensive use of the wealth of international experiences. The regional demarcation process in each country took place with urgency and against the background of pressure to finalise the regional boundaries so as to allow the federalisation to commence.

The author, who was a technical advisor to the 1993 provincial demarcation commission in South Africa, can attest that little attention was paid in the demarcation process of the South African provinces to comparative, international experiences.[77] The main emphasis of the South African commission was to make proposals for the creation of provinces that was generally acceptable to South Africans, within the very restricted timeframe given to it by the negotiators.

In contrast to many other established federal-type dispensations, South Africa, like India, Nigeria and Ethiopia, did not have widely accepted historic provinces or regions upon which its new constitutional dispensation could be established.[78] The only way forward after the dismantling of *apartheid* was therefore to create provinces starting from the principle of an undivided South Africa with a clean slate. A Demarcation Commission was appointed to undertake the task and to make recommendations to the negotiators of the Interim Constitution.

1. Two Stage Process

The creation of provinces in South Africa was part of a very hastily arranged transition process from *apartheid* to democratic rule. The unbanning of the African National Congress (ANC) and other liberation movements and the release of political prisoners in 1990-1992 was followed in late 1992 and 1993 by the multiparty negotiations for an Interim Constitution.

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[77] In a few instances there was some reference to international experiences, for example when a decision had to be made by the provincial demarcation commission in South Africa whether the capital Pretoria should be a province on its own; be amalgamated with the (now) Mpumalanga province or form part of the (now) Gauteng province, the author and several other experts made a submission, based amongst other evidence on the experience in Germany with city-Länder, for Pretoria to form part of a Gauteng province and not to be amalgamated with Mpumalanga. This recommendation was accepted. Refer to *B. de Villiers/J. du Pisanie/J. Mokgoro* (eds.), Eastern Transvaal - Pretoria: Separation or Integration?, 1993.

[78] Extract from *B. de Villiers*, The Future of Provinces in South Africa – The Debate Continues, 2007, 8 et seq.

The main political parties had agreed on a two stage transition process – the first phase being the negotiation of an Interim Constitution by the then unelected political parties and the second phase being the drafting of a final Constitution by the popularly elected Constitutional Assembly. The Constitutional Assembly was constituted by the Parliament that had been elected under the Interim Constitution. A quite novel compromise was therefore struck to facilitate the transition from apartheid to democracy.

The key element that facilitated the two-stage process was that the Interim Constitution included key Constitutional Principles that bound the popularly elected Constitutional Assembly.[79] The Constitutional Assembly was therefore not in a position to draft a final constitution that departed in substance from the Constitutional Principles. The final step to conclude the democratic transition was for the Constitutional Court to certify that the final Constitution complied with the Constitutional Principles.[80]

The Constitutional Principles contained key elements that established the basis for a federal-type final Constitution, for example a provision for a written, entrenched constitution that would guarantee the powers of national, provincial and local governments; the Constitution would be overseen by the judiciary; and the provinces would be represented in a second chamber of the national Parliament.[81]

2. Demarcation of the Provinces

The Negotiating Forum, which represented all of the major political parties involved in the negotiation process, appointed a Commission for the Demarcation and Delimitation of Provinces.[82] The Commission was also provided with a group of technical experts[83] to assist with the public con-

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[79] *B. de Villiers*, The Content and Significance of the Constitutional Principles, in: B. de Villiers (ed.), Birth of a Constitution, 1994, 37 et seq.

[80] a71(2) of the 1993 Constitution of South Africa. Ex Parte Chairperson of the National Assembly: In Re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (2) SA 97 (CC); 1997 (1) BCLR 1 (CC)

[81] For the benefit of reference those key Constitutional Principles are enclosed as Annexure A.

[82] At the time of the appointment of the Commission there was no agreement what the second tier governments in South Africa would be called, be it states, regions or provinces. The Commission's title therefore referred to "states, regions or provinces". It was only during the final phases of negotiations that agreement was reached to use the word "provinces" to describe the sub-national, second tier governments.

[83] Experts were drawn from multidisciplinary fields such as law, politics, sociology, economics, development studies and demographics.

sultation, to undertake research, to give technical advice and to assess the public comments and proposals.[84]

The Commission commenced its work in April 1993[85] and submitted its final report and recommendations in August 1993.[86] The Commission's recommendations were accepted with minor adaptations by the main negotiating parties and those recommendations continue to form the basis of demarcation of the current provinces.

The process of demarcation of the provinces did not occur in a vacuum. The Negotiating Forum provided the Commission with ten demarcation criteria according to which it had to assess the proposal submitted to it by the public and make recommendations about the future make-up of the provinces. The public was invited to make inputs to the Commission and to motivate their submissions by using the criteria as points of departure.

It is important to note that the Commission started its work with a clean slate, so to speak, with no draft demarcation outline or a minimum or maximum number of regions provided to it by the Negotiating Forum. Members of the public and political parties were therefore at liberty to propose any number of provinces provided they linked it in some way or another to the demarcation criteria.

The ten criteria for demarcation of the provinces were as follows:

- Historical boundary considerations, such as the then four provinces, the respective homelands, existing local governments, and the economic development regions.
- Administrative considerations, including nodal or central points for the delivery of services to ensure that each province would be properly served.
- Rationalisation of existing structures and institutions such as homelands, provinces, local and regional governments.
- Limit financial costs as far as possible.
- Minimise inconvenience to people as much as possible.
- Minimise the dislocation of existing and future services.
- Demographic considerations and future movement patterns.
- Development potential, natural resources and possible economic growth points.
- Cultural and language realities.

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[84] The author was a member of the technical team.

[85] Report of the Commission on the Demarcation/Delimitation of States/Regions/Provinces Multi-Party Negotiation Process, Kempton Park, 1993.

[86] For an excellent overview of the working and deliberation of the Commission refer to the views of another member of the Team of Technical Experts, *C. de Coning*, The Territorial Imperative: Towards an Evaluation of the Provincial Demarcation Process, in: B. De Villiers (note 79), 189 et seq.

- Other relevant considerations.

The Commission was required to take all these criteria into account and to assess the proposals submitted by the public on the basis of those criteria before making recommendations to the Negotiating Forum.

The intention of laying down criteria for demarcation and to invite an expert Demarcation Commission to make recommendations was that the Negotiating Forum expected a well balanced, considered and, if possible, a politically unbiased report.

In contrast with the experiences in Nigeria and Ethiopia, the Commission conducted its affairs in public, its recommendations were open for public scrutiny and comment, and it took a variety of criteria, of which "language and culture" were only one consideration, into account.

Although "culture and language" were not dominant criteria when the South African provinces were created, the living patterns of South Africans played an important role when final provincial boundaries were settled. Generally speaking the respective major African ethnic groupings were indirectly accommodated within the respective provinces in the areas where they constitute a majority (for example the Zulus in Kwazulu/Natal; the Xhosas in Eastern Cape; the Sotho in the Free State and the Tswana in the North West), while Afrikaans is the majority language in the Northern Cape Province and Western Cape Province.[87] The urban areas of the Gauteng Province such as Pretoria and Johannesburg are multi-lingual.[88]

Although the creation of the provinces was inevitably a highly political exercise, the Negotiating Forum of South Africa was adamant to prevent political controversy that could derail or discredit the demarcation process. The parties were generally also at pains not to abuse the process of demarcation for political gain.[89] Although the stakes were high, the demarcation

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[87] The 2001 breakdown of dominant language groups per province was as follows: Eastern Cape – isiXhosa (83.4 %), Afrikaans (9.3 %); Free State – Sesotho (64.4 %), Afrikaans (11.9 %); Gauteng – isiZulu (21.5 %), Afrikaans (14.4 %), Sesotho (13.1 %), English (12.5 %); KwaZulu-Natal – isiZulu (80.9 %), English (13.6 %); Limpopo – Sesotho (52.1 %), Xitsonga (22.4 %), Tshivenda (15.9 %); Mpumalanga – siSwati (30.8 %), isiZulu (26.4 %), isiNdebele (12.1 %); Northern Cape – Afrikaans (68 %), Setswana (20.8 %); North West – Setswana (65.4 %), Afrikaans (7.5 %); and Western Cape – Afrikaans (55.3 %), isiXhosa (23.7 %), English (19.3 %). Read more: <www.southafrica.info/about/people/language.htm#ixzz1VExMT p9g>.

[88] Refer to <www.statssa.gov.za/census2001/digiAtlas/index.html> for an overview of the 2001 census and for a map that demonstrates the residential patterns of the main language groups refer to <www.salanguages.com/languagemaps/south_african_language_map.gif>.

[89] As a member of the Technical Support Team to the Commission, the author can testify from his experience that the process of consultation and demarcation was, within the time constraints, largely open and free from political interference.

process was surprisingly a political and the outcome gained acceptance across a wide spectrum.

The enquiry of the Demarcation Commission was extensive compared to the other working committees of the Negotiating Forum at the time:[90] the Commission held public hearings in various parts of the country; received more than 300 written submissions; and more than 80 oral submissions were heard. After publication of its recommendations, the Commission received a further 400 submissions in response to the draft report and visited potential problematic areas to hear further submissions.[91]

The workings of the Commission were regarded as one of the most transparent and accessible processes undertaken in public consultation involving the interim Constitution, in comparison to the other committees that had responsibility for various aspects of that Constitution. Many of the other committees that played a role in the negotiating process had little, if any, public participation.

It must, however, be emphasised that during the phase of demarcation of the provinces in 1993 there were no democratically elected institutions in South Africa. The negotiating process was conducted between political parties and movements whose electoral support had not been tested. Dr. *de Coning* nevertheless concluded that the opportunity for public participation enhanced the recommendations of the Commission and that "the invitation for submissions, the inclusiveness of the process, the response of the public, and the nature of submissions played an important role in the demarcation process".[92]

The Commission recommended the creation of nine provinces, and those recommendations ultimately formed the basis for the provinces as they exist today.

Many observers were surprised that such a complicated and politically risky process could culminate in a general consensus between the main political parties. If provincial demarcation were to be undertaken today, the results may be different from those arrived at in 1993 and the public participation, especially from Black communities, would probably be much

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[90] All the working committees had to undertake their work within very limited timescales due to the pressure put onto them by the Negotiators. Most committees did not engage in public consultation. The public consultation undertaken by the Demarcation Commission must therefore be seen within its historical context. If a similar process were undertaken in 2012, it would probably be much more broad-ranging and receive many more submissions.

[91] *Y. G. Muthien/M. M. Khoza*, The Kingdom, the Volkstaat and the new South Africa: Drawing South Africa's new regional boundaries, Journal of Southern African Studies 21 (2005), 303 et seq.

[92] *C. de Coning* (note 86), 205.

stronger. But, at the same time, it must be acknowledged that the general public's acceptance of provincial boundaries since 1993 is indicative that the Commission was close to the mark in its recommendations.

Concerns were, however, also expressed at the time that the demarcation process was too hasty, not sufficiently transparent and lacked in-depth consultation with people on the ground. For example, in a minority report *Ann Bernstein* criticised the general public participatory process undertaken by the Commission. Her concern was that: "To try and actually produce the regional map of the country in such a short time and [think] that this will resolve the differences that exist between all the many interests on this matter is … totally unrealistic and dangerous."[93] At the same time it must be noted in response to *Bernstein's* criticism, that all of the 26 political parties that participated in the negotiating process, made submissions to the Commission and there was general public acceptance of the consultation undertaken by the Commission.

3. Soft Boundaries

The Commission in its recommendations introduced the concept "soft boundaries" when it referred to the potential impact of provincial boundaries on the movement of people, goods and services.

"Soft boundaries" was used to emphasise two important aspects namely that if the view of the Commission should guide the process of South African federalism: firstly, provincial boundaries should not be approached as rigid borders that inhibit the free flows of people, goods and services across the country. Secondly, the national government and provinces must have an obligation to support and assist one another financially and economically so as to prevent a situation where poor provinces were left behind while wealthier provinces advanced.

It was also acknowledged by the Commission that further adjustments to the proposed provincial boundaries may be required in the future.

The creation of the South African Provinces in 1993 is not beyond criticism. The demarcation had to be done in a relatively short period of time in order to keep the momentum of negotiations going, and the Commission completed its task to the best of its ability within a limited time frame. The public consultation was conducted before the democratic support of politi-

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[93] Report of the Commission, 1993, 88.

cal parties had been tested, but having said that, the way in which parties have since 1993 accepted the provincial boundaries added legitimacy to it.

4. The Future

In contrast with federations such as the US, Switzerland, Australia and Canada where historic states, decentralisation and federalism are accepted as given characteristics of the respective constitutional arrangements, South Africans had to get used to the idea of artificially created provinces with constitutionally protected powers. It is nevertheless surprising to note how well the provincial demarcation has been received by the public. In general, provincial identities have been developing since 1993 and there is presently no widespread public outcry for the demarcation of provinces to be un-done, to be completely redone or for more provinces to be created.

There may be criticism in regard to the quality of governance in some provinces, but the actual provincial boundaries have, in general, not been subject to popular challenge.

With the exception of a few local problem areas where some communities preferred being in one province to another,[94] one could contend that the general demarcation outcome in 1993 has since been repeatedly legitimised through wide acceptance by the public.

The general public acceptance of the provincial boundaries does not mean that alterations to boundaries, reduction of provinces or creating new provinces should never be considered. It is quite possible, as experienced in some other federal-type dispensations, that changes to boundaries may be required from time to time. This does not mean, however, that provincial boundaries should be altered at whim. If alterations to provincial bounda-ries are abused for political gain, the credibility of the system could suffer and demands for further changes to boundaries could grow.

The ANC recently announced that a general review of the provinces would be undertaken in the near future.[95] There have for some time been suggestions within the ANC of a review of the provinces and a possible re-duction of the number of provinces, but so far no practical effect has been given to such proposals.

If a review of provinces were to be undertaken, *de Villiers* and *Magi* made the following recommendations of the process that could be followed to

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[94] For example communities of Matatiele, Moutse, Khutsong and Bosbokrant.
[95] ANC Axe Hangs Over Provinces, 29.9.2008, Business Day.

ensure the outcome is credible and legitimate and free of political interference:[96]

   (i) The forum to undertake the review of the provinces and their boundaries must be credible, scientific and supported by technical expertise.
   (ii) The forum must be guided by criteria similar to those that were used when the provinces were created in 1993.
   (iii) Political interference in the work of the forum must be prevented so it can make its recommendations to Parliament and the provincial legislatures in an unbiased and objective way.
   (iv) Public participation by way of submissions and oral evidence must be invited and sufficient time must be given for submissions to be made.
   (v) Radical changes to boundaries should only be considered if the cost-benefits are clearly in favour of an alteration of a provincial boundary.
   (vi) Public consultation must have a qualitative and quantitative dimension and must be taken seriously as emphasised by the Constitutional Court in decisions affecting provincial boundaries.[97] In the decision the Constitutional Court emphasised that consultation with communities affected by changes to provincial boundaries must be in good faith and not merely as a formality or window-dressing.

In summary, the creation of the nine provinces of South Africa took place in the turmoil of political transformation and transition of the early 1990s, but the provincial boundaries have since 1993 been legitimised through wide acceptance and the development of provincial identities.

Although there are a few local areas where communities continue to agitate for changes to provincial boundaries, there is no wide-spread dissatisfaction with or resistance to the exiting provincial boundaries. There are also no demands, except perhaps from the die-hard Rightwing who continues to agitate for a *Volkstaat*, for additional provinces to be created.

It is possible that, over time, as the hegemony of the ANC becomes challenged, demands for more provinces may increase but so far it seems as if future debates regarding protection of minorities will focus on other mechanisms than the increase of the number of provinces.

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[96] *L. Magi/B. de Villiers*, Principles Underlying Demarcation: Implications for Provincial Boundaries, in: B. de Villiers (ed.), Review of the Provinces and Local Governments in South Africa: Constitutional Foundations and Practice, 2008, 41 et seq.

[97] *Matatiele Municipality and Others v. President of the Republic of South Africa and Others* (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) (18.8.2006) at para. 55.

VI. Ethiopia

Ethiopia introduced its federal-type system in 1995[98] following the removal of the previous Marxist regime and the enactment of the Transitional Charter by way of decree in 1991. Under the Transitional Charter a 547-member Constitutional Assembly was elected in 1994 and a federal constitution was drafted. The first election under the Federal Constitution took place in 1995. The Federation comprises nine states and two autonomous city-areas.[99]

Ethiopia, with its nearly 80 million people and around 80 ethnic, language, cultural and religious groups, is the second most populous country in Africa after Nigeria. The risk and reality of inter-ethnic conflict is part of everyday life and it is therefore not surprising that a substantial part of the Constitution is devoted to arrangements regarding the rights of the different ethnic groups.[100]

The ethnic groups and minorities are referred to collectively in the Constitution as "nations, nationalities and peoples".[101] The Constitution does not define what is meant by "nations, nationalities and peoples" (collectively referred to in this publication as "ethnic groups") or what the difference is between a "nation", a "nationality" and a "people". The Constitution also does not set out criteria according to which demands for recognition as a "nation, nationality, and peoples" can be determined. The reference to "peoples" may have flown from the African Charter of Human Rights, which recognises the rights of "peoples".[102]

The names of five of the nine Ethiopian states coincide with the majority ethnic group from the respective state (Tigray, Afar, Amhara, Oromia and Somalia). The state of Gambela is not the name of any ethnic group although there are five major ethnic groups in the Gambela area and they are

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[98] The Constitution of the Federal Democratic Republic of Ethiopia was ratified by the Constitutional Assembly in December 1994, it took effect on 21.8.1995 but it was only formally gazetted in December 1996.

[99] a47(1) of the Constitution of Ethiopia.

[100] For a discussion of the ways that Ethiopians deal with conflict in the respective states refer to *W. G. C. Smidt/K. Abraham* (eds.), Discussing Conflict in Ethiopia – Conflict Management and Resolution, 2007.

[101] Preamble and a8 of the Constitution of Ethiopia.

[102] a19 of the African Charter determined that "All peoples shall be equal, they shall enjoy the same respect and shall have the same rights." Several other articles, for example articles 20-24, contain references to the protection of "peoples". African [Banjul] Charter on Human and Peoples' Rights, adopted 27.6.1981, OAU Doc. CAB/LEG/67/3 rev. 5, I.L.M. 21 (1982), 58 entered into force 21.10.1986.

generally referred to as the Gambela peoples.[103] The state of Benishangul-Gumuz is named after the two main ethnic groups within the state. The Southern Nations, Nationalities and People's State refer to the 56 different ethnic groups[104] residing in that state. The tiny city-state of Harari contains only 0,2 % of Ethiopia's population. The semi-autonomous cities are Addis Ababa and Dire Dawa.

Each of the Ethiopian ethnic groups is entitled to self-government and this may extend to secession of the territory they inhabit.[105]

In addition to the rights of the existing states to self-determination and secession, any ethnic group within an existing state is entitled to establish its own state as recognition of its right to self-determination.[106] It is interesting that the Constitution recognises the right to self-determination and secession of the "nations, nationalities and peoples" without specifically mentioning the states in which the respective groups reside.[107] It seems as if the Constitutional Assembly foresaw that self-determination is an inherent right of a group and not to a territory, and for a group to obtain self-determination the first step would be to establish some territorial basis where it forms the majority, and then to use that as a platform for self-determination and even secession.

None of the nationalities is large enough to constitute an absolute majority at the federal level. The largest group is the Omoros who constitute about 34 % of the population, although the Amhara who constitute about 26 % was historically (and continues to be) the most influential and powerful of all the ethnic groups.[108] Amharic is the language of national administration[109] and the principal language for exchanges between the respective

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[103] *G. Assefa*, Human and Group Rights in Ethiopia: A Reply to Kjetil Tronvoll, International Journal on Minority and Group Rights 16 (2009), 249.

[104] Central Statistical Authority, 2007 Census.

[105] a39 of the Constitution of Ethiopia.

[106] a47(2) of the Constitution of Ethiopia and in a47(3) of the Constitution the process for achieving statehood is set out.

[107] The recognition of "self-determination" was overwhelmingly supported by the Constitutional Assembly by a vote of 508 in favour, 7 against and 1 abstention. *K. Henrard/S. Mis*, Recent Experiences in South Africa and Ethiopia to Accommodate Cultural Diversity: A Regained Interest in the Right to Self-determination, J.A.L. 44 (2000), 42.

[108] *L. Aalen* observes as follows: "But a fundamental problem with the historically entrenched Ethiopian identity is nevertheless that it is constructed from the Amhara dominated elite's point of view. The cultures of the peripheral peoples of the south, west and east of the country are not included in this identity." (*L. Aalen*, Ethnic Federalism and Self-Determination for Nationalities in a Semi-Authorian State: The Case of Ethiopia, International Journal on Minority and Group Rights 13 (2006), 256).

[109] a5(2) of the Constitution of Ethiopia.

governments, tertiary education, civil service training and in the conduct of intergovernmental relations.[110]

It is, however, recognised that in practice, young persons are in increasing numbers unable to converse fluently in Amharic and as a result the language-issue and recognition of the various other languages at the federal level and in the conduct of intergovernmental relations are likely to remain at the very forefront of Ethiopian politics.

In addition to language being an important basis for social and political organisation, within language groups individuals distinguish themselves on the basis of their religion, sub-group, dialect, cultures, traditions, tribe and community. Individuals are therefore often bearers of multiple identities and this phenomenon increases with urbanisation and internal migration between the states. While multiple identities may be a basis for closer cooperation between individuals and groups, the constitutional emphasis of language provides little flexibility for the multiple identities to be given practical effect.

Although Ethiopia had no pre-independent or colonial states, it nevertheless at various stages of its history, had different types of regional arrangements with tribes and emperors ruling different parts of the country. While the notion of democratic federalism is therefore new to Ethiopia, the principle of government of some kind on a regional and local basis has been part of its history for many years. The principle of decentralised government of some sort (albeit not necessarily democratic) is therefore a concept with which the Ethiopians are historically familiar.

1. Self-Determination of Ethnic Groups

Arguably the most unique, and controversial, aspect of the Constitution of Ethiopia is its recognition of the "unconditional right of self-determination, including the right to secession" of the "nations, nationalities and peoples" of Ethiopia[111] and the organisation of the federal states on principally majoritarian linguistic lines.[112] The Constitution recognises the

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[110] For a general discussion of the language issues in Ethiopia refer to *M. Haile*, The New Ethiopian Constitution: Its Impact on Unity, Human Rights and Development, Suffolk Transnat'l L. Rev. 21 (1996), 11.

[111] a39(1) of the Constitution of Ethiopia.

[112] a46 of the Constitution of Ethiopia provides that the states "shall be delimited on the basis of settlement patterns, language, identity and consent of the people concerned".

right of every nation, nationality and peoples to self-government, including the right to establish institutions for the territory it inhabits.[113]

"Nations, nationalities and peoples are defined as follows:

> "A group of people who have a large measure of common culture of similar custom, mutual intelligibility of language, belief in a common or related identities and who predominately inhabit a contiguous territory."[114]

Although the country has previous experience with governance on regional and local levels, the current states do not reflect any previous political entities and although the states are predominately organised along linguistic lines, none of the states are entirely homogenous and even in states with a majority of one nationality, there are sizeable minorities. The most diverse state, the Southern Nations, Nationalities and People's State, comprises at least 56 minorities[115] and the State has been referred to as a "federation within a federation".

According to some observers the inclusion of the right to self-determination in the Constitution was a remnant of the previous Communist-left regime,[116] while others view the ethnic basis of the Federation as an essential requirement to keep the country together and in pace with recent international developments that recognise enhanced rights for minorities.[117]

Ethiopia is one of the few countries and the only in Africa that has from the outset when its Constitution was drafted, not only recognised the diversity of its population but used the diversity as a building block upon which the Constitution and the federal states are based. In contrast to many African states where ethnicity is treated with ambivalence, Ethiopians often exhibit a pride and openness in their diversity.

The constitutional recognition and legal emphasis that is placed by the Constitution on diversity, however, was and remains controversial. The emphasis of ethnicity as the building block for federal, state and local institutions at the possible cost of developing cross-cutting values, may in the long term be detrimental to stability, democratic development and the evolution of cross-cutting loyalties between the respective ethnic groups. The Consti-

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[113] a39(3) of the Constitution of Ethiopia.

[114] a39(5) of the Constitution of Ethiopia.

[115] The number of recognised nationalities in the Southern State has increased from 45 at independence to the current 56.

[116] Refer for example to the a72 of the 1977 Constitution of the Soviet Union which provided that "the right to free secession from the USSR shall be preserved for each republic".

[117] For an excellent overview of the process leading to the 1995 Constitution and issues arising as part of its implementation, refer to *A. Vaughan*, Ethnicity and Power in Ethiopia, 2003.

tutions provides little "reward" to groups or parties that seek to move outside the confines of ethnicity. It is hard to predict, unless the Constitution is revised, how cross-cutting loyalties that are so important for stability in deeply divided societies, can be developed to provide some balance to the emphasis on ethnicity.

The recognition of self-determination and the creation of states based on ethnic identity must be seen against the background of the military and political processes that led to the overthrow of the previous Derg Marxist-regime and the enactment of the democratic, federal constitution.

At the time of the drafting of the Constitution the various military and resistance forces that had fought against the Derg on their own and in coalition with each other, insisted that the right to statehood as well as the right to self-determination and secession be built into the Constitution.[118] The trust amongst the respective groups was weak; each group had in effect a military basis and arsenal at its disposal; and the experiences with centralised government were painful. The cooperation between the fighting forces to oppose the Derg can in a certain sense be likened to a confederal military alliance aimed at creating a federal constitution.

The decision to create an ethnic-federation was therefore not as much a grand philosophical scheme, but rather an expression of the realities of politics at the time.

To some observers the constitutional recognition of diversity imbedded the seed of diversity within the very heart of the constitutional, political and economic arrangements of the country, while others contend that absence of recognition of ethnicity would have threatened the very existence of the nation and would have prevented a democratic political and constitutional settlement in 1994.

Most observers agree that without the recognition of the nationalities – be it in the long term a positive or negative factor – the constitutional settlement of the early 1990s would probably have been unlikely.

The recognition of the right to secession was and remains, however, very controversial and contemporary debates continue to centre on the appropriateness of it and whether the Constitution should be amended to remove it.[119]

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[118] *B. Thomas-Woolly/E. Keller*, Majority Rule and Minority Rights: American Federalism and African Experience, Journal of Modern African Studies 32 (1994), 417.

[119] An example is the commitment by the Oromo leader of the opposition, *Bulcha Demeksa*, that his party would remove from the Constitution a39 which guarantees the right to secession. Oromos don't want secession from Ethiopia, 9.4.2009, Jimma Times. *J. Abbink*, for example, is one who describes the secessionist clause as a "left-over from the socialist-

The recognition of nations, nationalities and peoples is unique in the "explicitness, at a constitutional level, of its affirmation of the national self-determination and the logical consequence with which it attempts to institutionalize that principle".[120]

Although the Constitution attempts to create for each of the main nationalities a "mother state",[121] it is impossible for a country with such diversity of groups to secure to each of the minorities an own state.[122] Each of the states is therefore, in varying degrees, a multi-ethnic entity. So far the Ethiopian policy makers have attempted to resolve demands for more states by way of local and sub-state arrangements rather than to encourage state reorganisation or the creation of more states.

The dominance of a single governing party at the federal and state levels has contributed to keep demands for additional states under control.

A point of criticism against the Constitution is that although it goes to great lengths to accommodate diversity and thereby acknowledges the importance of self-rule on a state and local level, it has not sufficiently developed federal and state institutions of shared-decision-making. The relatively weak federal second chamber, the House of the Federation (discussed below) reinforces the lack of co-decision-making institutions at the federal level in which the states can participate.

Although the ruling governing party currently holds together the different pieces of the Federation,[123] the real challenge for Ethiopian federalism will come when different parties are elected to govern at federal, state and local levels and those parties need to show respect for self-rule, to form a basis for shared rule and to conduct intergovernmental relations without the dominance of a single party.[124]

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communist thinking". *J. Abbink*, Ethnicity and Constitutionalism in Contemporary Ethiopia, Journal of African Review 41 (1997), 167.

[120] *W. Kymlicka*, Emerging Western Models of Multicultural Federalism: Are They Relevant to Africa?, in: D. Turton, (ed.), Ethnic Federalism: The Ethiopian Experience in Comparative Perspective, 2006. 54.

[121] *A. Fiseha/M. Habib*, "Ethiopia", in: L. Moreno/C. Colino (note 9), 149.

[122] *A. Eshete*, Ethnic Federalism: New Frontiers in Ethiopian Politics, in: G. Barnabas (ed.), First National Conference on Federalism, Conflict and Peace Building, 2003.

[123] The situation of one-party dominance in Ethiopia is not dissimilar to the experiences of India and South Africa in the period following the enactment of their democratic constitutions. In the case of India, the Indian Congress Party was the overwhelming force in Indian politics for at least two decades and in South Africa, the African National Congress continues to command around 66 % of the popular votes close to twenty years after the first democratic elections.

[124] Refer in this regard to the instability that arose after the 1995 elections when the minority opposition parties saw an increase in support and took control of the capital city, Addis Ababa.

Currently the dominance of the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) and its alliance parties at the national and state levels means it is not always possible to analyse the actual effectiveness of the federal, state and local institutions since the EPRDF effectively controls all public institutions and policy.[125] Similar to the dominance of the ANC and the Indian Congress after independence, the EPRDF basically controls decision-making and administration at all levels of government. As is summarised by *Fiseha*: "While granting wide powers to the constituent units on paper, the ruling party that in principle is based on regionally based member fronts, controls most of the policy making and executive processes from the center."[126]

2. Minorities without a State

Regardless of the ethnic basis of some of the respective states, the challenge of minorities that do not have a state of their own continues to confront the Ethiopian Federation. In similar vein like Nigeria, India and South Africa, Ethiopia's stability will ultimately also be influenced by its ability to devise policy mechanisms and legal institutions at the sub-federal level to accommodate the rights of minorities within states that do not have a state or a local government where they constitute the majority.

Ethiopia has broken new ground in the composition of its House of the Federation and the demarcation of its states, but this success must be assessed in light of three qualifications, firstly the centralised and dominant party structure has assisted to mitigate potential conflict;[127] secondly the solutions are principally territory based; and thirdly there is a potentially dangerous absence of cross-cutting loyalties due to the constitutional emphasis on ethnicity.

Many of the minorities within the existing Ethiopian states are sufficiently concentrated for various forms of local and sub-state government and decentralisation of decision-making or administrative responsibilities, but other minority groups are so scattered that they do not form an effective majority at any level. Examples have been documented where minori-

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[125] The EPRDF is in essence a coalition between four major political groups – the Oromo People's Democratic Organisation, the Amhara National Democratic Movement, the South Ethiopian People's Democratic Front and the Tigrayan People's Liberation Front.

[126] *A. Fiseha*, Federalism in Ethiopia in Particular and in Multicultural Societies in General, Recht in Africa (2006), 21.

[127] *A. Fiseha*, Theory versus Practice in the Implementation of Ethiopia's Ethnic Federalism, in: Turton, 2006, 118.

ties within states have been the subject of discrimination, violence, and even expulsion from the territory of a state.[128] These local minorities within states continue to create serious challenges for Ethiopia (and for other federations with inner-state minorities).[129]

In Ethiopia demands for the creation of more states persists – especially in light of the expectation created by the constitutional recognition of ethnic diversity and the right to self-determination as cornerstones of the Federation. The federal authorities have so far been successful to resist calls for a reorganisation of states out of concern that a Nigerian-type industry of state-creation may be unleashed. The dominance of a single political party has also assisted to curb state-reorganisation demands.

At the same time that some groups are clamouring for additional states to be created, there is also a growing proportion of the population that do not wish to exercise their rights through ethnic means – they may be the offspring of inter-ethnic relations; they may be part of the elite that may have respect for their customs but not for purposes of political interaction; and they may be part of the growing urban population that have migrated from different parts of Ethiopia. Some states may therefore find that they become less and less a "home" of a specific group and more and more a conglomerate of different identities.[130]

There is a hesitancy, for understandable reasons, in Ethiopia to follow the example of Nigeria by embarking on a state-creation drive in order to provide as many as possible minorities with an own state. While it is recognised that the creation of new states may diffuse tension and that it may be in compliance with the self-determinations of the Constitution, there is also awareness that once the process of state creation is started it can become difficult to control. Although the recognition of nationalities has therefore brought stability to Ethiopia, there are remaining groups who aspire to be recognised, to be clothed with an own state and who may become a new source of instability.[131]

Ethiopia may, however, benefit at some stage in the future from a general review of the state boundaries to assess how successful the 1994 demarca-

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[128] *A. Fiseha / M. Habib* (note 121), 154.

[129] For a general discussion of Ethiopian federalism and issues arising refer to *A. Fiseha*, Federalism and Accommodation of Diversity in Ethiopia: A Comparative Study, 2006.

[130] *J. Abbink*, Ethnicity and Constitutionalism in Contemporary Ethiopia, J.A.L. 41 (1997), 171 et seq.

[131] Refer for example to the demands of the Sidama group in the Southern Nations, Nationalities, and People's Region to establish their own regional state as well as to groups such as the Shiekash who do not live sufficiently concentrated to qualify for a form of territorial autonomy.

tion has been or whether adjustments can be made to improve the effectiveness of the Federation. Although the original emphasis in state creation was ethnic habitation patterns, greater emphasis – without excluding ethnic living patterns – may need to be placed on considerations such as economic viability of states and administrative convenience in order to ensure the sustainability of the Federation.

VII. Guidelines to Create Federal Regions

In summary, the following observations can be made about the creation of regions in federations and how it can facilitate the protection of minorities:

1. One of the first challenges for young federations is often to create regions upon which the decentralisation process can be based. In the four case studies of India, Nigeria, South Africa and Ethiopia, regions had to be created and the process is not yet complete. Each of the countries remains in a process of assessing their regional boundaries from time to time and making adjustments where necessary. Reviewing regional boundaries is not unique to new federations. Even established federations revisit their regional boundaries when required. Young federations should therefore allow themselves time to gain experience from the created regions, to make adjustments to regional boundaries when required, to do a review of the regions and the functioning thereof after a period of say 10-15 years, and to create additional regions or to reorganise and even amalgamate existing regions if necessary. It is inevitable that young federations will experience some period of trial and error before newly created regions are settled with some certainty.

2. Ethiopia, South Africa, India and Nigeria acknowledge that they are not yet at a stage where regional boundaries can be regarded as "final". In fact, South Africa is probably the only one of the four case studies where there are no substantial proposals or public demands for reorganisation of the provinces. In India, Nigeria and Ethiopia there are various demands for the number of states to be increased and for state boundaries to be adjusted to allow for more states.

3. It is understandable for young federations to go through a lengthy period of boundary-adjustments especially if they had little or no historic regions upon which to build their federation. If highly stable and historic federations such as Switzerland, which created the half-canton of Jura in 1979, and Germany, which has been through major territorial reorganisation of its

Länder,[132] had to make adjustments to their federal states, there is no reason for young, developing federations to hasten into declaring finality to state creation.

4. There is no ideal number of regions, but experience does suggest the following: firstly, too few regions (e.g. 2-3) may lead to instability and domination of one or two regions over another. Too few regions may also weaken integrationist forces and encourage segregation or secession. Secondly, too few regions may concentrate conflict and competition at the central level. In order to prevent and diffuse conflicts it is more appropriate to have multiple regions so the regions can compete with each other at a subnational rather than a national level. Thirdly, it is unlikely and even undesired to grant to each minority a region of its own or to create ethnically homogenous regions.

5. The way in which regional boundaries are drawn can play a very constructive role in the protection of minorities. Regional boundaries that take into account living patterns of cultural, linguistic and religious minorities and thereby create an opportunity for such groups to take responsibility for the management of matters that affect their daily lives and identity within the context of an existing state. Regional boundaries that take account of language, cultural and religious concentrations also simplify the process of governance and administration since decisions regarding language of administration, language of teaching, symbols, culture and so forth are often easier to make at a regional level than at a national level. The converse is also the case. Regional boundaries that show ambivalence to linguistic, cultural and religious identities may cause instability, violence and demands for changes to regional boundaries.

6. The process of creation and review of regions must ideally be characterised by four phases: political, technical, public and constitutional.

The *political* element of regional creation entails that the demarcation process must be undertaken according to proper legislative and democratic

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[132] Of the 16 Länder in the current Federation of Germany, only 5 existed in 1933. Refer to the development and changes of Länder boundaries as discussed in *A. B. Gunlicks*, The Laender Constitutions in Germany, 2003, 7 et seq.; and also *U. Leonardy*, Demarcation of Regions: International Perspectives, in: B. de Villiers/J. Sindane (eds.), Regionalism: Problems and Prospects, 1993, 1 et seq. In reply to a question put by the editors to Mr. *Leonardy* in 1992 when South Africa had to decide how to progress the provincial demarcation process as to whether the process of region creation should be facilitated by a specialised commission, he replies (at 21) as follows: "The answer is a definite 'yes'. Taking into account the complexity of the demarcation problem, which faces a variety of criteria to be applied properly, political decisions [about demarcation] ... should not be drafted in these political bodies alone, but only after obligatory consultation with an independently organised Commission for that purpose."

processes. Regions-creation is primarily a political responsibility and it is the duty of elected leaders to lay down criteria for demarcation, to use technical expertise to assist in the demarcation process and to review regional demarcation from time to time.

The *technical* element of the demarcation process entails the involvement of technical experts from an interdisciplinary background to hear public submissions, to assess proposals and to make recommendations on the basis of the criteria provided to it, for the demarcation of regional boundaries. The technical process must, as far as possible, be void of political interference and political considerations. The report of the technical experts must demonstrate how the demarcation criteria had been applied to its recommendations and if necessary, alternative options could be suggested for further consultation and/or decision-making.

The *public process* entails inviting public comments and submissions on proposals for demarcation, changes of regional boundaries and visits to specific problem areas to listen to public submission. The public involvement can be structured at two stages – firstly when the demarcation process starts and secondly when a draft report if available for further comment and dissemination.

The *constitutional process* entails the legislative enactment of the outcome of demarcation and also provision for mechanisms whereby the demarcation can be reviewed or assessed from time to time as well as the procedures for making changes to boundaries. In this way the process of regional demarcation and alterations to regions is a constitutional, legal process with clear principles and guidelines.

7. The typical criteria that could be used to guide the demarcation process or any review of existing regions can comprise the following:

- Historical boundary considerations, such as the existing regions, local governments, traditional authorities, previously existing regions or districts, zones, administrative arrangements and so forth.
- Administrative considerations such as effectiveness of administration and access to services, including key points for the delivery of services to ensure that each region would be properly served.
- The financial costs, implications of and affordability of regions.
- Minimise inconvenience to people as much as possible if new regions are proposed or if existing regional boundaries are altered.
- Minimise the dislocation of services or administrative relocation when boundaries are changed.
- Demographic considerations, urbanisation and projected future movement patterns.

   - Development potential, resources and possible economic growth points for the respective regions.
   - Geographical considerations such as rivers, mountains, and deserts.
   - Availability of infrastructure and accessibility to various parts of the proposed regions as well as ease of communication between regional populations and regional capital city.
   - Cultural, language and religious living patterns.
   - Other relevant considerations.

8. Based on the experience of federations as discussed in this chapter, the following "checklist" may serve as a guide to the process of creating regions:

   - Establish a credible process whereby regional demarcation and the drawing of boundaries can occur. Such a process should ideally involve a political, expert and public participatory element.
   - Lay down criteria for the demarcation of regional boundaries, for example geographical features, infrastructure, economic and other resources, location of service centres, traditional and local authorities; and language, cultural and other characteristics of the population.
   - Identify, if possible, the range of minimum and maximum number of regions to be created based on affordability, practicality and feasibility.
   - Develop a process of public consultation and comment whereby the public can make proposals for regional demarcation and comment on the draft recommendations.
   - Provide mechanisms and procedures to resolve disputes that may arise as a result of the creation of regions.
   - Allow for a process of assessment and evaluation after some time has lapsed to review the appropriateness of the regional boundaries and to determine if boundaries should be varied, regions ought to be amalgamated or new regions should be created.

No federation is therefore entirely immune against demands to review the boundaries of some or all of its regions, but new federations are more likely to experience instability and turbulence around the creation of regions due to the absence of generally agreed historical regions.