ASPIRATIONAL PRINCIPLES IN AFRICAN FEDERALISM: SOUTH AFRICA, ETHIOPIA AND NIGERIA COMPARED

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I. INTRODUCTION

Finding the appropriate balance between diversity and social cohesion is a common concern in constitutional design, particularly in societies divided along ethno-linguistic and religious lines. Constitution drafters have often addressed this quest through federalism: in fact, federal arrangements seek to facilitate a balance between unity and diversity to curb tensions typical of highly diverse societies.

Aside from designing the institutional architecture and power division within a state, constitutions are also repositories of shared values, as they may entrench fundamental principles guiding public and private behaviours and to which citizens aspire. These aspirational elements can express the goals and dreams for the future of a country,[1] seeking to unite people towards some shared aims, or pursuing the integration of the state, meaning the understanding of the state as substance and realisation of its values. As Grimm posits, '[when] we speak of the integrative function of constitutions, we are referring to the extra-legal effects

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1 K. L. Scheppele, 'Aspirational and Aversive Constitutionalism: The Case for Studying Cross-constitutional Influence through Negative Models', 1 *International Journal of Constitutional Law* (2003), at 299.

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of a legal object [. . .] The effect – integration – is an actual process by which the members of a polity develop a sense of belonging together [. . .].'[2]

Aspirational values are thus intimately connected to the very idea of constitution and constitution making, as constitutions should reflect the 'highest aspirations and most deeply held values'[3] of the people, as opposed to ordinary legislation that reflects the 'short-sighted bargaining, fears and passions of elected representatives'.[4] In this sense the effectiveness of aspirational principles is considered a value guaranteeing the historical continuity as part of the core values of a given country.

Mortati's insights over the distinction and relationship between formal and substantial constitution are also helpful. In fact, aspirational principles are part of the formal constitution, but public policies must be in line with them and aim at pursuing given aspirations. Aspirational values are the basis of the political union and the real constitution may be addressed as the dynamic relationship between the social context and the foundational aspirational values; it brings us to the degree of positive interaction between constitutional provisions and the community of a given country.[5] One problem that exists in the countries studied in this article (as in many other post-colonial states) is that they have often 'failed to live up to these founding aspirations'.[6]

Aspirational values may be embedded in the preamble or in other parts of the constitution (such as a Bill of Rights),[7] and may contribute to paint the 'grand identitarian narratives' of a constitution.[8] But regardless of their exact positioning, modern constitutions 'explicitly or implicitly outline the future goals of the polity by identifying an aspirational vision for the polity itself'.[9]

Once entrenched in a constitution, principles and values become aspirational in the sense that they may direct policies to foster equality, eliminate obstacles or require the different tiers of government to collaborate harmoniously in the performance of their respective functions.[10] As noted, the need to reconcile diversity and social cohesion can thus also be addressed through the study of the aspirational values embedded in a constitution.

Some scholars have contended that federalism provisions can be added to the aspirational (or organic) features of a constitution:[11] this is probably because

2 The reference is to the integrationist theory of the State of Rudolph Smend and recently recalled by Dieter Grimm in D. Grimm, *Constitutionalism: Past, Present and Future* (Oxford University Press, 2016), at 144ff.

3 M. Versteeg, 'Unpopular Constitutionalism', 89 *Indiana Law Journal* (2014), at 1136.

4 *Ibid*., at 1136.

5 C. Mortati, *La Costituzione in senso materiale* (Giuffrè, 1998), at 202.

6 T. Khaitan, 'Constitutional Directives: Morally-Committed Political Constitutionalism', 82 *Modern Law Review* (2019), at 3.

7 B. Breslin, *From Words to Worlds: Exploring Constitutional Functionality* (Johns Hopkins University Press, 2009), at 46–7.

8 Khaitan, *supra*, note 6, at 23.

9 Breslin, *supra*, note 7, at 47.

10 E. Arcioni and A. Stone, 'The Small Brown Bird: Values and Aspirations in the Australian Constitution', 14 *International Journal of Constitutional Law* (2016), at 60–79.

11 R. Hirschl, 'Comparative Matters: Response to the Interlocutors', 96 *Boston University Law Review* (2016), at 1420.

federalism incarnates an ideal way of sharing powers and responsibilities to more effectively respond to citizens' and state/public needs, to find the perfect balance between diversity and social cohesion and, eventually, the way to peace.[12] However, besides federalism as a global concept, there are other values embedded in federal constitutions that are clearly marked by an aspirational nature.

Aspirational elements can be found both in extra-constitutional documents (such as judicial rulings) and in the constitutional text itself, most commonly in constitutional preambles and directive principles.[13] This article focuses on the aspirational elements present in the constitutional text, and its objective is to offer a comparative account of the three most important federations in Africa to assess how their constitutions propose to reconcile diversity and social cohesion through aspirational principles related to federalism. The following principles will be examined: solidarity between different communities and cooperative government in South Africa, ethnicity as a foundational value in Ethiopia and the federal character in Nigeria.

From a methodological standpoint, the choice to focus on these three countries reflects the fact that, in recent years, federalism has played an increasingly significant role in Africa to tame – rarely successfully – the ethnic and non-ethnic tensions that plague most countries in the continent. While South Africa, Ethiopia and Nigeria can be regarded as the most prominent African federal/decentralised systems, federal/devolutionary arrangements have also been recently introduced in the Comoros (2001), Sudan (2005), the Democratic Republic of Congo (2006), Kenya (2010), South Sudan (2011) and Somalia (2012).[14] Furthermore, the constitutions currently in force in the three countries analysed here are the product of the mid- and late-1990s wave of constitutional drafting and represent attempts to reconcile profoundly embedded ethnic diversity with good and effective governance, although they have embraced different paths and approaches to do so. Likewise, these three countries are struggling to maintain this delicate balance between what is enshrined in the constitution and actual, real life. In our opinion, these three countries represent ideal cases to test the reconciliation of diversity and social cohesion as addressed by aspirational elements.

As will be better explained in the remainder of the article, South Africa, Ethiopia and Nigeria have all chosen varieties of constitutional federal arrangements to better deal with their numerous internal cleavages, although South Africa might be considered a quasi-federal or regional state (a scheme usually referred to as cooperative government). Ethiopia and Nigeria are, according to their constitutions, fully fledged federations, but they function in

12 D. Elazar, *Federalism and the Way to Peace* (Institute of Intergovernmental Relations, Queen's University, 1994)

13 This article does not engage in a thorough discussion on directive principles and their similarities and differences with aspirational values. Readers interested in this debate can consult the following literature: Khaitan, *supra*, note 6; L. K. Weis, 'Constitutional Directive Principles', 37 *Oxford Journal of Legal Studies* (2017); Berihun Adugna Gebeye, 'The Potential Role of Directive Principles of State Policies for Transformative Constitutionalism in Africa', 1 *African Journal of Comparative Constitutional Law* (2017).

14 N. Steytler, 'Domesticating the Leviathan: Constitutionalism and Federalism in Africa', 24 *African Journal of International and Comparative Law* (2016), at 279.

practice in a very centralised manner, a legacy of the military rule that has so significantly marked their most recent history. Being fairly young, the three constitutions herewith discussed are rather complex legal texts that condense the essence of modern constitutionalism, although there is always the risk that they are considered 'sham'[15] because they do not reflect the actual practice in real life (except perhaps for South Africa).

By looking at how South Africa, Ethiopia and Nigeria reconcile diversity and social cohesion through some specific federalism-based aspirational elements enshrined in their constitutions, this article contributes to the literature on comparative constitutional law and theory and comparative federalism, by adopting mainly a textual, doctrinal/analytical and explorative approach of the constitutional texts in question.

II. SOUTH AFRICA: SOLIDARITY AMONG COMMUNITIES AND COOPERATIVE GOVERNMENT

A. South Africa: A Brief Historical and Conceptual Overview

As are other African countries, South Africa is deeply diverse and multi-ethnic. The majority of its 54 million inhabitants are Africans (about 80.2 per cent of the population), followed by Coloureds (or mixed-race people, comprising about 8.8 per cent of the population), whites (about 8.4 per cent) and Indians or Asians (about 2.5 per cent).[16] Article 6(1) of the South African Constitution recognises eleven official languages: among them, IsiZulu, IsiXhosa and Afrikaans are the most spoken.[17]

The first European settlers in South Africa were the Dutch, who established themselves in the Cape in 1652. During the nineteenth century, the British instituted two colonies (Cape and Natal) and two Boer republics which, after the Boer War (1899–1902), also became British colonies. Modern South Africa was formed in 1910 with the fusion of the four British colonies to become the Union of South Africa.[18] During the 1950s, with the advent of National Party rule, an institutionalised form of racial segregation – apartheid – emerged and lasted until the liberation movements of the early 1990s:[19] its purpose was to ensure 'white survival and hegemony by dividing the non-white population along racial and even ethnic lines'.[20]

15 M. Tushnet, *Advanced Introduction to Comparative Constitutional Law* (Edward Elgar, 2014), at 11.

16 N. Steytler, 'The Constitutional Court of South Africa: Reinforcing an Hourglass System of Multi-Level Governance', in N. Aroney and J. Kinkaid (eds), *Courts in Federal Countries: Federalists or Unitarists?* (University of Toronto Press, 2017), at 329.

17 *Ibid.*

18 On the historical background until the Union see W. C. Scully, *A History of South Africa: From the Earliest Days to Union* (Longmans, Green & Co., 1915).

19 N. L. Clark and W. H. Worgerp, *South Africa: The Rise and Fall of Apartheid*, 2nd edn (Routledge, 2013).

20 K. Henrard and S. Smis, 'Recent Experiences in South Africa and Ethiopia', 44 *Journal of African Law* (2011), at 26.

Democratic South Africa, a country willing to leave behind the legacy of apartheid, was established in 1994 and the present constitution – building upon the 1993 *interim* constitution – was enacted in 1996.[21] It emphasises values such as equality, democracy, national unity and a system committed to a non-racial and non-ethnic society.[22]

South Africa is not a fully fledged federation but is usually regarded as a hybrid or quasi-federal state building upon principles of German constitutionalism such as *Bundestreue* and cooperative federalism (see *infra*).[23] The present model of cooperative government – as it is labelled in South Africa – is the result of a compromise between the African National Congress ('ANC', the major political party) which during the constitution-making process sought to create a strong centre, and local leaders who hoped for a fully fledged federal system to accommodate ethnic groups and limit the powers of the centre.[24] The rejection of federalism in both the interim and the final constitution can be explained by the fact that, during the racial regime, the federal idea was associated by the majority of the population with the segregation policies. Besides that, the ANC's vision of the state was rather centralised, even though the party was aware that a degree of decentralisation should be included in the new constitutional framework.[25]

B. Main Features of the South African Quasi-federal System

The South African system of cooperative government is tripartite: Article 40(1) Const. provides for three spheres of government – national, provincial and local – all 'distinctive, interdependent and interrelated'. This qualification shall be understood in light of Article 1 Const. whereby South Africa is 'one sovereign democratic state',[26] meaning that, although with different roles and responsibilities, they shall work together to help the government as a whole to fulfil its role.[27] The language of Chapter Three on cooperative government shows also the transformative agenda of the 1996 Constitution:[28] in fact, the national, provincial and local governments are now 'spheres' and not 'levels', as previously worded in the interim Constitution.[29] Most provincial powers are concurrent

21 N. Steytler, 'South Africa: The Reluctant Hybrid Federal State', in J. Loughlin, J. Kincaid and W. Swenden (eds), *Routledge Handbook of Regionalism and Federalism* (Routledge, 2013), at 443.

22 Henrard and Smis, *supra*, note 20, at 29–30.

23 D. Brand, 'The South African Constitution – Three Crucial Issues for Future Development', 2 *Stellenbosch Law Review* (1998), at 186.

24 Steytler, *supra*, note 16, at 330; Steytler, *supra*, note 21, at 444.

25 B. De Villiers, *Democratic Prospects for South Africa* (HRSC Publishers, 1992), at 27–39.

26 S. Woolman and T. Roux, 'Co-operative Government and Intergovernmental Relations', in S. Woolman and M. Bishop (eds), *Constitutional Law of South Africa* (Juta, 2012), at 14–17.

27 *Ibid*.

28 The word 'transformative' was firstly coined about the South African constitutional design: see K. E. Klare, 'Legal Culture and Transformative Constitutionalism', 14 *South African Journal on Human Rights* (1998), at 150. See also P. Langa, 'Transformative Constitutionalism', 17 *Stellenbosch Law Review* (2006), at 351ff.

29 The word 'level' was used in the interim constitution but was removed from the final constitution.

with the national level, while exclusive provincial powers are limited.[30] Local (municipal) governments also enjoy constitutionally entrenched power, although they are not exclusive.[31] Residual powers are vested in the national government, which can delegate some of them to provincial and local governments.[32] The South African Constitutional Court has competence in settling disputes on conflicts of attribution among the three tiers of government.[33]

Pursuant to Article 42(1) Const., the South African Parliament is bicameral and is composed of the National Assembly and the National Council of Provinces, the latter acting as a federal upper chamber representing provincial interests at the central level.

C. Aspirational Values in the South African Constitution

Because of its transformative agenda, the South African Constitution is rife with aspirational values that influence its whole constitutional architecture. Article 1 spells out the values upon which South Africa is founded, including human dignity, equality, advancement of human rights and freedoms, non-racialism and non-sexism, constitutional supremacy and the rule of law.[34] Of all these constitutional values, we will now discuss two important principles, solidarity among communities and cooperative government: although these values are separate, they are also intimately interrelated in the communal goal to foster diversity and social cohesion.

1. National Solidarity (or Solidarity among Communities) as a Vital Aspiration

In legal scholarship, solidarity assumes two main connotations: first, the concept of legal solidarity, stemming from the Latin *obligatio in solidum*, that requires any party to pay in full for a debt and is usually found in private law; second, a more aspirational value of solidarity, one that refers to concepts such as brotherhood, mutual help, friendship, and so on. Sometimes, the two aspects – aspirational and legal – are fused.

The principle of solidarity among communities – or national solidarity – is not entrenched as such in the South African constitution, but it can be inferred by looking at other principles and values explicitly protected. For example, the preamble to the 1996 Constitution states, in relevant part, that:

> We, the people of South Africa, [. . .]
> Believe that South Africa belongs to all who live in it, united in our diversity.

30 Steytler, *supra*, note 16, at 332–3; Steytler, *South Africa*, *supra*, note 21, at 448.
31 Steytler, *supra*, note 16, at 333.
32 *Ibid.*
33 *Ibid.*
34 Brand, *supra*, note 23, at 182; Steytler, *supra*, note 16, at 328; S. Levinson, 'Do Constitutions Have a Point? Reflections on "Parchment Barriers" and preambles', 28 *Social Philosophy and Policy* (2011), at 163.

> We [. . .] adopt this Constitution as the supreme law of the Republic so as to
> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
> Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
> Improve the quality of life of all citizens and free the potential of each person; and
> Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations [. . .]

This preamble has been widely studied for its thick aspirational character. Scheppele outlined how its whole tone is intended to show the 'centrality of the aversion to the previous South African constitutional model' enshrined in a system – apartheid – based on racism and discrimination.[35] In South Africa, the preamble does not represent an independent source of rights but, as declared by the Constitutional Court, it inspires and guides their interpretation.[36] In fact, in many ways the preamble has represented the foundation for judges to construct the constitutional text.[37] However, Justice Sachs has also warned that the preamble shall not be considered as aspirational only, but as a text that 'helps to establish the basic design of the Constitution and indicate its fundamental purposes'.[38]

Likewise, the requirement in Article 41(1)(a) Const. that all spheres of government and organs of state must preserve the national unity and indivisibility of South Africa can be directly linked to the principle of (national) solidarity permeating the constitutional preamble.[39] Also the preambular statement that South Africa belongs to all who live in it, united in diversity, can be seen as an expression of national or intercommunal solidarity. Consequently, although national solidarity is not spelled out as such in the South African Constitution, all references made therein to concepts like 'unity in diversity' or that somehow refer to a desire to overcome the legacy of apartheid can be considered as an expression of an implicit – yet pervasive – desire to foster national (or intercommunal) solidarity. But while the new South African constitutional edifice attempts to balance (national) unity with the diversity of the different communities, and thus the solidarity bond among them,[40] South African symbolism is not intended to

35 Scheppele, *supra*, note 1, at 304–5; Levinson, *supra*, note 34, at 162; W. Voermans, M. Stremler and P. Cliteur, *Constitutional Preambles. A Comparative Analysis* (Edward Elgar, 2017), at 142, who talk about the preambles to the 1993 and 1996 constitutions as having the character of a 'clean break' with the past, proclaiming the end of apartheid and the beginning of a new democratic era.

36 L. Orgad, 'The Preamble in Constitutional Interpretation', 8 *International Journal of Constitutional Law* (2010), at 724 (citing Plessis); Levinson, *supra*, note 34, at 164.

37 Voermans et al., *supra*, note 35, at 146, offering examples of South African case law

38 *Ibid.*, at 143 (citing Sachs).

39 Y. Fessha, *Ethnic Diversity and Federalism: Constitution Making in South Africa and Ethiopia* (Routledge, 2011), at 98.

40 *Ibid.*, p. 101.

paint the country as a collection of different groups living separately, but as diverse groups living in 'unison'.[41] Hence, the South African constitution portrays a state seeking to build a common national identity and emphasised national unity, but not at the expenses of ethnic diversity.[42] So, without suppressing ethnic diversity, the state does not actively promote it.[43] In this sense, national solidarity is a typical aspirational element that fosters diversity and social cohesion. This is quite different from the treatment reserved for ethnicity in Ethiopia (see *infra*).

2. Cooperative Government: A Foreign Concept Reshaped by the Context

The need to build a new state from its grassroots, to reconciliate fragmented groups and, most importantly, to redraw the territorial structure of the new pluralist and democratic South Africa is well embedded in the guidelines and principles set in Chapter Three of the Constitution (Articles 40–41) titled 'Cooperative Government'.

The inclusion of Articles 40 and 41 is connected to the main aspiration of the new constitutional framework, the real drive of these principles being to promote coordination and cooperation – not competition – among the three spheres of government. Hence, by transforming, restructuring and integrating the diverse groups, the aspiration was to address massive disparities through a trustworthy coordination of policies among the spheres of government.[44]

The South African founding fathers chose the cooperative – instead of the competitive – model based on the German constitutional experience, notably the *Bundestreue* principle, which enshrines federal loyalty and coordination between the central government and the other spheres, and among the subnational spheres themselves. This idea is well embedded in Article 40(1) Const., stating that each sphere must be 'distinctive, interdependent and interrelated' and in Article 40(2), mandating that the three spheres of government 'must adhere' to the principles enshrined in Chapter Three and 'must conduct their activities within the parameters' of the same Chapter. Article 40 Const. aims at promoting dialogue and agreement among the spheres of government. The South African multilevel government safeguards the integrity of each sphere, together with its powers and function, hence integrity 'must be understood in light of the powers and the purpose of that entity'.[45]

A striking feature of Chapter Three relates to the provisions embedded in Article 41. Cooperative government is a clear aspiration and a groundwork of the South African constitutional design; in fact, in this regard, the Constitution sets out a list of principles (and duties) which falls on South African political institutions. These principles are embodied in Article 41(1), which lays down

41 *Ibid*.
42 *Ibid*., at 109.
43 *Ibid*., at 110.
44 Woolman and Roux, *supra*, note 26, at 14–15; B. De Villiers and J. Sindane, *Cooperative Government: The Oil of the Engine* (Konrad Adenauer Stiftung, 2011), at 13.
45 Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26, para. 292. See also Woolman and Roux, *supra*, note 26, at 14–18.

obligations for the spheres of government; among them those referred to as the 'South African' *Bundestreue* may be detected in subsections (e), (g) and (h), with the latter asserting a duty to 'co-operate with one another in mutual trust and good faith'. In this regard, the same subsection lists a sort of 'code of conduct' resembling more a 'political behaviour principle' or a specific political guideline for the three spheres.[46]

Because the three spheres must exhaust all political solutions before engaging in legal proceedings, subsection (h) is linked to Article 41(3) which embeds the gist of cooperative government:

> An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.

The constitutional duty to cooperate is a task for any organ of the state. Likewise, the Parliament must adopt legislation to promote and facilitate intergovernmental relations and the settlement of intergovernmental disputes.

One imperative of cooperative government is seeking agreements and compromises before appealing to courts:[47] such political resolution of a dispute is an obligation for the three spheres of government, and the Court shall ask to prove whether or not all possible resolutions were exhausted and intergovernmental disputes resolved amicably.

In can be argued that, despite the aspiration to cooperative government, the relationship among the three spheres is still rather centralised and 'party guided'. For instance, pursuant to Article 41(3) Const., Parliament enacted the Intergovernmental Relations Framework Act 13 of 2005 (IGRFA), an institutionalised mechanism and forum for dispute settlement among the spheres. Yet, the hierarchisation of intergovernmental relations cannot be underestimated, as the national executive plays the main role by establishing the process, structures and main goals to achieve. This led major scholarships to stress the shift from the (aspirational) cooperative to a (factual) coercive model of intergovernmental relations, thus significantly shaping the aspirational spirit of Chapter Three and unveiling the intimate connection between party system and constitutional politics.[48]

46 Article 41(1)(e) mandates for the 'respect the constitutional status, institutions, powers and functions of government in the other spheres'. Article 41(1)(g) provides that they 'exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere'.

47 Woolman and Roux, *supra*, note 26, at 14–19. See generally L. Malan, 'Intergovernmental Relations and Co-operative Government in South Africa: The Ten-year Yeview', 24 *Politeia* (2005), at 229–32; De Villiers and Sindane, *supra*, note 44, at 3ff. The Constitutional Court Shared This View in *National Gambling Board* v. *Premier of KwaZulu-Natal and Others* (CCT32/01) [2001] ZACC 8, 35–36; *Uthukela District Municipality* v. *President of the Republic of South Africa* 2003 (1) SA 678 (CC), para. 6. In this latter case the Court refused the access because the organs of state did not follow the 'guidelines' of Chapter Three.

48 R. Watts, 'Intergovernmental Relations: A Report by Dr Ronald Watts for the Department of Constitutional Development and Provincial Affairs' (1999), 10–11; N. Steytler, 'Cooperative and

To conclude, the link between the principles of national solidarity and cooperative government in South Africa can be found in the fact that both were meant to depart from the apartheid experience and legacy. In fact, cooperative government was preferred to the purely and fully fledged federal option because of the fear that federalism would lead back to apartheid. Similarly, the prominence given to the value of 'unity in diversity' without reference to the different ethnic groups also marks a departure from the apartheid experience of racial segregation and aspires to solidarity (in the sense of brotherhood) among communities. Furthermore, the institutional design and constitutional framework for processes of shared rule are consistent with the constitutional emphasis on national unity and, accordingly, solidarity among communities.[49]

III. ETHIOPIA: ETHNICITY AS FOUNDATIONAL, ORGANISING AND ASPIRATIONAL PRINCIPLE

A. The Historical Background of the Ethiopian Model of Federalism

The main purpose of the Ethiopian Constitution is to address differences among ethnic groups. It epitomises the primary task of the constitution and the first step to understand any section and constitutional provision. Before an in-depth analysis of ethnicity as foundational and aspirational principle we provide a brief account of the historical events which eventually led to what is perhaps the purest federal ethnic model in the world.

Far from other African regions, Ethiopia has existed as an independent state for centuries and it was not occupied in the course of colonialism apart from the Italian occupation (1935–41).[50] Ethnic federalism is the clear rejection of the two previous strongly centralised political regimes. Furthermore, in both cases the leadership belonged mainly to the Amharic ethnic group, leaving the majority of the population marginalised. First was the feudal monarchy of the Emperor Haile Selassie (1930–74) which was overthrown by the Provisional Military Council (Derg). Afterwards, the military regime (1974–91) became even more centralised and brutal than the former. This feeling of marginalisation was stronger among Oromos and Somali. Unsurprisingly, during the civil war against the Derg, opposition forces organised themselves on an ethnic basis. This constellation of National Liberation Movements toppled the Derg in June 1991 and was hegemonised by the Tigray Peoples' Liberation Front, which formed a coalition with several national liberation movements: the Ethiopian People's Revolutionary Democratic Front (EPRDF).[51] The main political achievement was the resolution of ethnic diversities and the accommodation of minorities. Thus

Coercive Models of Intergovernmental Relations: A South African Case Study', in T. Courchene, J. R. Allan, C. Leuprecht and N. Verrelli (eds), *The Federal Idea: Essays in Honour of Ronald L. Watts* (McGill-Queen's University Press, 2011), at 413–28.

49 Fessha, *supra*, note 39, at 135.

50 B. Zewde, *A History of Modern Ethiopia: 1855–1991* (Addis Ababa University Press, 2007).

51 T. Pätz, 'Ethiopia', in J. Kincaid and A. Tarr (eds), *Constitutional Origins, Structure, and Change in Federal Countries* (McGill-Queen's University Press, 2005).

ethnicity became the primary task of the constitution-making process, alongside self-determination. Ethnicity is the foundational, organisational[52] and aspirational principle encompassing the most relevant constitutional provisions.[53] The first answer to constitutionalise ethnicity was found in the variety and flexibility of the federal model.[54] The EPRDF coalition, which was the architect of the Federation and is still the dominant party in Ethiopia, reached a broad agreement around the adoption of one of the most radical Constitutions in Sub-Saharan Africa.

B. Ethnicity and Preambular Aspiration(s)

Ethnicity is the structural dimension of the Ethiopian federal constitution. The Preamble is the first step to understand the relevance of the 'Ethiopian federal way' among African federal or decentralised countries. The first striking feature is the absence of the word 'people' borrowed from the US model *We, the People*. The Ethiopian autochthonous version of *We, the People* reflects the desire to build a nation with a different approach. The grassroots are represented by Ethiopia's groups and minorities, as the Preamble points out in its opening words: 'We, the Nations, Nationalities and Peoples of Ethiopia'. The language of the Preamble initially shows the main ambition of the Constitution: building a nation based not on a single *demos* but on multiple *demoi*, the 'Nations, Nationalities and Peoples' (NNPs).[55] Group and minority rights are underlined in the Preamble, in Chapter One on 'General Provision' and even in Chapter Three on 'Fundamental Rights and Freedoms'. The role of ethnic groups is mirrored in the first sentence of the Preamble, stating that: 'Strongly committed, in full and free exercise of our right to self-determination, to building a political community [...]'. The aspiration of this new constitutional framework sets some challenges ahead, as transpires from the combined reading of paragraphs 3 and 4. The former states that the NNPs 'by continuing to live with our rich and proud cultural legacies in territories we have long inhabited have, through continuous interaction [...], built up a common interest and [...] contributed to the emergence of a common outlook'. Paragraph 4 lays down the imperative to rectify historically unjust relationships and promote shared interests. Both paragraphs underline that the new country is based on 'we'

52 M. Burgess, *In Search of the Federal Spirit. New Theoretical and Empirical Perspectives in Comparative Federalism* (Oxford University Press, 2012), at 292.

53 A. Habtu, 'Ethnic Pluralism as an Organizing Principle of the Ethiopian Federation', 28 *Dialectical Anthropology* (2004), at 91–123; L. Aalen, *The Politics of Ethnicity in Ethiopia: Actors, Power and Mobilisation under Ethnic Federalism* (Brill, 2011), at 35–40.

54 Since the adoption of the Transitional Charter on 22 July 1991, the desire of the founding fathers has been to give light to a 'home-made' ethnic federal system which embodied the right to secede. See A. P. Micheau, 'The 1991 Transitional Charter of Ethiopia: A New Application of the Self-Determination Principle', 28 *Case Western Reserve Journal of International L*aw (1996), at 367.

55 NNPs are defined in Article 39 as 'who have or share large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory'. See also S. Dersso, *Taking Ethno-Cultural Diversity Seriously in Constitutional Design. A Theory of Minority Rights for Addressing Africa's Multi-Ethnic Challenge* (Brill, 2012), at 196.

in the meaning of (many and different) 'cultural legacies' and 'interactions'. At the same time, the mission is to build common features, whose emergence may be considered the achieved peace among NNPs and a common path. The wording of the following paragraph, especially the new-born 'common destiny', embodies the difficulties of such a multi-ethnic federation, which is often the challenge of multinational federations in a divided society. These aspirations shape the subsequent sections of the constitution of which they can be considered the spirit.

C. Constitutional Tools for Ethnic Federal Aspiration

The first aspirational principles inspired by the content of the Preamble may be implicitly pulled out from Articles 3 and 4. The former relates to the national flag, the latter to the national anthem, but both emphasise the need to connect symbols to the purpose and principles of the constitution: the hope and the commitment of the NNPs to live together in equality and unity, in a democratic order and in their common destiny. This desire of unity shall not be overemphasised, because the concept of sovereignty (Article 8, para. 1) resides in the NNPs, not in a *demos*. These provisions are conducive to framing the constitutional identity, which is multifaceted and mirrored in the NNPs.

How deep is this polyvocality? The manifestation of this multifaceted identity lies in the structure of the federation which aims at accommodating ethnic groups by drawing internal boundaries, although not totally, along ethnic lines.[56] In fact, the composition of five states (Tigray, Afar, Amhara, Oromia, Somalia) is homogenous due to the overwhelming majority of the given ethnic group. Other states (Benshangul/Gumuz, Gambela, Harari) show more heterogeneity and, among them, the Southern Nations, Nationalities and Peoples' Region (SNNPR) is considered a federation within a federation, whose population is composed of more than 45 ethnic groups. Lastly, a special status has been conferred on the capital city of Addis Ababa by the Constitution, and to Dire Dawa – through ordinary legislation – for its ethnic composition.[57] The outlined territorial structure sought to manage ethnic diversities through territorial autonomy but, in certain circumstances, the ethnic federal ideal type could not have been achieved. The Ethiopian constitutional framework enshrines the federal dilemma: does the

56 *Ibid*., at 197; A. Abebe, 'From the "TPLF Constitution" to the "Constitution of the People of Ethiopia": Constitutionalism and Proposals for Constitutional Reform', in M. K. Mbondenyi and T. Ojienda (eds), *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub-Saharan Africa* (Pretoria University Law Press, 2013), at 57–62. According to Article 46(1)(2) Const., 'States shall be delimited on the basis of the settlement patterns, language, identity and consent of the peoples concerned.'

57 Dire Dawa was a bone of contention between the Oromia Regional State and Somali Regional State as both claimed Dire Dawa as their capital. A solution was reached by an agreement under the direct intervention of the federal government. Dire Dawa gained a special status through the enactment of the Dire Dawa City Charter (Proclamation no. 416/2004), which introduced a form of power sharing in the administration of the city, mainly between Oromos and Somali. For further analysis see A. Kefale, 'Ethnic Decentralization and the Challenges of Inclusive Governance in Multiethnic Cities: The Case of Dire Dawa, Ethiopia', 24 *Regional and Federal Studies* (2014), at 589–605.

territorial autonomy exacerbate ethnic divisions? This issue is debated among scholars, and the main risk of the current constitutional engineering is linked to the threat of a balkanisation. The aspirational values in practice have to face the extreme politicisation of ethnicity. Without any doubt, ethnicity has become the sole 'lexicon of political discourse' although the EPRDF is the only political actor in Ethiopia.[58] Anxieties, demonstrations and even clashes among ethnic groups[59] show that fuelling ethnicity in a 'constitutional federal ethnic country' may spread more dangerous ethnic violence, at both the regional and local levels.[60]

The attention to groups and minority rights has its main manifestation in the unconditional right to secession: among the rights listed in Article 39, secession is the first and most relevant right of NNPs. Article 39(1) states that '[e]very Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession'.[61] A further reason may be found in prioritising the right to secede from the Federation in front of other 'classic' minority rights: the right to secession as a constitutional tool for safeguarding groups rights. The right to secede must be understood in light of the EPRDF's hegemony: this concession was made in order to strengthen its own power and, as of today, any possible claim about the activation of the procedure for achieving secession depends upon the EPRDF political position. It was a compromise within the EPRDF, although it has never been in the party agenda, nor demanded by any NNP. The secession clause is significant in a comparative perspective: the Ethiopian version does not have similarities with other existing cases because it does not acknowledge the right to secede to a region or a state, only to NNPs. It means, *de jure*, that each NNP can secede even though, *de facto* and in practice, the identification of a given ethnic group with regional or local institutions might simplify the hypothesis of secession.[62]

The basic aspiration of the Ethiopian constitutional framework has its direct consequences on powers and functions of the Upper Chamber, the House of the

58 See Y. Fessha, *Ethnic Diversity and Federalism: Constitution Making in South Africa and Ethiopia* (Routledge, 2011), at 203–7.

59 See A. Kefale, *Federalism and Ethnic Conflict in Ethiopia* (Routledge, 2013).

60 According to Article 39(3) Const., claims for specific homelands within regional states represent an additional proof of this unsettled issue. To this regard, the *Silte* case is the best example: Silte is one of the ethnic groups within the Southern Nations, Nationalities and Peoples' Region ('SNNPR'), which sought the adoption of a special form of autonomy, later the Silte Administrative Zone (nationality zones). The other current contentious issue is the secession of the Sidama ethnic group from the SNNPR, which eventually led to the successful referendum of November 2019. See E. A. Baylis, 'Beyond Rights: Legal Process and Ethnic Conflicts', 25 *Michigan Journal of International Law* (2004), at 565–7; L. Aalen, 'Ethnic Federalism and Self-Determination for Nationalities in a Semi-Authoritarian State: The Case of Ethiopia', 13 *International Journal on Minority and Group Rights* (2006), at 243–61.

61 In the subsequent paragraph, other rights of NNPs are spelled out: 'the right to speak, to write and to develop its own language; to express, to develop and to promote its culture; and to preserve its history'.

62 The influence of the 1977 USSR Constitution is clear, whereby Article 72 Const. stressed that 'each Union Republic shall retain the right freely to secede from the USSR'. Some similarities exist also with the 1974 Constitution of the Socialist Federal Republic of Yugoslavia (Basic Principles: Section I and VII).

Federation (HoF). The composition of the Upper Chamber (Article 61) grants representation to each NNP with at least one member; moreover, to safeguard the proportional representation, 'each Nation or Nationality shall be represented by one additional representative for each one million of its population'. The role of the HoF is strikingly different from upper chambers in other federal systems: in fact, the HoF has little, if any, legislative function.[63] According to Article 62, the HoF has the power to interpret the Constitution and this provision is also prescribed by Article 83, which states that 'all constitutional disputes shall be decided by the House of the Federation'. In addition, two powers of the HoF shall be taken into account: it shall decide in matters related to the rights of NNPs (para. 3) and promote the equality together with the unity of the NNPs (para. 4). The HoF, with its powers, is the House of NNPs where sovereignty resides; this is likely to explain the repetition, in the fourth paragraph, of the same general directive principle already spelled out in the Preamble, in the general provisions and implicitly in the whole text.

This wording is widespread also in Chapter Ten on National Policy Principles and Objectives, which is related to the duty of both federal or state governments; thus it lays down principles and objectives which shall be addressed by the political organs of the state. The political objective is ethnic accommodation, which is once more underlined and empowered. According to Article 88, the government shall promote and support People's self-rule (para. 1), and respect the identity and strengthen the unity, equality and fraternity of NNPs. These are the last relevant provisions concerning aspirational principles in the Ethiopian constitution.

D. Ethiopian Foundational Values as Aspirational Principles

Undoubtedly the Ethiopian Preamble is one of the most quoted among federal countries for its specific reference to NNPs instead of *we, the people*. It encompasses several aspirations and commitments of the new state which represent a new constitutional and political era and a new identity.[64] The role of the preamble is relevant in shaping the wording and significance of the constitutional provisions. The preamble was drafted to accommodate different ethnic groups. In this sense, even though the constitutional function is recognised, the Preamble seems 'to speak in an international idiom'.[65] This is not far from the insights by Paul and Brietzke into the nature of the Ethiopian constitution.[66]

63 A. Fiseha, 'Federalism and Adjudication of Constitutional Issues: The Ethiopian Experience', 52 *Netherlands International Law Review* (2005), at 1–30; A. Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study* (Wolf Legal Publishers, 2006).

64 See T. Ginsburg, N. Foti and D. Rockmore, '"We the Peoples": The Global Origins of Constitutional Preamble', 46 *George Washington International Law Review* (2014), at 109–10.

65 *Ibid.*, at 132–3.

66 Paul observed that the Ethiopian Constitution should be seen 'as a treaty between the nations and the peoples of Ethiopia, who are portrayed as its authors': see J. C. N. Paul, 'Ethnicity and the New Constitutional Orders of Ethiopia and Eritrea', in Y. Ghai (ed.), *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (Cambridge University Press, 2010),

IV. NIGERIA: THE FEDERAL CHARACTER PRINCIPLE

A. The Nigerian Federalism Squeezed by Military Regimes and Ethnic Rivalries

Nigeria is a country of more than 200 million people divided into three main ethnicities (Hausa-Fulani, Yoruba and Igbo), hundreds of smaller ethno-linguistic groups and about an equal number of Muslims and Christians.[67] Furthermore, Nigeria is characterised by a tripartite legal tradition whereby the Islamic (Sharia) and customary (tribal) legal systems coexist with the English common law tradition.[68]

What is now a federation of 36 states and a federal government headquartered in the capital city of Abuja[69] originated in 1954 when Nigeria was still under British colonial rule.[70] Upon achieving independence in 1960, it became a union of three constituent regions. Federalism, however, has always been accepted as indispensable for holding together such a complex and diverse country.[71]

There are six major moments that have marked the evolution of Nigerian federalism since its inception. The first phase coincided with the late colonial period (1954–60), characterised by three regions each dominated by a major ethnic group (the Muslim Hausa-Fulani in the North, the Christian Ibo in the East and the bi-communal Yoruba in the West). The second phase was represented by the First Republic (1960–6): upon achieving independence in 1960, Nigeria continued to function as a fully fledged federal system characterised by a Westminster-style form of government and three regions (which became four in 1963 with the addition of the Mid-West).[72] Because the North was dominant, this created ethno-regional tensions leading in 1966 to the overthrow of the Republic by the military and the beginning of the first phase of the military rule (1966–79) which significantly transformed the federal state.[73] The four regions were dissolved into 12 states in 1967 and 19 in 1976 to tame the secessionist threats coming from the Ibo groups and consolidate the unity of the country. This first phase of military rule increased the scope and competences of the central (federal) government.[74] The Second Republic (1979–83) consolidated the centralised state structure as emerged under the previous military rule in the 1979 Nigerian Constitution. This document introduced for the first time the

at 189. See also P. H. Brietzke, 'Ethiopia's "Leap in the Dark": Federalism and Self-Determination in the New Constitution', 39 *Journal of African Law* (1995), at 33–8.

67 R. Suberu, 'Nigeria. A Centralizing Federation', in J. Loughlin, J. Kinkaid and W. Swenden (eds), *Routledge Handbook of Regionalism and Federalism* (Routledge, (2013), at 415.

68 R. Suberu, 'The Supreme Court of Nigeria: An Embattled Judiciary More Centralist than Federalist', in N. Aroney and J. Kinkaid (eds), *Courts in Federal Countries. Federalists or Unitarists?* (University of Toronto Press, 2017), at 297–8.

69 Abuja became the official capital of Nigeria in 1991.

70 E. O. Awa, *Federal Government in Nigeria* (University of California Press, 1964), at 42ff.

71 D. S. Rothchild, *Toward Unity in Africa: A Study of Federalism in British Africa* (Public Affairs Press, 1960), at 148ff.

72 Suberu, *supra*, note 67, at 416

73 R. Suberu, *Federalism and Ethnic Conflict in Nigeria* (Institute of Peace Press, 2002), p 4.

74 Suberu, *supra*, note 67, at 417.

federal character clause, to reflect the ethnic diversity of the country in the composition of central institutions.[75] The second phase of military rule (1984–99) continued the centralising trends initiated in previous years, but the number of states increased from 19 to 36. During this phase, a transition to a Third Republic was aborted and ethno-nationalist sentiments, suffocated during the preceding phases, emerged once again.[76] Finally, the Fourth Republic (1999 to date) began with the implementation of the 1999 constitution still in force. While this phase has brought the longest period of civilian rule for Nigeria, it is still marked by corruption, economic mismanagement, serious environmental concerns (especially in the oil-rich Niger Delta) and violent ethno-religious conflicts, as exemplified by the pressures of the Islamist movement Boko Haram for a more rigid application of Sharia law in the Muslim North.[77]

This last phase has been characterised by strong demands for a more decentralised federal constitutional framework. In fact, the unitary federalism currently in place is believed to concentrate too many legislative, administrative and judicial powers in the hands of the central (federal) government, this being a legacy of military rule:[78] in fact, the 36 states constitute a weak level of government, with relative few powers, no separate constitutions, no independent police system and no significant internal revenue sources.[79] However, there is a discrepancy between the formal constitution and the political functioning of the federation: in fact, while the various states are, constitutionally speaking, rather weak, they become quite strong politically thanks to their cross-sectional alliances. Furthermore, while there is a second or upper chamber (federal Senate) composed of 109 members representing the 36 states, there is also a constitutionally mandated political party system that reinforces this over-centralisation.[80] Consequently, although Nigeria is a rather centralised federation, it remains politically decentralised because of the muscle of state governments, which becomes particularly relevant in the context of a lack of rule of law especially in rural areas.

75 J. Read, 'The New Constitution of Nigeria, 1979: "The Washington Model?"' 23 *Journal of African Law* (1979), at 131–74.

76 Suberu, *supra*, note 67, at 417.

77 *Ex multis*, see J. Paden, *Muslim Civic Cultures and Conflict Resolution. The Challenge of Democratic Federalism in Nigeria* (Brookings Institution Press, 2005); Y. Sodiq, *A History of the Application of Islamic Law in Nigeria* (Palgrave, 2017), at 51–68.

78 Suberu, *supra*, note 68, at 294.

79 *Ibid*., at 296. Under the current constitutional framework, there are 68 exclusive federal legislative powers, while only 12 items are on the concurrent list, with federal law prevailing in case of conflict between federal and state legislation. As residual powers belong to the states, there is hardly any policy area that can be described as truly exclusive. Furthermore, state and local governments depend for more than 80 per cent of their finances from the so-called Federation Account (a central revenue collection system) (*ibid*.)

80 *Ibid*., at 295. Of the 109 senators, each of the 36 states is represented by three members, plus one senator from the capital city of Abuja (*ibid*., at 294).

B. Federal Character as an Aspirational Principle

The federal character principle is mentioned in the Nigerian Constitution in Article 14(3), as part of Chapter II on the fundamental objectives and directive principles of state policy:

> The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few states or from a few ethnic or other sectional groups in that Government or in any of its agencies.

Article 14(4) Const. expresses the same idea with regard to state governments, without explicit mention of 'federal character':

> The composition of the Government of a State, a local government council, or any of the agencies of such Government or council, and the conduct of the affairs of the Government or council or such agencies shall be carried out in such manner as to recognise the diversity of the people within its area of authority and the need to promote a sense of belonging and loyalty among all the people of the Federation.

Article 14(3) is devoted to the federal government and agencies, while Article 14(4) targets state governments: in both instances, the idea is that the governments shall represent the diverse communities that compose Nigeria, although Article 14(3) expressly refers to 'federal character' while Article 14(4) merely talks about 'diversity of the people'.[81]

The meaning of this principle is enunciated in Article 318(1) included in Part IV of the Constitution on interpretation, citation and commencement:

> '[F]ederal character of Nigeria' refers to the distinctive desire of the peoples of Nigeria to promote national unity, foster national loyalty and give every citizen of Nigeria a sense of belonging to the nation [. . .]

The emphasis of this constitutional principle is to create a representative bureaucratic apparatus and public service representing Nigeria's various ethnic groups and constituent states in a fair and equal basis so as to promote national unity.[82] In fact, Nigeria is the most populous country in Africa and one of the most complex multi-ethnic federations in the world.[83] Although it is not a pure ethnic federation (since its constituent units are not organised along ethnic lines),

81 A. Gboyega, 'The "Federal Character" or the Attempt to Create Representative Bureaucracies in Nigeria', 50 *International Review of Administrative Sciences* (1984), at 18.

82 L. Adamolekun, J. Erero and B. Oshionebo, 'Federal Character and Management of the Federal Civil Service and the Military', 21 *Publius* (1991), at 77.

83 Suberu, *supra*, note 68, at 291.

ethnicity cannot be disregarded. In a multinational and multi-ethnic federation like Nigeria, ensuring equal sharing of public resources in the component parts of the country becomes very important.[84]

The federal character principle was first entrenched in the 1979 Constitution,[85] although the term federal character was casually used for the first time in 1975 by the Head of State Murtala Mohammed addressing the Constitution Drafting Committee ('CDC'):

> We feel that there should be legal provisions to ensure that [the President and the Vice-President] are brought into office in a manner so as to reflect the *Federal character* of the country; and the choice of members of the Cabinet should also be such as would reflect the *Federal character* of the country. (*Emphasis* added)[86]

This phrase was coined during the debate on the executive and the legislature dealing with the promotion of 'national loyalty in a multi-ethnic society'.[87] Federal character is thus intertwined with the twin values of loyalty and multi-ethnicity. Although not everyone in the CDC was ready to deal with issues of ethnicity in the constitution, the suggestion of a federal character principle (as opposed to more contentious concepts such as 'ethnic balancing') seemed to be a good compromise.[88] Although the federal character has quickly become 'the hallmark of Nigeria's new constitution',[89] some scholars have observed how the acceptance of this terminology by the CDC:

> partly in its novelty, partly in its cosmetic character, partly in its rhetorical appeal, but above all, in its vagueness. In fact, it was so vague in the minds of CDC members that the Committee ended up displaying almost total ignorance of what it had accepted.[90]

Within the larger goal of promoting national unity, the federal character principle sought to achieve fairness and equality in representing the various ethnic groups and component states,[91] thus creating a representative public service not dominated by one or a few ethnic groups.[92] The idea behind this was that only an equal representation of the various ethnic groups in the different levels of

84 Gboyega, *supra*, note 81, at 18.
85 Adamolekun et al., *supra*, note 82, at 75.
86 As cited in A. H. M. Kirk-Greene, 'Ethnic Engineering and the "Federal Character" of Nigeria: Boon of Contentment or Bone of Contention?' 6 *Ethnic and Racial Studies* (1983), at 460. See also A. E. Afigbo, 'Federal Character: Its Meaning and History', in P. P. Ekeh and E. E. Oshaghae (eds), *Federal Character and Federalism in Nigeria* (Heinemann Educational Books, 1989), at 3.
87 *Ibid.*
88 *Ibid.*, at 4
89 Kirk-Greene, *supra*, note 86, at 461.
90 Afigbo, *supra*, note 86, at 4.
91 Adamolekun et al., *supra*, note 85, at 77.
92 Gboyega, *supra*, note 81, at 20.

government would contribute to the development of a sense of belonging to public institutions and preserve Nigeria's stability.[93]

The federal character applies to a variety of Nigerian institutions, such as: (a) election of the President; (b) formation of political parties; (c) composition of the Cabinet; (d) recruitment of the armed forces; and (e) establishment of federal commissions and councils.[94] Furthermore, by express constitutional provision, the federal character principle applies to the civil service of the federation. Articles 171(1)(2) Const. vest in the President the power to appoint several federal officials, including the Secretary to the Government, the Head of the Civil Service, Ambassadors and High Commissioners. Article 171(5) Const. indicates that in exercising these powers of appointment, the President shall have regard to the federal character of Nigeria as well as to the need to promote national unity. Finally, the federal character shall apply also to political parties or associations: pursuant to Article 223(1)(b) Const., members of the executive committee or other governing body of a political party shall reflect the federal character of Nigeria. This reference to political parties is not accidental considering that they have been subject to special scrutiny for their potential to catalyse regional or local interests only.[95]

The 1999 constitution is silent in regard to the application of the federal character principle to judicial appointments. As Suberu points out, the federal character principle has been implemented 'more judiciously' in the case of Supreme Court appointments, in the sense that it has been employed as a rule to represent broad geographical identities more than in a literal way as is the case with the other federal appointments.[96]

1. The Federal Character Commission

Article 153(1) Const. calls for the establishment of several federal executive bodies, among which is the Federal Character Commission.

Article 8 of the Third Schedule of the Constitution ('Schedule') spells out the powers of this Federal Character Commission, particularly in regard to giving effect to the provisions enshrined in Articles 14(3)(4) Const. and discussed above. Among these powers, the Commission shall work out an equitable formula for the distribution of all cadres of posts in the public service of the federation and of the states, including the federal armed forces and other government security agencies, government-owned companies and parastatals of the states. Furthermore, it shall promote, monitor and enforce compliance with the principles of proportional sharing of all bureaucratic, economic, media and political posts at all levels of government; it shall take all legal measures in case of failure to comply with the federal character principle by the accountable bodies. Finally, it shall ensure

93 A. Dirri, 'L'evoluzione del federalismo nigeriano tra conflitti etnici e transizioni demcratiche', *federalismi.it* (2017), at 33–4.

94 Kirk-Greene, *supra*, note 86, at 463.

95 Dirri, *supra*, note 93, at 35.

96 Suberu, *supra*, note 68, at 300–1.

that every public company or corporation reflects the federal character in the appointments of its directors and senior management staff.

Article 9 of the Schedule concludes by saying that it shall be the duty of the Board of Directors of every state-owned enterprise to recognise and promote the principle of federal character in the ownership and management structure of the company.

C. Conclusions on the Federal Character

To conclude, the federal character can be aspirational as it is intimately connected to values such as national unity, loyalty and sense of belonging to the nation that, in and of themselves, are typically aspirational. Both the provision enshrined in Article 14(3) Const. with regard to the composition of the federal government and the description of the federal character principle as defined in Article 318 Const. refer to the twin principles of national unity and national loyalty, so as to instil in every Nigerian citizen a sense of belonging to the nation as a whole. In fact, the *federal character* doctrine was adopted to deal with ethnic loyalties vis-à-vis national loyalties:[97] this desire to overcome local divisions had (and still has) a very important aspirational significance, given that the constitutional drafters sought to foster a broader idea of loyalty or belonging to the nation as a whole and not only to the local tribe or community. As an exercise in national identity building, the aspirational meaning of fostering diversity and social cohesion through the federal character – in a country deeply torn by internal ethnic and tribal divisions – is thus evident.

However, the federal character principle reproduces the quota system that exists in other countries, only with a fancier name. The downside of it is that it undermines other criteria (such as the efficiency of public service) in an effort to reconcile positive discrimination and affirmative actions.

V. CONCLUDING REMARKS: DIVERSE ASPIRATIONS THROUGH DIVERSE CONSTITUTIONAL LANGUAGE?

Our analysis has proved that both Nigeria and South Africa have resorted to principles such as national solidarity, cooperative government and federal character – respectively – in the hope of overcoming the legacy of their past represented by the apartheid division in South Africa and by the ethnic/religious/linguistic fragmentation in Nigeria: the principles/values analysed intend to foster diversity and social cohesion through the enhancement of twin values such as solidarity- and loyalty-based bonds among the various actors, both at horizontal and vertical levels. In fact, national solidarity, cooperative government and federal character are aspirational principles that guide the functioning and architecture of the state.

97 P. P. Ekeh, 'The Structure and Meaning of Federal Character in the Nigerian Political System', in P. P. Ekeh and E. E. Oshaghae (eds), *Federal Character and Federalism in Nigeria* (Heinemann Educational Books, 1989), at 30.

Ethiopia, however, has embraced a different path, that of an ethnic-based federalism, one where the value of ethnicity is what deeply informs the practical and constitutional edifice of this country. Diversity and social cohesion are thus pursued here through the use of a value – ethnicity – that is intended to preserve the uniqueness, the rights and the values of each of the several nations, nationalities and peoples of Ethiopia and the social cohesion among these groups, to the point of granting to each of them the right to self-determination and, quite counter-intuitively, secession. The political reality of Ethiopia shows different outputs: the democratic centralism of the EPRDF, coupled with the economic centralisation carried out by the national level of government, has weakened the aspiration of this constitutional framework.

As flagged by Gebeye, the relevance of aspirational values such as those discussed in this article (especially if entrenched as directive principles), 'should not be underestimated in transforming the lives of Africans, given the continent's troubled history with conflicts, wars, natural resources, management, and development crises'.[98]

Finally, the aspirational values/principles analysed in this article may have some comparative relevance for those countries – in Africa but also elsewhere (see Sri Lanka, Myanmar, Philippines or Nepal) – that are still struggling to find a balance between diversity and social cohesion. What is quite interesting and fascinating for comparative constitutional studies is the continuing search for formulas through which to try to infuse a sense of belonging to a given state, which is still substantially in formation, despite the adoption of a (more or less) shared constitution.

98 B. Gebeye, 'The Potential Role of Directive Principles of State Policies for Transformative Constitutionalism in Africa', 1 *African Journal of Comparative Constitutional Law* (2017), at 17 and 23.