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The Ethiopian federation and private international law: the contours of the federal and the state governments' jurisdictions

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The Ethiopian Constitution divides the power to enact private laws between the federal government and the states. This entails certain inexorable private international law disputes which are concomitant of state private laws. The federal arrangement confers upon the states an inherent jurisdiction to wield disputes connected with their private laws. Nevertheless, the Federal Courts Proclamation and a precedent set by the Federal Supreme Court's Cassation Division render the Federal High Court the wielder of an inherent jurisdiction over disputes connected with state laws. Superciliously, the federal government has aggrandised its jurisdiction by extending it to disputes connected with state private laws. This paper addresses the question whether the power of the states to enact private laws subsumes a jurisdiction to wield private international law disputes. To this end, it analyses the relevant provisions of the Constitution, statutes and a case law. It also draws on the experiences of other federations. The paper will argue that the Constitution confers upon the states an inherent jurisdiction to wield disputes connected with their private laws. It concludes that the states should have their own private international law rules and courts designated to adjudicate private international law disputes.

Keywords: Federal Democratic Republic of Ethiopia; private international law; private law; jurisdiction; federal government; state government; cassation; constitution

A. Introduction

Technological advancement and the elimination of exorbitant legal barriers expedited painless international and intranational transactions. This resulted in an unprecedented global and regional interconnectedness; international as well as intranational movement of people and the flow of capital have become almost commonplaces. This poses certain challenges as it presents opportunities. The disparity of private laws and the consequent inconsistent treatment of disputes is one of the challenges. Private international law works to remedy this discrepancy and

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ensure a uniform settlement of disputes connected with two or more legal systems.[1]

Private international law disputes could be international or intranational. International disputes involve elements connected with the legal systems of two or more independent sovereigns. On the other hand, intranational cases are domestic disputes with no connection to the legal systems of other nations. The latter cases are frequent in federations where the non-central governments maintain their own legal systems and private laws. These classes of cases owe their existence to the disparities of the private laws of sub-national entities.[2]

The Constitution of the Federal Democratic Republic of Ethiopia establishes a federal nation comprised of the federal government and nine autonomous states.[3] The Constitutional architecture engendered discrete federal and state legal systems. Based on the area in question, the Constitution divides the power to enact private laws between the federal government and the states. Accordingly, the federal government may enact a labour code, a commercial code, and intellectual property laws.[4] The states have a residual power to legislate on the remaining areas of private law.[5] The Constitution also states that both entities shall have their own legislative, executive and judicial organs.[6]

As the Constitution divides the power to enact private laws between the federal government and the states, private international law disputes may spring in relation to the federal as well as the state private laws. These disputes could be international or interstate. International cases come into the picture where there is a dispute connected with a foreign sovereign on one hand and the federal or the state laws on the other. On the other hand, the heterogeneity of state private laws and the establishment of separate state court systems offer a fertile ground for interstate private international law disputes.

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[1]See LR Kiestra, *The Impact of the European Convention on Human Rights on Private International Law* (Asser Press, 2014), 13–14, See A Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge University Press, 2009), 20–23.

[2]See Arthur T. von Mehren, *Adjudicatory Authority in Private International Law: A Comparative Study (*MARTINUS NIJHOFF PUBLISHERS, 2007) 57–58; See generally M Pryles, "Interstate Conflict of Laws in Australia" (1979) 44 *Journal of Comparative and International Private Law*; Mills, *supra* n 1, 16–17; See generally Joost Blom, "Constitutionalizing Canadian Private International Law – 25 Years since *Morguard*" (2017) 13(2) *Journal of Private International Law.*

[3]The Constitution of the Federal Democratic Republic of Ethiopia, 1995, *Negarit Gazzeta*., 1st Year No. 1, articles 1, 46(1) and 50(1).

[4]Ethiopian Constitution ,1995, articles 51(19), 55(3) and 55(4).

[5]Ethiopian Constitution, 1995, article 52(1).

[6]Ethiopian Constitution, 1995, article 50(2).

Since the Constitution is the supreme law of the land,[7] it should be the sole touchstone in delineating the jurisdictions of the federal government and the states. The Constitution divides the power to enact private laws between the federal government and the states. It also establishes separate federal and state courts. These empower both entities to wield classes of cases connected with their respective private laws. In a marked contrast to this, the Federal Courts Proclamation[8] and a precedent set by the Federal Supreme Court's Cassation Division in the case of *Meseret Alemayehu* V.*Emushet Mulugeta,*[9] promiscuously dictate that the Federal High Court shall have an inherent jurisdiction over every private international law dispute. Neither the legislation nor the precedent makes a distinction between cases connected with the federal laws on the one hand and state laws on the other.

Ironically, the Federal Supreme Court's Cassation Division ruled that the jurisdictions of the state courts – to adjudicate cases connected with state laws – emanates from their delegation to exercise the jurisdiction of the Federal High Court. The power of the federal government to revoke this delegation, by establishing the Federal High Court in the states, makes the irony more deplorable.[10] Based on this power, the federal government has already withdrawn the delegation of five states.[11] As long as the myth of inherent federal jurisdiction over disputes connected with state laws is venerated, these states may not lay hands on any private international law case; it is only the remaining four states that may exercise even the ironic delegated jurisdiction.

The idea that the federal government should be the wielder of an inherent jurisdiction – over disputes connected with state laws – is quite conceited and unconstitutional. There is no solid constitutional or logical justification which may warrant extending the jurisdiction of the federal government to cases connected with state laws. The emergence and progression of state private international law rules and jurisprudence require extricating the states from reverence for the frivolous myth of inherent federal jurisdiction over disputes connected with state laws; the myth has hitherto smothered the very idea of state private international law.

Faithful implementation of the Constitution and the circumvention of the profound confusion require cautious delimitation of jurisdiction. This requires treading through numerous and intricate conundrums. Among other things, one should

[7]Ethiopian Constitution, 1995, article 9(1).
[8]Federal Courts Proclamation, Number 25/96, Federal *Negarit Gazeta* of the Federal Democratic Republic of Ethiopia, 2nd Year, Number 13 (15 February 1996).
[9]*Meseret Alemayehu* V.*Emushet Mulugeta* and *Tsegaye Demeke, (2015)*, Federal Supreme Court Cassation Bench, Vol. 18, File No.100290, 330.
[10]Ethiopian Constitution, 1995, article 78(2).
[11]A Proclamation to Provide for the Establishment of Federal High Court in Some Regions, Number 322/2003, Federal *Negarit Gazeta* of the Federal Democratic Republic of Ethiopia, 9th Year, Number 42 (8 April 2003).

go over the allocation of legislative and judicial jurisdictions under the Constitution. It is also decisive to examine the relationship between the substantive private laws and private international law rules. Crafting a legal landscape where the normative differences and the autonomy of the states may not jeopardise the legitimate expectations of parties involved in multi-state disputes is also crucial; their potential legislations and judicial approaches should be tolerant of their differences and deferent to the federal arrangement.[12]

This article aims at exploring the extant constitutional and logical justifications for the enactment of state private international law rules and the adjudication of private international law disputes by the state courts. It answers the question whether the states have inherent legislative and judicial jurisdictions over disputes connected with their private laws. To this end, it critically analyses the relevant provision of the Constitution, statutes and a caselaw. It also draws on the experiences of the Nigerian and the U.S federations in dealing with private international law disputes. These federations are selected based on various considerations. First, taking the relatively embryonic Nigerian federalism and the advanced US federalism as samples offers an ideal opportunity to explore the experiences in both types of federations. Second, comparison with these systems is sound and convenient as their structures of power allocation are analogous to the Ethiopia Constitution.

This article is divided into five parts. The first part explores the role of the sub-national units in Nigeria and USA in wielding private international law disputes. The second part illuminates the erroneous Ethiopian legislative and judicial position that the federal government possesses an inherent jurisdiction over cases connected with state laws. This section analyses the relevant provisions of the Federal Courts Proclamation and the decision of the Federal Supreme Court's Cassation Division in the case of *Meseret Alemayehu* V.*Emushet Mulugeta.* The third part presents constitutional and logical justifications for state private international law rules and the adjudication of private international law disputes by the state courts. This section asserts that the states have inherent constitutional jurisdictions over cases connected with their private laws. The Fourth part outlines the frontiers of the jurisdictions of the federal government on one hand, and the states on the other. The fifth part presents limitations that should check the private international law jurisdictions of the states.

[12]Jurisdictional conflict is one of the costs of federalism. For this and other costs of federalism not to outweigh its benefits, there must be a developed legal system capable of resolving the differences. This among other things requires an impartial umpire. See DL Horowitz, "'The Many Uses of Federalism" (2007) 55 *Drake Law Review* 953, 969; "within federal systems the inevitability of overlaps and interdependence in the exercise by governments of their constitutional power has generally required extensive intergovernmental consultation, cooperation, and coordination." See RL Watts, "Federalism, Federal Political Systems and Federations" (1998) 1 *Annual Review of Political Science* 117, 129.

B. Private international law disputes and the power of sub-national units: the cases of Nigeria and the USA

There is an ongoing debate as to the precise meaning of federalism; there is no exclusive design which may quench every thirst for a federal arrangement.[13] However, one thing is common to all federations: a supreme and written Constitution divides power between a central government and two or more sub-national units.[14] Earnest division of power gives both entities the final say over the matters under their respective exclusive jurisdictions.[15] However, a watertight division of power is nearly impossible. Delimiting the federal and the state legal spheres through interpretation is also perplexing.[16]

If both the federal government and the states have the power to enact private laws, private international law disputes may spring in relation to the federal as well as the state laws. Cases connected with federal laws could be characterised as an international conflict of laws; the nationwide applicability of federal laws precludes interstate conflict of laws with respect to the matters they cover.[17] International, as well as intra-national private international law disputes, may arise in connection with state laws. This section explores the role of the sub-national units in Nigeria and USA in wielding private international law cases.

The 1999 Constitution of the Federal Republic of Nigeria provides that the nation shall be a Federation comprising thirty-six states and a federal capital.[18] It establishes legislative bodies, both at the national and state levels. The legislature at the centre is a bicameral body constituted by the Senate and the House of Representatives.[19] On the other hand, the state legislative bodies are unicameral assemblies.[20] The Constitution also establishes a high court for each state of the federation.[21]

[13]EL Rubin, "'The Role of Federalism in International Law" (2017) 40(2) *Boston College International and Comparative Law Review* 195, 200; *See also* RL Watts, *Comparing Federal Systems in the 1990s* (Queen's University Press, 1996), 7.
[14]*See* JF Zimmerman, *Contemporary American Federalism: The Growth of National Power* (State University of New York Press, 2nd edn, 2008), 4; *See also* DV Verney, "Federalism, Federative Systems, and Federations: The United States, Canada, and India" (1995) 25(2) *Publius: The Journal of Federalism*, 81, 85–88; *See also* Watts, *supra* n 13, 7; *See also* B Harris, *A New Constitution for Australia* (Cavendish Publishing, 2002), 123.
[15]Zimmerman, *supra* n 14, 4.
[16]CH Beckett, "'Separation of Power and Federalism: Their Impact on Individual Liberty and the Functioning of Our Government" (1988) 29 *William & Mary Law Review* 635, 636–37.
[17]However, if the jurisdiction of the federal courts is delegated to the state courts, the nationwide applicability federal laws avoids only inter-state choice of law issues. *See* Pryles, *supra* n 2, 719.
[18]Constitution of the Federal Republic of Nigeria, 1999, s 2 (2) and s 3(1).
[19]Constitution of Nigeria, 1999, s 4(1).
[20]Constitution of Nigeria, 1999, s 6; AO Yekini, "Choice of Jurisdiction in Inter-state Matters in Nigeria: A Need for Judicial Rethink" (2012) 6(2) *The journal of Jurisprudence and Contemporary Issues* 1, 6.
[21]Constitution of Nigeria, 1999, s 270(1).

Nigeria is a pluralistic nation with analogous ethnic diversity and state structure to Ethiopia. Its Constitution divides legislative power between the federal government and the states. The first part of the second schedule of the Constitution provides the list of matters over which the federal government shall exercise exclusive legislative power.[22] The states have a residual legislative power on all matters not included in the list of the exclusive powers of the federal government.[23]

The Power to legislate on matters of private law is constitutionally divided between the federal government and the states. The Constitution confers a substantial private lawmaking power upon the federal government. Among others things, it may legislate on the formation, annulment, and dissolution of civil marriages; labour; insurance; banking; copyright; patent; incorporation, regulation and winding up of bodies corporate.[24] The states may legislate on the remaining civil matters such as tort, succession, and contract.[25]

Due to the federal arrangement, Nigerian courts may face two types of private international law cases: international and interstate.[26] As noted above, the states have their own legislative and judicial organs, ie they have their own legal systems. Therefore, for the purpose of private international law, they are considered as separate countries.[27]

Laws enacted by the states constitute important sources of private international law; the majority of state high court laws have private international law rules.[28] With respect to jurisdiction, the Nigerian Constitution confers exclusive jurisdiction to adjudicate various disputes upon the Federal High Court. This includes disputes pertaining to the operation of companies, intellectual properties, and banking.[29] The state high courts have unlimited jurisdiction over the reaming civil and commercial matters.[30]

"Each state high court in Nigeria has an enabling law that makes provisions for conflict of laws rules which in essence govern among others, choice of jurisdiction rule."[31] The combined reading of the Constitution, the relevant provisions of the state high courts' enabling laws, and the Sheriffs and Civil Processes Act reveal

[22]Constitution of Nigeria, 1999, s 4(2).
[23]Constitution of Nigeria, 1999, s 7(a).
[24]Constitution of Nigeria, 1999, s 4(2).
[25]Constitution of Nigeria, 1999, s 4(7)(a).
[26]HA Olaniyan, "Conflict of Laws through Nigerian Case Law: A Researcher's Critical Comments (Part I)" (2012) 20(3) *African Journal of International and Comparative Law* 388, 389 n 7.
[27]*Ibid*, 389, n 7.
[28]Yekini, *supra* n 20, 5.
[29]Constitution of Nigeria, 1999, s 251.
[30]Constitution of Nigeria, 1999, s 272; AO Yekini, "Comparative Choice of Jurisdiction Rules in Cases Having a Foreign Element: Are There Any Lesson for Nigerian Courts (2013) *Commonwealth Law Bulletin* 333, 349, available at https://www.tandfonline.com/doi/abs/10.1080/03050718.2013.802129 accessed on 22 August 2018.
[31]*Ibid*.

that any state high court may exercise jurisdiction over any subject matter except those reserved for the Federal High Court. With respect to private international disputes, any state high court may exercise jurisdiction over international as well as interstate cases – as far as the dispute is closely connected with it. This has been well established through the experiences of the state courts and the rulings of the Federal Supreme Court which affirmed that state courts may exercise jurisdiction over private international law cases.[32] In conclusion, there is no doubt that the states have the power to introduce private international law rules and adjudicate private international law disputes. The major concern is that the assertion of jurisdiction should be fair and square in every case: justifiable under the relevant statutes or the common law rules.

Moving onto the US experience, federalism is one of the pillars of its Constitution.[33] The US Constitution is often described as the "most perfect federal Constitution that ever existed."[34] Under this covenant, power is divided between the federal government and the states. There are also shared powers.[35] "The [U.S.] Constitution allows for local policy in areas where a uniform national policy would be disastrous, if not tyrannical."[36] "The States have the power to enact a civil law – relating to contracts, damages to persons and property, commercial and personal relations, inheritances, and wills"[37]

In the US, private international law can be best characterised as a hybrid of state laws that directly regulate private international law cases and federal laws that fashion the state private international law rules.[38] The US Supreme Court rejected the idea that private international law is part of federal law; the court stated that private international law is part of the law of each state. In *Erie Rail road* V. *Tomkins,* the Court rejected the notion of federal common law. It stated that federal courts exercising their diversity jurisdiction[39] should apply the substantive laws of the state in which they are physically sitting. In *Klaxon* V. *Stentor Electric*, it ruled that the federal courts should, in addition to state

[32]Yekini, *supra* n 30, 349–51; HA Olaniyan, "Conflict of Laws in Nigerian Appellate and Apex Courts: A Biennial Critical Assessment (2009–2010)" (2012) 9 *US-China Law Review* 297, 310–16.
[33]CH Beckett, "'Separation of Power and Federalism: Their Impact on Individual Liberty and the Functioning of our Government" (1988) 29 *William & Mary Law Review* 635, 635.
[34]A de Tocquevjlle, *Democracy in America* 160 (P. Bradley ed.1945). Cited in Beckett, *supra* n 33, 646.
[35]Beckett, *supra* n 33, 639.
[36]*Ibid*, 648.
[37]Mills, *supra* n 1, 86.
[38]*Ibid*, 152.
[39]Diversity jurisdiction refers to the power of the US Federal Courts to adjudicate disputes over which the states normally have jurisdiction, should it involve the citizens of different states. The original purpose of such jurisdiction was to avoid discrimination of non-citizens by the state courts. See TA Sarver, "Resolution of Bias: Tort Diversity Cases in the United States Courts of Appeals" (2007) 28(2) *Justice System Journal* 183, 183–84.

substantive laws, apply state choice of law rules to cases they adjudicate based on their diversity jurisdiction. However, the state private international rules operate within the framework of federal laws. This includes the due process clause of the Fourteenth Amendment and the full faith and credit clause.[40]

Given their power to enact various private laws, the states have their own private international law rules. Due to their experimentation with private international law rules, the US states have been described as "the fifty laboratories."[41] The diversity of state legal systems has offered a fertile ground for the development of state private international law rules.[42] "Despite the claims of international law and the large and growing importance of federal law, it is still the law of the states which is of major concern in private interstate and international cases."[43] Excepting few constitutional limitations, a private international law dispute is mostly a state law concern.[44]

To sum up, the legal landscapes in both federations reveal that the states exercise both legislative and judicial jurisdictions over private international law disputes. The legislative power of the states is not limited to enacting private laws; rather, they have the major say on how private international law disputes should be handled: in both federations, with the exception of certain limitations, the states have a vivid jurisdiction over private international law disputes.

C. The myth of inherent federal jurisdiction over disputes connected with state laws: the Ethiopian private international law paradox

The current Ethiopian Constitution came into force in 1995. It establishes a federation in which power is divided between the federal government and the states.[45] The federal structure engendered three categories of government powers – exclusive federal powers, exclusive state powers, and shared powers. The exclusive powers of the federal government are enumerated under article 51 of the Constitution. However, they are not limited to competencies enumerated under this

[40]Mills, *supra* n 1, 134–37; MT Hertz, "The Constitution and the Conflict of Laws: Approaches in Canada and American Law" (1977) 27(1) *University of Toronto Law Journal* 1, 5.
[41]L Brilmayer and R Lee, "'State Sovereignty and the Two Faces of Federalism: A Comparative Study of Federal Jurisdiction and the Conflict of Laws" (1985) 60 *Notre Dame Law Review* 833, 852 cited in, Mills, *supra* n 1, 125.
[42]Mills, *supra* n 1, 125.
[43]EE Cheatham, "Sources of Rules for Conflict of Laws" (1941) 43 *University of Pennsylvania Law Review*, 430, 447.
[44]SK Marshall, *et al*., "Conflict of Laws" (2009) 62 *SMU Law Review* 1021, 1022.
[45]Ethiopia has nine states, namely: (1) The State of Tigray (2) The State of Afar (3) The State of Amhara (4) The State of Oromia (5) The State of Somalia (6) The State of Benshangu-Gumuz (7) The State of the Southern Nations, Nationalities and Peoples (8) The State of the Gambela Peoples and (9) The State of the Harari People: Ethiopian Constitution, 1995, article 47.

article; article 55 of the Constitution, on the powers and functions of the House of Peoples' Representatives, confers additional legislative powers upon the federal government. The states have two categories of exclusive powers: enumerated and residual. They have a residual power over matters that are not expressly assigned to the federal government or the federal government and the states jointly.[46] There are also powers shared by the federal government and the states.

The Constitution provides that both the federal government and the states shall have legislative, executive, and judicial organs.[47] Coupled with this, the division of private lawmaking powers between the federal government and the states engendered disjunct systems of laws. The ensuing heterogeneity of laws and undesirable conflicts in dealing with similar questions of private law necessitates private international law rules; these rules are vital to moderate inconsistent treatment of like cases and achieve orderly international and intra-national private law relationships.[48]

"Private international law owes its existence to the fact that there are in the world a number of separate municipal systems of laws – a number of separate legal units … "[49] "The existence of diverse rules of private law in a national legal system creates the potential for conflict, for the inconsistent legal treatment of an event or set of facts."[50] Private international law is applicable to private law disputes connected with two or more jurisdictions. Private laws, in relation to which private international law cases may arise, include the law of contracts, the law of torts, the law of agency, the law of succession, the law of companies, the law of insurance, labour law, family law, and property law.[51]

[46]Tsegaye Regassa, "Sub-national Constitutions in Ethiopia: Towards Entrenching Constitutionalism at State Level" (2009) 3(1) *Mizan Law Review* 33, 43–46.
[47]Ethiopian Constitution, 1995, article 50(2).
[48]*See* Joseph William Singer, "Multistate Justice: Better Law, Comity, and Fairness in the Conflict of Laws" 2015(5) *University of Illinois Law Review* 1923, 1937–57; *see* Gregory S Alexander, "'The Application and Avoidance of Foreign Law in the Law of Conflicts: Variations on a Theme of Alexander Nekam" (1975) 70(4) *Northwestern University Law Review* 602, 623; "The leading idea, underlying all modern systems of Private International Law, would seem to be that, as a matter of principle, foreign legal thought shall be given consideration in all cases before the domestic courts where fairness to the parties and equity will demand such consideration"; see Gerhart Husserl, "'The Foreign Fact Element in Conflict of Laws. Part II: Defining and Characterizing the Fact Element in Conflict Cases" (1940) 26(4) *Virginia Law Review* 453, 454–55; see Fowler V Harper, "Torts, Contracts, Property, Status, Characterization, and the Conflict of Laws" (1959) 59 *Columbia Law Review* 440, 443–44; "Completely disregarding foreign laws and decisions … would lead to injustices for the parties involved in such international proceedings" Kiestra, *supra* n 1, 16.
[49]GC Cheshire, *Private International Law* (Clarendon Press, 1923), 3.
[50]Mills, *supra* n 1, 16–17.
[51]See JG Collier, *Conflict of Laws* (Cambridge University Press, 3rd edn, 2004), 5–6; Kiestra, *supra* n 1, 14; However, there is an emerging thesis that choice of law should be applicable in criminal matters. *See generally* Robert A Leflar, "Conflict of Laws: Choice of Law in Criminal Cases" (1974) *25 Case Western Reserve Law Review* 44.

The Ethiopian Constitution divides the power to legislate on various areas of private law between the federal government and the states. The legislative jurisdiction of the federal government encompasses enacting a commercial code,[52] patents and copyrights laws,[53] and a labour code.[54] By virtue of their residual power, the states may legislate on the remaining areas of private law such as family, tort, contract, and succession.[55] Consequently, private international law disputes may arise in relation to federal as well as state private laws. The existence of federal private laws necessitates a federal private international law system which deals with disputes connected with federal laws. Likewise, the existence of state private laws requires a state private international law system which deals with cases connected with state laws. Therefore, both the federal government and the states should have their own private international law rules and specific courts designated to adjudicate private international law disputes.

Nevertheless, the Federal Courts Proclamation and the decision of the Federal Supreme Court's Cassation Division in the case of *Meseret Alemayehu V. Emushet Mulugeta*, render the federal government the sole wielder of an inherent private international law jurisdiction. Paradoxically, the Federal Supreme Court's Cassation Division ruled that the jurisdiction of the state courts – to adjudicate cases connected with state laws – emanates from their delegation to exercise the jurisdiction of the Federal High Court.[56] The situation has gone south for states whose delegations have been revoked by the federal government.[57] These states may not adjudicate private international law disputes connected with their private laws – even through the ironic delegation; private international law disputes connected with the laws of these states are made subject to the exclusive jurisdiction of Federal High Court.

The Federal Courts Proclamation under article 5(2) provides that the federal courts shall have jurisdiction over suits involving permanent residents of different states. Article 5(4) of the same Proclamation provides that the federal courts shall exercise jurisdiction over cases involving a foreign national. Specifically,

[52]Ethiopian Constitution, 1995, article 55(4).
[53]Ethiopian Constitution, 1995, article 55 (2) (g).
[54]Ethiopian Constitution, 1995, article 55 (3).
[55]Ethiopian Constitution, 1995, article 52 (1).
[56]The State Supreme Courts have constitutional delegation to exercise the jurisdiction of the Federal High court: Ethiopian Constitution, 1995, articles 78(2) and 80(2).
[57]Though the Constitution delegates the state supreme courts to exercise the jurisdiction of the Federal High Court, the federal government may revoke this delegation by establishing the Federal High Court in the states: Ethiopian Constitution, 1995, article 78(2) and 80(2). Accordingly, the federal government has revoked the delegation of five states as of April 2003. The states are: (1) the State of Afar, (2) the States of Benshangul, (3) the States of Gambella, (4) the States of Somali, and (5) the State of Southern Nations Nationalities and Peoples. See Proclamation to Provide for the Establishment of Federal High Court in Some Regions, Number 322/2003.

article 11(2) (a) of the proclamation provides that the Federal High Court shall exercise jurisdiction over private international law cases. These provisions do not make any distinction between disputes connected with federal laws on one hand, and state laws on the other. Since the proclamation is a federal legislation, one may reasonably assume that it concerns only private international law disputes connected with federal laws. However, article 6(1) (b) of the proclamation which states that – the federal courts shall apply state laws if the case pertains to such laws – extends the jurisdiction of the federal courts to cases connected with state laws.

The decision of the Federal Supreme Court's Cassation Division amplifies the usurpation of the jurisdiction of the states by the Federal Courts Proclamation. The Division in the case of *Meseret Alemayehu V. Emushet Mulugeta*,[58] ruled that a private international law dispute connected with the family law of the State of Oromia falls under the inherent jurisdiction of the Federal High Court. According to the Court's holding, the state courts may adjudicate cases connected with their own private laws only through a delegation to exercise the jurisdiction of the Federal High Court.

At this juncture, examining the status and substance of the decision of the Supreme Court's Cassation Division is imperative. The Federal Supreme Court has the supreme federal judicial authority.[59] The Constitution provides that the Court shall, in addition to its regular judicial authority, exercise a cassation power and review final court decisions. It provides:

> The Federal Supreme Court has a power of cassation over any final court decision containing a basic error of law. Particulars shall be determined by law.[60]

The Cassation Division of the Supreme Court, on appeal, reviews the final decisions of the federal and the state courts.[61] However, the review is limited to the legal aspects of the decisions: it may not review factual findings.

The subordinate legislation enacted by the federal government to operationalise the above-cited constitutional provision gives the decisions of the Cassation Division the status of a binding precedent. It provides:

[58]*Meseret Alemayehu V.Emushet Mulugeta* and *Tsegaye Demeke, (2015)*, Federal Supreme Court Cassation Bench, Vol. 18, File No.100290, 330(Eth.).
[59]Ethiopian Constitution, 1995, article 78(2).
[60]Ethiopian Constitution, 1995, article 80(3) (a).
[61]However, the power of the court to review the decision of the state courts over state matters has been highly contested. Some writers argue that the cassation power of the Federal Supreme Court should be limited to the decisions of the federal courts. Despite the theoretical debates, the court to date reviews the decision of state courts resolved based on state laws. See generally Muradu Abdo "Review of Decisions of State Courts over State Matters by the Federal Supreme Court" (2007) 1(1) *Mizan Law Review.*

> Interpretation of a law by the Federal Supreme Court rendered by the Cassation Division with not less than five judges shall be binding on federal as well as regional courts at all levels.[62]

To return to the case of *Meseret Alemayehu*, it was lodged as an appeal before the Federal Supreme Court's Cassation Division to have the decisions of the courts of the State of Oromia reversed; the appellant, Mrs. *Meseret Alemayehu*, sought the reversal of the decisions of the East *Shoa* Zone High Court and that of the Oromia Regional State Supreme Court which, on appeal, affirmed the decision of the High Court.

The case involved the appellant, a Swedish citizen, and two respondents: an American and another Ethiopian. Originally, the case was initiated through a pleading lodged before the East *Shoa* Zone High Court, which is a State Court, objecting to the decision of the court in another case. In the earlier case, the court had pronounced a divorce and ordered the partition of the alleged common property of the respondents. In this latter case, the appellant had jointly sued the respondents, Mr. *Tsegaye Demeke* and Mrs. *Emushet Mulugeta,* whom the court divorced. She had contended that the decision of the court was erroneous as the two respondents never married each other. Instead, she claimed to be the wife of the second respondent and the owner of half of the property. She had argued that the Court should reconsider its decision as it violates her right. However, the Court rejected her opposition on the ground that the evidence she adduced was not admissible. The appellant had preferred an appeal to the Oromia Regional State Supreme Court.[63] The State Supreme Court affirmed the decision of the State High Court.

As a last resort, the appellant took her case to the Federal Supreme Court's Cassation Division seeking the reversal of the decisions of the State courts. The issue framed by the Federal Supreme Court's Cassation Division was whether the State High Court had the jurisdiction to adjudicate the case. By pointing out the elements which connected the case with other jurisdictions, the Division characterised it as a private international law dispute. The Division reasoned that as the parties involved in the case are the citizens of three different states, the case was not a purely domestic case. The Division also characterised the conclusion of the alleged marriage between the appellant and the second respondent in the USA as a foreign element.

Finally, the Division reversed the decisions of the State Courts and remanded the case to the Supreme Court of the State of Oromia for further proceedings. It determined that the State High Court had no jurisdiction to

[62]Article 2(1) of Federal Courts Proclamation Re-amendment Proclamation No. 454/2005, Federal *Negarit Gazeta* of the Federal Democratic Republic of Ethiopia, 11th Year No. 42, (14 June 2005).

[63]According to article 64(2) (b) of the Constitution of the Oromia Regional State, the Supreme Court has the final judicial authority on State matters.

adjudicate a private international law case. It further stated that the court entrusted by law to adjudicate private international law disputes is the Federal High Court. Ironically, the Division concluded that only the Supreme Court of the State of Oromia may adjudicate the case through its delegation to exercise the jurisdiction of the Federal High Court.

The Division based its decision on article 11(2) (a) of the Federal Courts Proclamation which indiscriminately provides that the Federal High Court shall have jurisdiction over private international law cases. The case concerned matrimonial and divorce issues connected with the family law of the State of Oromia. Nevertheless, the Division ruled that even such case falls under the inherent jurisdiction of the Federal High Court. The Division's decision means that the state courts do not have an inherent jurisdiction to adjudicate private international law disputes that may arise even in relation to their own private laws. Sadly, other than restating the supercilious flaws of the proclamation, the Division did render any constitutional or logical ground to confer such power upon the Federal High Court.

In conclusion, the Federal Courts Proclamation and the precedent set by the Federal Supreme Court invented a monumentally erroneous myth which depicts the federal government as the sole wielder of an inherent private international law jurisdiction. The following section refutes this myth by accentuating the reasons why the states, as well as the federal government, should have their own discrete private international rules and courts designated to handle private international law disputes.

D. Justifications for discrete federal and state private international law rules and courts

It is erroneous to take every private international law dispute as the exclusive concern of the federal government. The states, as well as the federal government, have inherent legislative and judicial jurisdictions over disputes connected with their respective private laws. This empowers both entities to enact their own private international law rules and designate one of their courts to handle private international law disputes. This section presents justifications for discrete federal and state private international law systems comprised of private international law rules and courts.

H.L.A Hart describes law as the combination of primary and secondary rules. The primary rules are substantive laws that define rights and obligations. The secondary rules, on the other hand, control the incidence and operation of the primary rules. The latter, among others things, dictate the procedure of ascertainment of the primary rules, determine the entity that should authoritatively adjudicate disputes and lay the procedures of adjudication. The secondary rules are not distinct from the primary rules: they are supplementary. These rules are parasitic upon the basic primary rules. According to Hart, the secondary rules are indispensable components of any legal system. These rules are vital for the effective functioning

of any system of primary rules.[64] Private international law can be characterised as a body secondary rule: it is a body of rules that allocate a regulatory authority among various jurisdictions. These rules do not furnish substantive solutions; they just direct us to adjudicatory bodies and applicable substantive rules.[65] Therefore, any entity with the power to enact private laws should have the supplementary private international law rules. In the Ethiopian context, both the federal government and the states should have their own private international law rules.

Besides the theoretical justification, the constitutional power of the states to enact private laws subsumes enacting private international law rules. The Constitution divides the power to enact private laws between the federal government and the states. Consequently, private international law dispute may arise in relation to the federal as well as state laws. This requires both entities to determine how disputes connected with their respective private laws should be handled, ie they need to determine the incidence and operation of their respective private laws through private international law rules. These rules may require courts to limit the application of forum laws in particular cases; based on the choice of law rules, courts may hold back the application of forum law and give precedence to the law of another jurisdiction.[66] This is a patent limitation of one's legislative jurisdiction over the controversy in question.[67] Choice of law rules represents a decision to curtail the application of one's private laws in some cases. This makes enacting choice of law rules part and parcel of the power to enact private laws; an entity with the power to enact the primary substantive laws should also determine the content of the parasitic private international law rules.[68]

In addition to their power to enact private laws, the other legislative powers of the states also justify state private international law rules. Private international law is a procedural law: it dictates how courts should handle cases involving a foreign element.[69] The Ethiopian Constitution requires the states to establish their own courts and determine the "particulars" by law.[70] Establishing a court, among other things, requires prescribing how it should adjudicate cases, including a private international dispute. Arguably, the "particulars" which the Constitution refers to subsume enacting procedural laws such as private international law. Moreover, the Constitution provides that the states as well as the federal

[64]HLA Hart, *The Concept of Law* (Clarendon Press, 2nd edn, 1994), 79–99.
[65]Mills, *supra* n 1, 19–20.
[66]*Id*., 19–20.
[67]K Lipstein, *Principles of the Conflict of Laws National and International* (Martinus Nijhoff Publishers, 1981), 66.
[68]*See generally* Hart, *supra* n 23, at 79–99.
[69]Lipstein, *supra* n 67, 15.
[70]Ethiopian Constitution, 1995, article78 (3).

government shall have the power to legislate on their respective "matters."[71] As the Constitution confers upon the states the power to establish their own courts, one of these matters should the procedure their respective courts must observe. Accordingly, the states should prescribe how their respective courts should adjudicate private international law disputes.

It is self-evident that private international law rules should perfectly fit with the private laws of a given jurisdiction. In the case of Ethiopia, this requires discrete federal and state private international law rules. The Constitution divides the power to enact private laws between the federal government and states. Due to this division, they legislate on distinct areas of private laws. This necessitates uniquely designed private international law rules congruent with the respective laws of the federal government and the states; grafting the private international law rules of one entity onto the peculiar disputes of the other will be futile.[72] Therefore, both the federal government and the states should have their own private international law rules designed based on their disjunct private laws.

Ensuring the integrity of the federal and the state legal systems also requires the enactment of separate federal and state private international laws. As mentioned earlier, both entities have their own disjunct legal systems. As a result, both the federal and the state courts face disputes connected with their respective substantive laws. A given legal system should have adequate rules to address issues that may arise under its laws.[73] This includes private international law disputes. Therefore, both entities must have their own private international law rules which dictate how their courts should handle cases concomitant of their respective private laws; the courts should not be expected to look into the procedural laws of other jurisdictions to resolve cases brought to them.[74]

The experiences of other federations also reveal that the non-central governments regulate private international law cases through their own laws and courts. As mentioned in the first section, in the U.S private international law cases are predominantly regulated by the state laws.[75] Likewise, the Nigerian states have substantial control over private international law cases.

[71] Article 55(1) of the 1995 Ethiopian Constitution provides: "The House of Peoples' Representatives shall have the power of legislation in all matters assigned by this Constitution to Federal jurisdiction." article 50(5) of the Constitution also provides: "The State Council has the power of legislation on matters falling under State jurisdiction."

[72] *See* AJ Bellia, "Federal Regulation of State Court Procedures" (2010) 110 *Yale Law Journal* 949, 993–97.

[73] *See* Hart, *supra* n 64, at 99.

[74] This rational has been presented to defend the regulation of first stage characterisation by the internal substantive laws of the forum. Arguably, this can be used to support the claim that conflict of laws issues that arise from forum internal substantive laws should be regulated by forum conflict of laws rules. *Cf.* V Allarousse, "A Comparative Approach to the Conflict of Characterization in Private International Law" (1991) 23 *Case Western Reserve Journal of International Law* 479, 483.

[75] Marshall, *supra* n 44, 1022.

Besides the foregoing justifications, the underlying bases of private international law require the federal government and the states to have private international law rules. Among other things, ensuring fairness and predictability require the states to adopt uniform private international law rules.

"Justice" is one of the foundations of private international law. Treating cases involving a foreign element like that of purely domestic cases may result in an unfair outcome. Private international law rules help to ensure justice by summoning "appropriate" laws into application and obviating the application of the forum laws deemed inappropriate to a given dispute.[76] The recognition and enforcement of a foreign judgment is the other mechanism of serving justice. This helps judgment creditors to enforce valid judgments against migratory judgment debtors.[77] Private international law rules also circumscribe the assertion of judicial jurisdiction if it may lead to an unfair outcome due to unparalleled inconvenience to one of the parties involved in a private international law dispute.[78]

In addition to advancing the ends of justice, private international law offers a certain degree of predictability as it underpins the underlying policies of private laws. For instance, the generally accepted purpose of the law contracts is upholding the legitimate expectations of the contracting parties.[79] Promiscuous application of the law of the forum to a contract formed in another jurisdiction may render such contract void and cripple the legitimate expectations of the contracting parties. Private international law circumvents deplorable inconsistencies by referring courts to the law which may uphold the legitimate expectations of the concerned parties. This ensures uniformity in the settlement of cases irrespective of what forum entertains a given case.[80] This Uniformity is in turn expected to prevent forum shopping.[81] Private international law also gives convenience to parties involved in multi-state transactions. It provides a room to make their transaction expedient; within the bounds of the law, they may choose applicable law or forum.[82]

[76] *See* Singer, *supra* n 44, 1937–57; Husserl, *supra* n 44, 454–55; Kiestra, *supra* n 1, 16.
[77] [In the U.S] [t]he problem of migratory debtors was a major impetus behind the drafting and adoption of the full faith and credit clause' William L Reynold and William M Richman, *The Full Faith and Credit Clause: A Reference Guide to the United States Constitution* (Praeger Publishers, 2005), 2.
[78] Ruth Hayward, *Conflict of Laws* (Cavendish Publishing, 4th edn, 2006), 5.
[79] Peter Stone, *The Conflict of Laws* (Longman, 1995), 4; Singer, *supra* n 48, 50; In addition to the substantive laws, private international law itself has a generally accepted purpose of protecting the legitimate expectations of the parties. Upholding the legitimate expectations of the parties augments the effort to achieve a fair outcome. Here it is important to note that the parties may not have shared expectations. Thus, it is necessary to determine whose expectation is the legitimate one. This requires applying objective standards. see Mills, *supra* n 1, at 10.
[80] Kiestra, *supra* n 1, at 16.
[81] Alexander, *supra* n 48, 631.
[82] Richard A Epstein, "Consent, Not Power, as the Basis of Jurisdiction" (2000) 2001(2) *University of Chicago Legal Forum* 1, 1–3; Stone, *supra* n 79, 4.

Generally, the states as well as the federal government should enact their own private international law as this is crucial to achieving orderly international and intra-national private law relationships.[83] However, this does not mean that the states should come up with utterly different private international law rules. Indeed, they will have work on the harmonisation of their potential private international law rules. The primary purpose of state private international rules should be, with the exception of irreconcilable differences, ensuring consistent treatment of similar cases across the federation. This will ensure uniform adjudication of private international law disputes: irrespective of the forum of adjudication like disputes could be settled alike. Therefore, one should not be sceptical about the relevance of state private international law rules.[84]

With respect to judicial jurisdiction, the Constitution confers upon the Federal Supreme Court the highest and final judicial power over federal matters. Likewise, the State Supreme Courts have the highest and final judicial power over state matters.[85] A sound interpretation of the word "matters" under the Constitution encompasses controversies that are concomitant with the respective laws of the states and the federal government. This makes disputes which may arise in relation to state laws subject to the jurisdiction of the state courts. Therefore, the states may designate a state court which adjudicates private international law disputes that may arise in relation to their private laws. By the same token, the federal courts should exercise jurisdiction over private international law disputes which may arise in relation to federal laws.

E. The frontiers of the federal and the state governments' jurisdictions over private international disputes

1. *The jurisdictions of the federal government*

The competencies of the federal government in wielding private international law disputes can be classified into two. The first pertains to private international law disputes associated with centrally enacted private laws. The Constitution gives the federal government a direct legislative and judicial mastery over such disputes. Thus, the federal government may, through a detailed legislation, regulate issues of judicial jurisdiction, choice of law and recognition of foreign judgements associated with its private laws. Second, the federal government may indirectly influence the private international law jurisdictions of the states based on its foreign relations power and the power to regulate interstate commerce.

The legislative power of the federal government to enact private laws can be classified into two. The first encompasses certain areas of private that are expressly assigned to it by the Constitution. This covers commercial law, labour law, and

[83]Stone, *supra* n 79, 4.
[84]See *ibid*.
[85]Ethiopian Constitution, 1995, article 80 (1) and (2).

intellectual property laws.[86] In addition to the enumerated private laws, the federal government may enact civil laws which the House of Federation[87] considers necessary to establish and sustain one economic community.[88] The Constitution provides:

> It [the House of Peoples' Representatives] shall enact civil laws which the House of the Federation deems necessary to establish and sustain one economic community.[89]

Therefore, a given area of civil matter may not perpetually remain under the jurisdiction of the states. This will have various ramifications. First, a private law enacted based on this power will be a source of federal private international law dispute. Second, the private international law jurisdiction of the federal government cannot be determined solely based on the Constitution.

One concern here is the conundrum with respect to disputes which may have connections with both federal and state laws. For instance, a given controversy may arise under the federal commercial code and concern another incidental issue under the succession law of one of the states. In such cases, the sound solution is the adjudication of the case by the courts of the entity under the law of which the principal issue has arisen and a mere application of the law of the entity within the legal village of which the incidental issue has arisen.[90]

The federal government may, in addition to its power to directly wield private international law disputes pertaining to its private laws, set certain general touchstones which the states should observe in dealing with private international law disputes. Based on its foreign relations and commerce powers the federal government must make sure that the states will not unduly disrupt international and interstate interactions.

The experiences of numerous federations reveal that there are certain powers deemed necessary for the federal government to discharge its roles

[86]Ethiopian Constitution, 1995, articles 55(4), 55 (2) (g) and 55 (3).
[87]The House of Federation is the upper house of the Ethiopian parliament. It is composed the representatives of the Ethiopian Nation, Nationalities, and peoples. The House has the power to interpret the constitution and "determine civil matters which requires the enactment of laws by House of Peoples' Representatives" Ethiopian Constitution, 1995, articles 53,61(1), 62(1) and (8).
[88]The Authentication and Registration of Documents Proclamation was enacted to achieve this. Authentication and Registration of Documents Proclamation No. 922/2015, Federal *Negarit Gazeta* of the Federal Democratic Republic of Ethiopia, 22nd Year No. 39 (15 February 2016) Preamble.
[89]Ethiopian Constitution, 1995, article 55 (6).
[90]The regulation of different issues in a given case by different laws is known as Dépeçage. "Dépeçage is the practice of splitting multiple claims in a lawsuit, or multiple issues in a claim, and applying different states' laws to the separate issues or claims." Marshall, *supra* n 44, at 1047.

for the federation as a whole. One of such authorities pertains to foreign relations.[91] While the specific division of power depends on each federation's Constitution until recent times the widely held view was that the central governments should exercise exclusive control over foreign relations. However, this has been eroded due to the increasing involvement of sub-national governments in foreign relations.[92]

The increasing involvement of non-central governments in international relations is attributed to the impacts of the expanding international affairs over their jurisdictions and the difficulty of determining whether a given conduct falls within the domain of domestic or foreign policies. The interdependence between social, cultural and environmental regulations that are considered domestic concerns on one hand, and security and diplomatic concerns on the other further complicate the problem. The confusion and the real concerns contributed to the internationalisation of matters that were considered domestic issues and domestication of previously international matters.[93]

The Ethiopian Constitution vests exclusive foreign relations power in the federal government. It provides:

> It [The federal government] shall formulate and implement foreign policy; it shall negotiate and ratify international agreements.[94]

Specifically, the House of Peoples' Representatives has the power to ratify international treaties. The Constitution provides:

> It [The House of Peoples' Representatives] shall ratify international agreements concluded by the Executive.[95]

These provisions exclusively vest the foreign relations power in the federal government. However, determining its implications for the states' private international jurisdiction is a thorny task; like other federations, the precise limits of this power could be contested.

In order to determine the relationship between the federal foreign relations power and the states' private international law jurisdiction, characterising private international law disputes based on the level of their impact on the interests of other nations is imperative. The bulk of private international law disputes do not

[91] Watts, *supra* n 13, 74.
[92] Ivo D Duchacek, "Perforated Sovereignties: Towards a Typology of New Actors in International Relations", in HJ Michelmann and P Soldatos (eds), *Federalism and International Relations: The Role of Sub-national Units,* (Clarendon Press, 1990), (Reprinted 2001), 1, 1–3.
[93] *Id., at 7–8.*
[94] Ethiopian Constitution, 1995, article 51 (8).
[95] Ethiopian Constitution, 1995, article 55 (12).

have an appreciable effect on foreign relations; they involve individuals or private legal entities acting in their own private capacities.

> Private international law is concerned with the legal relations between private individuals and corporations, though also with the relations between states and governments so far as their relationships with other entities are governed by municipal law, an example being a government which contracts with individuals and corporations by raising a loan from them.[96]

Therefore, the states should exclusively regulate a private international law dispute concomitant of their private laws – as long as it does not directly and significantly affect the interest of a foreign sovereign. Albeit a foreign element is involved, the states should exclusively regulate cases of purely or primarily private interest; a mere involvement of a foreigner does not make a given case a matter of foreign relations power of the federal government.[97]

The jurisdictions of the federal as well as the state courts cover areas of laws over which their respective legislatures enact laws.[98] The federal court's jurisdiction is limited to disputes which may arise in relation to federal laws. Likewise, the state courts' jurisdictions correspond to state laws. This reveals that the Constitution delimits courts' jurisdiction based on the nature of a controversy in question, not the status of the parties involved in it. Contrary to this, the Federal Courts Proclamation provides that the federal courts shall have jurisdiction over cases to which a foreign national is a party.[99] The proclamation does not make any distinction between disputes connected with federal laws one hand, and state laws on the other. If a given case emerges from the legal village of the states, the state courts should adjudicate it no matter a foreigner is involved in it. The difference between a foreigner and a foreign relation should not be overlooked.

In exceptional circumstances, cases subject to the jurisdiction of the states may affect the interest of other nations. This requires the involvement of the federal government empowered to regulate the nation's relations with other sovereigns. One of the circumstances where the federal government may limit the jurisdictions of the states pertains to diplomatic immunities. The state courts should respect the

[96]JG Collier, *Conflict of Laws* (Cambridge University Press, 3rd edn, 2004), 5.
[97]James AR Nafziger, "Resolving International Conflict of Laws by Federal and State Law" (1990) 2 *Pace International Law Review* 67, 69; Ted Cruz in his article on the foreign relation power of the US government asserts that the foreign relation power of the federal government should be exercised only in relation to matters over which it has an expressed power. According to Cruz, conclusion of treaties which pertains to matters assigned to the states encroaches upon their indefinite power. Ted Cruz, "Limits on the Treaty Power" (2014) 127(93) *Harvard Law Review.*
[98]Ethiopian Constitution, 1995, article 80 (1) and (2).
[99]Article 5(4) of the Federal Courts Proclamation No. 25/96, Federal *Negarit Gazeta* of The Federal Democratic Republic of Ethiopia, 2nd Year No. 13 (15 February 1996).

diplomatic protections accorded by the federal government and limit the application of their jurisdictional rules.

It is neither possible nor desirable for the states to isolate themselves from the rest of the world; various private international law matters require co-operation with foreign sovereigns. For instance, the judgements of the state courts may not be recognised in other jurisdictions unless there is a treaty to that effect. Thus, crafting a constitutional mechanism by which the states may jointly negotiate treaties through the federal government is imperative. If this approach is adopted, it is important to design a mechanism for the states to scrutinise negotiated agreements and adequately guard their interest.[100]

The federal government may, though arguable, influence the private international rules of the states based on its power to regulate interstate and international commerce. The commerce clause requires the federal government to regulate interstate and international commerce.[101] Specifically, the Constitution requires the House of Peoples' Representatives to legislate on interstate commerce and foreign trade matters.[102] Therefore, the federal government may exercise this power to check laws which may unduly disrupt international or interstate commerce.[103]

In conclusion, the federal government may directly regulate private international law disputes associated with its private laws and set basic touchstones to fashion the private international law rules of the states.

2. *The jurisdiction of the states*

Save the areas assigned to the federal government, the legislative jurisdictions of the states cover indefinite areas of private laws.[104] Two classes of cases may spring in relation to the private laws of the states: international and inter-state. International conflict of laws arises where there is a case connected with one of the states and a foreign sovereign. On the other hand, interstate disputes involve

[100]See Z Degifie, "De-centering Treaty Making Power of The Federal Government under the Ethiopian Federal System: In Search of Better Safeguarding Mechanisms" (2015) 1 (1) *The International Journal of Ethiopian Legal Studies*, 4, 27–31; *See* Nafziger, *supra* n 97, 69; *See also* A Briggs, *The Conflict of Laws* (Oxford University Press, 3rd edn, 2013), 51–52.

[101]Ethiopian Constitution, 1995, article 51(12).

[102]Ethiopian Constitution, 1995, article 55(2) (B).

[103]In the US there is no consensus about the precise limits of the power of the national government to regulate interstate commerce. The first view is that its authority covers only direct regulation of matters with economic nature such as labour standards. The second line of argument is that the authority of the national government includes the regulation of non-economic activities, but still with substantial economic effect such as litigations. In the latter case, the commerce clause can be used to ensure that certain litigations will not disrupt interstate commerce. Bellia, *supra* n 72, 970.

[104]Ethiopian Constitution 1995, articles 52, and 55(6).

elements connected with two or more states of the federation. The states wield constitutional legislative and judicial jurisdictions to regulate both types of disputes.[105]

Due to socio-economic differences, the states may come up with disparate private laws. The disparity of the laws of the states may entail a conflict of laws in cases connected with two or more states. The establishment of separate court systems by the states entails jurisdictional issues. The recognition and enforcement of sister-state judgements is also the other concern. Therefore, the states should regulate these issues by enacting private international law rules. So far, neither the states nor the federal government has enacted a full-fledged private international law.

At this juncture, exploring areas of some state laws where differences are apparent is important. The first noteworthy difference is the form required for the conclusion of a valid betrothal under the Family Codes of the State of Amhara and that of the State of Oromia. The first requires that a betrothal shall be made in a written form.[106] On the other hand, there is no such requirement under the latter Code.[107] It accords the same legal effect to betrothals concluded orally as well as in writing. Then, what should be the fate of a betrothal concluded orally in the State of Oromia if the parties move to the State of Amhara? Should the courts of the state of Amhara recognise such betrothal or reject it?

The other difference between the two Codes is the duration of a betrothal. According to the Amhara Regional State Family Code, a betrothal is valid for two years.[108] On the other hand, a betrothal is valid only for a year under the Oromia Regional State Family Code.[109] What should be the fate of a betrothal concluded in the Amhara regional state if the parties move to the state of Oromia after a year but before the end of the two years period prescribed by the

[105]In the US, different approaches have been suggested as to what choice of law rules should apply to international conflict of laws. The first line of argument demands the application of national laws in every international conflict of laws cases. This argument primarily rests on the idea that decisions in an international conflict of laws may affect the foreign relations power of the federal government. The proponents, therefore, suggest that the federal common law must supersede state laws. On the other hand, the second line of argument demands the application of state laws if the case has arisen under such law and its application does not affect the foreign relations power of the federal government. Proponents of the second approach argue that a significant portion of international conflict of law cases can be properly handled by applying state laws. In Nafziger words: "Just because a case is international does not mean that the foreign relations or other interests of the federal government are affected significantly enough to replace the normal application of state law. In fact, they usually are not." Nafziger, *supra* n 97, 67–72.

[106]Article 5 of the Amhara Regional State Family Code Approval Proclamation No.79/2003, *Zikre-Hig Gazetta*, 8th Year, No. 3.

[107]Article 11 of the Oromia Regional State Family Code, *Megelete Oromia*, Proclamation. No.69/1995.

[108]Article 6 of the Family Code of the State of Amhara, Proclamation 79/2003.

[109]Article 13 of the Family Code of the State of Oromia of Proclamation No. 69/1995.

Amhara Regional State Family Code? Should the Courts of the Oromia Regional State reject such betrothal on the ground of the lapse of the one year period prescribed by the Oromia Regional State Family Code or give it effect by displacing such law and applying the Amhara Regional State Family Code?

The degree of matrimonial kinship they prohibit is the other difference between the two Codes. The Oromia Regional State Family Code prohibits marriage within seven degrees of collateral consanguinity.[110] On the other hand, the prohibition under the Amhara Regional State Family Code is limited to the second degree of collateral consanguinity.[111] Therefore, a marriage validly concluded in the State of Amhara may not be so under the Oromia Regional State Family law.[112] These and other issues that arise out of the disparity of state laws require state private international law rules which provide the courts with answers.

The Ethiopian Constitution recognises the freedom of movement and choice of residence.[113] It also recognises the right to marry and found a family.[114] However, the disparities of the laws of the states and inconsistent treatment of disputes may unduly curtail these constitutional rights.[115] To obviate the chilling effects of the diversity of their laws on the enjoyment of constitutional rights, the states may use private international law rules. Among other things, the Constitution requires the states to respect and enforce human rights it recognised.[116] Through private international law rules, the states may ensure consistent treatment of disputes. Specifically, choice of law rules may provide legal bases to exclude the law of the forum and apply the law of another state which may, in particular cases, allow giving effect to human rights of the concerned parties. Therefore, the states should use private international law as an instrument of human rights protection.[117]

F. Limitations on state private international law jurisdictions

The discussions in the foregoing sections reveal the reach of the legislative and judicial jurisdictions of the states over private international law matters. However, their jurisdictions should be checked through overarching norms intended to ensure tolerance of differences and fairness to parties involved in interstate disputes. Exorbitant rules with no deference to the laws and judicial decisions

[110]Article 27(2) of the Family Code of the State of Oromia, Proclamation No. 69/1995.
[111]Article 19(2) of the Family Code of the State of Amhara, Proclamation No. 79/2003.
[112]According to article 49 of the Family Code of the State of Oromia, a marriage concluded in violation of the prohibited degree of matrimonial kinship can be dissolved upon the application of any concerned person or public prosecutor.
[113]Article 18 of the Ethiopian Constitution, 1995.
[114]Article 34 of the Ethiopian Constitution, 1995.
[115]Mills, *supra* n 1, 17.
[116]Article 13 of Ethiopian Constitution, 1995.
[117]Mills, *Supra* n 1, 124–25.

of other states may spoil interstate relations and jeopardise individuals' legitimate interests. To check such irregularities a full faith and credit principle is commonly used in federations such as the US and Nigeria.[118] Lamentably, there is no such requirement under the Ethiopian Constitution.

The major concern in an interstate conflict of laws is the place that should be accorded to the official acts of a sister state. The U.S Constitution requires each state to accord a full faith and credit to the official acts of other sister-states. It provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effects thereof.[119]

The Full faith and credit clause requires the states to accord a full faith and credit to each other's public Acts, Records, and judicial Proceedings.[120] With respect to judicial decisions, the states are required to respect and enforce each other's judicial decisions.[121] The full faith and credit clause, among other things, advances the interests of the states and the Federation at large by welding the states into a united nation.[122]

Coming to the Ethiopian Constitution, there is no constitutional provision which requires the states to recognise each other's laws and judicial decisions. The Draft Proclamation to Provide for Federal Rules of Private International Law under article 8 provides:

> In inter-state matters, full faith and credit shall be given to the laws and judicial proceeding and judgments of the competent courts of a state by all other states.

Sadly, this provision does not offer any solution as it is just a draft. However, even if enacted as a law, there is no constitutional basis which allows the federal government to introduce such provision. Among other things, the Constitution requires the

[118]Article IV section 1 of the U.S Constitution and Nigerian Sheriffs and Civil Process Act 1990, s. 105(2) and 108.
[119]Article IV section 1 of the U.S Constitution.
[120]*See* Stephen E Sachs, "Full Faith, and Credit in the Early Congress" (2009) 95 *Virginia Law Review* 1203, 1229.
[121]Tomas M Joraanstad, "Half Faith, and Credit?: The Fifth Circuit Upholds Louisiana's Refusal to Issue a Revised Birth Certificate" (2013) 19 *William & Mary Journal of Women and the Law* 421, 42; Douglas Laycock, "Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law" (1992) 92(2) *Columbia Law Review* 252, 289.
[122]Pamela K Terry, "E Pluribus Unum? The Full Faith and Credit Clause and Meaningful Recognition of Out-of-State Adoptions" (2012) 80 *Fordham Law Review* 3092, 3105–107; see Joraanstad, *supra* n 121 at 424.

federal government to respect the powers of the regional states.[123] However, the non-existence of a full faith and credit clause in the Constitution or an agreement among the regional states may not be reasonably invoked as a ground to deny the legal force of the official acts of a sister-state. Let alone in an interstate conflict of laws, in the case of international conflict of laws, it is not always a binding law that serves as a basis to accept the laws and judicial decisions of another nation.[124]

G. Conclusion

The 1995 Ethiopian Constitution establishes a federal nation in which power is divided between the federal government and the states. The states, as well as the federal government, have the power to enact private law. This entails private international law disputes connected with state private laws on one hand, and laws enacted by the federal government on the other. In light of the constitutional division of power and the purposes of private international law, the states should wield cases connected with their private laws. Among other things, the states may enact private international rules and designate one of their courts to entertain private international law disputes.

In total disregard to the Constitution, the Federal Courts Proclamation and the decision of the Federal Supreme Court's Cassation Division in the case of *Meseret Alemayehu V. Emushet Mulugeta*, render the Federal High Court the holder of an inherent jurisdiction over disputes connected with state laws. Ironically, the Division ruled that the state courts' power to adjudicate cases connected with their own laws emanates from their delegation to exercise the jurisdiction of the Federal High Court.

The idea that the states need to have the delegation of the Federal High Court to adjudicate cases connected with their private laws is a frivolous myth. This myth, invented by the Federal Courts Proclamation and the Federal Supreme Court, usurps the constitutional jurisdictions of the states. Hitherto, it has stifled the very idea of state private international law; the federal government is viewed as the sole wielder of private international law jurisdiction. However, this postulate is fundamentally flawed as it is entirely at odds with the Constitution and the bases of private international law.

There are various constitutional and logical justifications which allow the states to exercise legislative and judicial jurisdictions over cases connected with their private laws. First, such jurisdiction naturally emanates from their power

[123] Article 50(8) of The Ethiopian Constitution provides: "The Federal Government shall … respect the powers of the States."

[124] The Canadian constitution has no full faith and credit clause. However, the Canadian Supreme Court, in *Morguard Investment Ltd v. De Savoye* (1990), introduced a full faith and credit principle. Therefore, the treatment of inter-state cases is analogous to that of US and Canada whose constitutions have a full faith and credit clause. See Mills, *supra* n 1, 168.

to enact private laws: their power to enact a primary substantive law subsumes enacting the parasitic private international law rules. Second achieving the ends of private international law such as justice, predictability, and uniformity requires the states to have discrete private international law systems consonant with their private laws. Last, the protection of certain human rights enshrined in the Constitution requires the states to have private international rules. Among other things, ensuring freedom of movement within the federation requires consistent treatment of like cases. Through the choice of law rules, the states may obviate the chilling effects of the heterogeneity of their laws.

The way forward is to overturn the myth and reshape the Ethiopian private international law architecture based on the constitutional division of power. The federal legislature and the Supreme Court should swallow their pride and countermand their flawed dictates. On the other hand, the states should enact private international law rules and designate one of their courts to handle private international law disputes connected with their laws. In crafting their private international law rules, the states should take into account the ends of private international law and human rights recognised by the Constitution. Among other things, the state private international law rules need to ensure "justice" and predictability.

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