

# **A Federation Without Federal Credentials: When Politics Trumps Law**

*Dr. Yonatan Fessha*

## **Abstract**

This paper discusses how federalism in Ethiopia has eventuated a dominant-party state. For any observer of Ethiopian federalism, it is clear that there is a wide gulf between the Constitution and the practice. Contributing to the lukewarm attitude towards constitutional federalism is the fact that the country, even after the adoption of the Constitution, has not seen the emergence of independent social, economic, and political forces that champion vertical constitutionalism and challenge the constitutionality of government actions. A few years ago, hopes were high that true federalism might finally arrive in Ethiopia. The government introduced a series of political and legislative reforms that suggested that the days of pseudo-federalism might be a thing of the past. That may no longer be evident. Today, it is not clear whether the country is capitalizing on the early reforms of 2018 or relapsing into its days of federalism without federal credentials.

## **Introduction**

Many of the contributors of this volume focus on federalism-related issues. Moreover, they do not dwell on uses of federalism beyond the accommodation of diversity. This is despite the fact that this volume is about constitutional issues more broadly. The constitutional discourse in Ethiopia is reduced to federalism. This should not be surprising; I am also a victim of that bias. But my focus is not on the federal design and its impact on the accommodation of diversity. My paper focuses instead on the operation of the federation. My argument, which is not new,

is that we might have a federal constitution, but we are not living in a federation. What we have in Ethiopia today is a federation without federal credentials.

Let me start by outlining what the Constitution promises in terms of the federal system.

## 1. The Promise of a Robust Federation

The picture that emerges from a reading of the Constitution is one of a dynamic and robust federation. The Constitution promises a model of federalism that features strong autonomous subnational units. For any keen observer of Ethiopian federalism, however, that is far from the reality: “state governments are expected to conform to decisions taken at the federal level. In many cases, states simply copy federal policies, including the Constitution. Federal development programs are also replicated. Government reforms are usually first implemented at federal and a little later at state level.”<sup>1</sup>

The gap between practice and what the Constitution promises casts serious doubt on the federal qualities of the federation. Why is this federation functioning as a centralized system?

## 2. Federalism in a Dominant-Party State

In the past, the centralized manner in which the federation operated was, to a large extent, a function of the fact that it was a federation operating under a dominant-party state. To be precise, there is no direct correlation between a dominant-party state and centralized federations. The fact that one political party controls the federal government and the states is not necessarily concomitant with a centralized federal system. A dominant party that is itself decentralised and

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<sup>1</sup> Yonatan Fessha, “A Federation without Federal Credentials: The Story of Federalism in a Dominant Party State” in Charles M Fombad and Nico Steytler (eds.), *Decentralization and Constitutionalism in Africa* 133 (2019).

committed to the values of federalism can leave ample room for its subnational branches to develop political structures that defend and advance subnational interests.

But EPRDF followed a very centralised decision-making process that was guided by the principle of “democratic centralism.” There was a strong level of alignment between the party structure and the governmental structure.

Democratic centralism has been dying slowly. Although the ruling party has transformed itself into a single national party, this has not translated into a federation that is ruled by a coherent and cohesive party. In fact, the country did not see the level of intergovernmental disputes that it is currently witnessing even during the days when the ruling party was, at least formally speaking, a coalition of four parties that controlled four state governments. In the absence of a coherent and cohesive party structure, the federal government has relied on its blunt coercive powers to direct state governments. In the present moment, it is not uncommon to hear the federal government sending the national army to the capitals of state governments to achieve its goals.

In addition, the federal government—both today and in the past—employs various mechanisms to ensure that state governments toe the line of the national government.

### **2.1. Advisers or “kingmakers”**

In the early days of the federation, the federal government ensured that state governments follow the line of the national government by dispatching the so-called advisers to the states from the Regional Affairs Bureau of the Prime Minister’s office. The role of these advisers was not “described in official decision-making documents.”<sup>2</sup> They did not have formal political authority, but they

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<sup>2</sup> *Ibid.*

exercised considerable influence over the internal political affairs of state governments.

Around 2001, a federal ministry was established with a mandate to regulate federal-state relations: the Ministry of Federal Affairs (MoFA). The Ministry continued the practice of deploying “technical advisers” to the country’s “peripheral regions.” In many respects, their mode of engaging with state governments has not changed. What has changed, however, is that the MoFA no longer stations advisers in the state capitals on a semi-permanent basis. Instead, advisers “regularly shuttle between their headquarters in Addis Ababa and the capital of the respective regions.”<sup>3</sup>

However, I believe the federal government no longer uses these mechanisms to direct state governments. If they are used, at least they do not feature prominently. The Ethiopian state no longer has a cabinet position resembling or having the same stature as the MoFA. It has been reduced to a desk or a department within the Ministry of Peace. At the same time, the federal government continues to use other mechanisms to ensure that state governments follow its directions. Some of the mechanisms are old; some are new.

## **2.2. Acting under dictation**

When the federal government does not rely on deploying advisers, it undermines vertical constitutionalism by dictating to state governments what policies and laws they should enact and what actions they must take. As you might know, dictation occurs when subnational governments are not exercising powers on their own accord but rather doing so according to the instructions of the national government or the ruling party. In these cases, the real decision maker is not the subnational government but rather the national government or the ruling party.

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<sup>3</sup> *Ibid.*

In the past, a good example of state governments acting under the dictation of the federal government consists of a major reform that affected the federal nature of the state. The federal Constitution focuses on the division of power between the federal and state governments and says little about the power of lower levels of government. It leaves determinations about the transfer of power by state governments to lower levels of government up to the states. Local governments, according to the Constitution, fall under the jurisdiction of state governments. In 2001, what is generally known as “second-level decentralisation” swept the states. One state after another amended its constitution so that powers and functions could be transferred from state governments to lower levels of government. While the move was meant to empower local communities, it also undermined subnational autonomy. The uniformity with which the reform was undertaken indicates that it was dictated by the federal government and state governments were required to meekly comply with it.

More recently, the resignation of some of the leaders in the Sothorn Nations, Nationalities and People’s Region (SNNPR) from their positions in state and local governments, after being asked publicly by the federal prime minister to do so, suggests that state officials are again acting under the dictation of the federal government. The fact that the ruling party of the state of Afar, after meeting with the prime minister, agreed to change the leadership of their state government is another example of dictation.

Subnational units in a federation are supposed to be “laboratories of democracy” where different policy initiatives are tested. Because they are acting uniformly under dictation, the states in Ethiopia are not laboratories of democracy but rather agents for implementing the orders of the federal government. The outcome is that state governments are functionally accountable to the federal government rather than to the state councils to which they are politically accountable.

### 2.3. Not-so-subtle Interference

The interference of the federal government in the autonomy of state governments is not always so subtle. It does not limit itself to dictating to state governments how they should manage their processes and institutions. The federal government has undermined state autonomy by formulating federal policies, adopting legislation, or taking actions on matters that are reserved to the states.

Although the organization of local governments, as mentioned earlier, is left to the states, this is not how it functions in practice. For example, Ethiopia's Sustainable Development and Poverty Reduction Programme, a federal document adopted in 2002, declares the devolution of a number of responsibilities from regional governments to Woredas and Kebeles. Despite the absence of provisions in the federal Constitution mandating that state governments transfer financial grants to lower levels of governments, this federal policy paper requires state governments to transfer "not less than 50% of their annual revenue as unconditional block grants to Woreda."<sup>4</sup>

This flagrant disregard for the autonomy of the states is also evident in the manner in which the federal government responds to unrest in the different parts of the country. Long before the House of Federation declares a federal intervention, the federal army is often deployed to troubled areas. Take, for example, the intervention of the federal government in the state of Somali that led to the removal of the state government. When the federal government ordered its army to take over key positions in Jigjiga, it was clear that it was not doing so upon the request of the state government. It was only after the federal government managed to remove the president of the state that it declared that the National Defence Forces had taken over the security-related responsibilities from the state upon the request of the new acting state president. This was an attempt to give a badge of constitutional federalism to an action that is already under way.

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<sup>4</sup> *Id.* at 142, fn. 39.

The projects that fall under the Dine for Sheger and Dine for Ethiopia initiatives, a nationwide program by the federal government, seem to also blur the division of responsibilities between the federal and state governments. The constructions of resorts, parks, and recreation centers do not feature in the long list of powers of the federal government. Neither is tourism the constitutional responsibility of the federal government. The Constitution does not expect the federal government to worry about the rivers of Addis.

Yet these are not the only areas where the separation of responsibilities is being blurred. We have witnessed leaders and representatives of state governments negotiating and signing a peace agreement with armed forces. Yet, declaring a war and making a peace deal is an exclusive responsibility of the federal government. We have also seen reports of a delegation of a state government visiting, inviting, and receiving a president of a foreign country—basically conducting foreign relations, a functional area that is exclusively reserved for the federal government.

To be precise, the federal government does not see these as interferences in federal affairs as they are probably done with its knowledge and its active or passive participation. But there is serious confusion surrounding mandates that are driven by politics. The state government engaging in foreign relations was not necessarily as motivated by the desire to promote harmony between the two countries rather than by the desire to score political points against a domestic opponent. It is a case of politics trumping law and sacrificing constitutional federalism.

### **3. Explaining the Gap Between the Constitution and Practice**

I have explained how the absence of both constitutionalism and a commitment to constitutional federalism has led to the wide gap in Ethiopia between the Constitution and constitutional practice. It is equally important, however, to identify the conditions that facilitate this rampant disregard of the basic principles of constitutionalism.

### **3.1. The making of the Constitution**

The Ethiopian Constitution did not emerge from a comprehensive and a broadly representative “bargaining.” The process was rather flawed in that it was dominated completely by ethnicity-based political formations.

Because the Constitution was not the product of a broadly representative bargaining process, its enforcement is not a top priority for some political parties. In fact, what they would like to do is engage in “large-scale constitutional overhaul,” if not introduce a completely new constitution.

It is difficult to argue that political parties in Ethiopia take the federal nature of the state seriously. Most major political parties focus on obtaining a place at the national table or, if possible, capturing the center. None of the relatively well-known parties has defined the states as their primary and exclusive target. Even the ethnicity-based parties do not focus on capturing subnational power. This explains why many of them are often busy creating coalitions with other parties with a view toward being a strong contender for the trophy of national power. They do not seem to appreciate that controlling subnational institutions provides them with the resources and space necessary to mount a formidable challenge in national elections.

### **3.2. The absence of the autonomous organs of civil society**

What happens in the arena of political competition is, of course, not the only variable that explains the gap between the Constitution and practice. Equally important is the autonomy of the organs of civil society. Independent and vibrant social forces are crucial for entrenching constitutionalism. Through advocacy and litigation, civil society organisations (CSOs) can help check/police the actions of the central government. Unfortunately, the situation in Ethiopia is not encouraging.



There are few professional and membership associations in Ethiopia. Thanks to the 2009 Charities and Societies Proclamation, the activities of CSOs was significantly curtailed. Although the restrictive law was subsequently abolished, the four years following abolition have not seen an increase in the active role of CSOs.

The existence of CSOs is not sufficient on its own. It is equally important that the space for civil society is not dominated by CSOs that advance particular agendas. Equally important as well is that there are no CSOs with diverse agendas or CSOs that champion constitutionalism and rule of law irrespective of the nature of government action, the section of the population that is impacted, or the elements of the Constitution that are implicated. If a civil society that claims to stand for rule of law and constitutionalism manages to bring a case before the Council of Constitutional Inquiry challenging the ethnic aspects of the federal arrangement, there is no reason why it or others cannot take the initiative to challenge a decision of the government that violates other laws and the Constitution.

The absence of autonomous organs of civil society and CSOs that are diverse in their orientation or are not partisan is, hence, a serious matter, as they are an important social force for challenging the federal government's erosion of subnational autonomy.

### **3.3. A press that is not free**

The absence of credible and independent media is another gap in the set of institutions and social forces that could play a key role in promoting vertical constitutionalism. Of course, media restrictions have contributed to the narrowness of public space. But the media also lack professionalism: "Low standards and partisan agendas taint the credibility of the private press".<sup>5</sup> In the

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<sup>5</sup> International Crisis Group, Ethiopia: Ethnic Federalism and its Discontents, Africa Report No. 153, 21 (2009).

era of YouTubers and social media actors, it is not clear whether Ethiopia has a professional media in the traditional sense.

### **3.4. The umpire that cannot guard the federation**

The other important factor is that a crucial feature of any kind of constitutional federalism is absent, that is, a credible umpire that stakeholders can rely on to police the Constitution. This is again largely because of the unusual model of constitutional review Ethiopia has chosen to adopt.

This unusual model of constitutional review that excludes courts from constitutional adjudication and gives the power of constitutional review to a political body is problematic. It leaves the federation without a competent, impartial, and suitable umpire that can police the Constitution. That is likely why its performance in the recent widely-followed case involving the postponement of the election was disappointing.

## **Conclusion**

The ethnic nature of the federal design has definitely contributed to the tensions and the forms that conflicts take in Ethiopia. Yet, the twenty-seven-year-old federal Constitution has, after all, not been fully brought to life. Ethiopia might have a constitution, but strictly speaking, the country is not a federation. The gap between the Constitution and practice makes it difficult to determine with certainty whether the federal solution has helped alleviate or exacerbated ethnic divisions. It also makes it difficult to sustain the argument that the current challenges are attributable to the federal nature of the state: it is difficult to blame

federalism when the federal credentials of the state are in question. Perhaps fidelity to the federal Constitution should be the starting point.<sup>6</sup>

## DISCUSSIONS

### *Dr. Zelalem Mogessie Teferra*

Yonatan, in your conclusion, you made a point that we have to be loyal to the Constitution in order to resolve the existing national contestations; however, the Constitution's legitimacy itself is being continuously questioned. If the Constitution is not capable of serving us as a common ground, then how can we be loyal to it? I do not see how, in this context, the call for loyalty to the Constitution would help us forge a harmonious future.

My second question, is the issue in Ethiopia really an issue of self-expression or is it a fight for the center? Self-autonomy, for some, seems to mean control of the center exclusively. The discussion of federalism in Ethiopia sometimes seems like a race to acquire the center. Given the experiences we had at least in the last three decades, there is therefore a need for reconsidering our discussion and dialogue on federalism.

### *Dr. Sisay Alamahu*

I have been curious about the way conflicts in Ethiopia are characterized, mostly by foreign scholars and media outlets: first, as a fight for the vision of the

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<sup>6</sup> Fidelity to the federal Constitution, of course, presupposes upholding the rule of law and democratising the state. Free, fair, and competitive subnational elections must become a more permanent fixture of the political landscape. Autonomous civil society forces must be given the space and support to exercise their role, including questioning the propriety and constitutionality of government actions. A competent and impartial system of constitutional review could take the form of judicial review, or a more powerful Constitutional Inquiry Council that does not have to refer its decisions to a political body for approval. Perhaps only then will subnational democracy flourish and the federal experiment in Ethiopia fully realise its potential.

country—unitarists and federalists; and second, characterizing the conflict in Tigray as a fight for more autonomy. But what I understand from your presentation is that there is no fight over vision between the warring parties, because the constitutional credential, or “federal credential” as you call it, shows that both had and have a unitary vision for the country in terms of practice. So, you have debunked that argument implicitly. But my question to you is: can the Constitution or the federal architecture that we have today survive a democratic dispensation? I ask this because you concluded your presentation by saying that we do not have enough evidence to say whether the federalism we have today works or not. Considering the level of autonomy, resources, institutions (including the special forces) that the regions have, and also the level of competition between ethnic groups that the present political architecture has promoted over the years, can the present constitutional architecture survive a democratic dispensation?

***Dr. Mulugeta Mengist***

I agree with your conclusion that unconstitutional centralization of power is one of the features of the way the Constitution has been implemented over the years. I also agree with the factor you mentioned as the reason for the over-centralization practice. But I want to mention one additional important factor: economics. In the context of the power sector for example, there is no constitutional or economic ground for a single entity to have the mandate to provide power services to 100 million people. And yet we see the federal government asserting that power and protecting it very jealously. And the reason for this is not politics, but economics: that is rent-seeking economics. Since there is quite a large amount of money involved in the power sector, the federal government is not willing to let it go to regional states. This is one important factor to note.

However, as much as there is unconstitutional centralization of power, there has also been neglect and fragmentation of constitutional power. For instance, the protection of human rights is entirely left to regional states. Because there is no money in that sector, it is not given much attention. But in theory that is one of the foci of a federalist state which strives to create a single economic and political

community. The Ethiopian federal government also makes broad delegation of power to regions without any assessment of regional capacity, or without any supervision and even without providing a constitutionally required financial assistance. Federal legislation governing land law, water law, forest law, and the like are left to the regions like a blank check. However, you see a departure in approach when it comes to mining laws. So, with land, water, or forests, regions can do as they wish but regarding mining, the federal government wants to assert its power. Therefore, yes unconstitutional centralization of power is politically driven but the economic factor must also be considered. Otherwise, the federal government's attempts to control money results in a suboptimal implementation of the federal arrangement as enshrined in the Constitution.

*Dr. Mohammed Dejen*

The current Constitution of Ethiopia is criticized for not being implemented, not for lack of devolution of power to subnational units. The Constitution has established one of the most devolved federal systems in the world. But because of the culture of democratic centralism that was entrenched in the EPRDF era, the Constitution was not implemented properly. However, taking this fact at face value and saying that it lacked democratic credentials because of a deficient practice downplays “the original sin” of the Constitution. So, I think, we cannot blame the lack of proper practice alone for what has gone wrong.

