

## ABHANDLUNGEN / ARTICLES

### Federal Theory and Federalism in Africa

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**Abstract:** This article examines the African experiment with federalism in light of classic federal theory with the objective of identifying and illuminating patterns of convergence and divergence and the consequences thereof. Classic federal theory offers explanations for the origin, formation, structures, and success and failure of federalism. This article, drawing from the experience of Nigeria, Ethiopia, and South Africa, reveals that while federalism in Africa shares the forms, structures, and discursive practices of classic federal theory, its normative articulations and institutional frameworks are animated by syncretic configurations. As a result, federalism transforms its purpose, fundamental elements, and operations in Africa. As federalism follows new pathways in Africa, this article shows how its system of operation and standards of assessment take a similar course. Against the central ethos of classic federal theory, federalism in Africa manages to operate and, to the extent possible, deliver its purpose mainly without liberal constitutionalism. This article argues that if federalism has to ensure the practice of constitutional democracy in Africa then democratic values, human rights, and constitutional considerations should animate its normative and institutional underpinnings as in classic federal theory.

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#### A. Introduction

Federalism has been proposed as an effective system with the normative appeal and institutional sophistication to manage complex socio-economic, cultural, and political issues at

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national, regional, and international levels.<sup>1</sup> Since its first introduction in the United States, federalism has offered a novel approach for the institution of sovereign yet interdependent governments in a state. Its success in the United States has inspired many nations worldwide, including and also regional organizations such as the European Union, to follow a similar course or to incorporate federalist principles and practices.

Despite these receptions, African states are either less interested in, or have a general distaste for, federalism. Even the word itself is an “anathema” in the lexicon of African politics.<sup>2</sup> Out of the 54 independent states on the continent, only a handful of them have adopted federalism. While Nigeria, Ethiopia, and South Africa are widely recognized African federal states, the Union of Comoros, Sudan, South Sudan, the Democratic Republic of Congo, and Somalia may also be considered federalist states.<sup>3</sup>

The purpose of this article, however, is neither to explain why federalism is not adopted by many African states nor to make a normative case for its suitability to these states. Rather, it is to explore and examine the federal experiment in Africa, by taking Nigeria, Ethiopia, and South Africa as comparative case studies, examining their experience in light of classic federal theory, which developed from the experiences of established systems such as the United States, Canada, Australia, and Switzerland. The investigation aims to illuminate both the reasons for, and ways of, convergence and divergence between classic federal theory and federalism in Africa, and the consequences thereof.

In order to compare and contrast the African federal experiences with established federal systems, the first section presents the origin, purpose and fundamental elements of federalism and its reasons for success and failure, as developed in classic federal theory. The second section explores how federalism takes new pathways in Africa both in its original purpose and institutional realization. The third section presents how the fundamental elements of federalism in Africa are a blend of syncretic convergences, adaptations, and innovations. Building on this, the final section argues why rethinking the classic standards for federalism’s success and failure is necessary and discusses how this helps to improve the performance of federalism in fostering constitutional democracy in African federal states.

## **B. Classic Federal Theory: Origin, Purpose, Fundamental Elements, Success and Failure**

It must be clear from the outset that no one theory explains the origin, purpose, and operation of federalism everywhere. There are numerous theories of federalism as there are fed-

- 1 *Andrew Arato, Jean Cohen and Astrid von Busekist*, Introduction, in: Andrew Arato, Jean Cohen and Astrid von Busekist (eds.), *Forms of Pluralism and Democratic Constitutionalism*, New York 2018, p.5–8.
- 2 *Rotimi Suberu*, *Federalism in Africa: The Nigerian Experience in Comparative Perspective*, *Ethnopolitics* 8(1) (2009), p. 67.
- 3 *Adem Kassie Abebe*, *Umpiring federalism in Africa: Institutional mosaic and innovations*, *African Studies Quarterly* 13 (4) (2013), p. 54.

eral states. Multiple theories can even emerge from the experiment of federalism within a single polity. The use of classic federal theory in this article, therefore, refers to a constellation of federal theories that emerge from the experiences of established Western federal democracies, which aimed to institutionalize and practice liberal constitutionalism.

Classic federal theory, drawing from the experiences of established federal systems such as the United States, Canada, Australia, and Switzerland, concerns itself mainly with explaining the fundamental elements, the original logic, the formation, and the successes and failures of federalism. The fundamental elements of federalism originate from its very conceptions or definitions. In this respect, offering the conceptions or definitions of the three towering figures in federalism is sufficient for our present purposes. William Riker defined federalism as an arrangement where the “(1) two levels of government rule the same land and people, (2) each level has at least one area of action in which it is autonomous, and (3) there is some guarantee ... of the autonomy of each government in its own sphere.”<sup>4</sup> Daniel Elazar defined federalism simply as “self-rule plus shared rule” in a polity.<sup>5</sup> Ronald Watts, like Elazar, defined federalism as “the advocacy of multi-tiered government combining elements of shared-rule and regional self-rule.”<sup>6</sup> From these definitions and the scholarship on federalism,<sup>7</sup> we can draw the following fundamental elements: federalism at a minimum requires (a) at least two tiers of government endowed with a sovereign power on some matters, (b) a non-unilateral amendable supreme written constitution with horizontal and vertical division of power, (c) representation mechanisms of self-rule and shared rule, and (d) an umpire.<sup>8</sup>

With respect to the original logic or purpose of federalism, scholars offer four major explanations why states adopt a federal structure. The first is provided in the *Federalist Papers* for the ratification of the United States Constitution. According to the *Federalist Papers*, the Union should opt for federalism as it responds to military necessity and ensures security (the *Federalist* No. 2 & 15), provides individual liberty, prosperity, and freedom, and guarantees a democratic form of government (the *Federalist* No. 9, 10, & 17).<sup>9</sup> The *Federalists’* account is a widely accepted explanation of why states should adopt federalism. In this regard, Elazar further develops the normative appeal of federalism. He argues that federalism maximizes individual liberty, equality, and freedom, and ensures and enhances democratic self-government in a polity.<sup>10</sup> He contends that federalism aims to insti-

4 William H Riker, *Federalism: Origin, Operation, Significance*, New York 1964, p.11.

5 Daniel J Elazar, *Exploring Federalism*, Alabama 1987, p.12.

6 Ronald Watts, *Comparing Federal Systems*, Montreal 2008, p.8.

7 Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Inquiry*, Toronto 2015, p.31–36.

8 Watts, note 6, p. 9.

9 Alexander Hamilton, John Jay, and James Madison, *Federal Theory*, in: D Karmis & W Norman, *Theories of Federalism: A Reader*, New York 2005, p. 105–133.

10 Elazar, note 5, p.83–91.

tute a workable political arrangement based on a just moral order.<sup>11</sup> Hence, according to this view, the superiority of federalism, as a system of state organization derives from its ability, to bring about workable polity with a just moral order, and this explains why states have adopted or should adopt federalism.

The second theory focuses on the existence of external military or diplomatic threat for the origin of federalism. The chief proponent of this theory is Riker. He rejects the assertion that states adopt federalism to protect liberty and ensure democracy. He posits that federalism is a result of a bargain between politicians who offer the bargain and those who accept it.<sup>12</sup> According to him, a federal bargain is possible when those “who offer the bargain desire to expand their territorial control, usually either to meet an external military or diplomatic threat or to prepare for military or diplomatic aggression or aggrandizement,” and those “who accept the bargain, giving up some independence for the sake of union, are willing to do so because of some external military-diplomatic threat or opportunity”.<sup>13</sup> Thus, for Riker, the cumulative existence of these conditions, that is “the expansion” and “the military condition,” creates federalism.<sup>14</sup>

The third theory locates the origin of federalism in the disjuncture between political identity and the geography of a polity. Malcolm Feeley and Edward Rubin advance this theory when they suggest that states adopt federalism as a result of a “tragic compromise” to mediate the disjuncture between political identity and geographic governance. Unlike the first theory, which considers federalism as a means to minimize human vice in a political community, Feeley and Rubin consider “federalism as a tragic aspect of life” as it is born of the misfortunes of “conflicts in political identity.”<sup>15</sup> According to Feeley and Rubin, the fundamental reason for the origin of federalism is an attempt “to resolve conflicts among citizens that arise from the disjuncture between their geography based sense of political identity and the actual or potential geographic organization of their polity.”<sup>16</sup> In the absence of these conditions, either federalism cannot arise in the first place or, if it does arise, it will become vestigial.<sup>17</sup>

The fourth theory is the institutional infrastructure theory that attributes the origin of federalism to the level of institutionalization and to the infrastructural capacity of subunits for governance. Daniel Ziblatt, in a departure from comparative federalism and by a thorough investigation of the state formation processes in Germany and Italy, argues that the origin of federalism is not so much related to the military power of those who offer the fed-

11 Ibid, p.104.

12 *Riker*, note 4, p.12.

13 Ibid.

14 Ibid, p.13.

15 *Malcolm Feeley and Edward Rubin*, *Federalism: Political Identity and Tragic Compromise*, Ann Arbor 2009, p.39.

16 Ibid, p.38.

17 Ibid, p.38–39.

eral bargain as Riker argued; rather, it is related to the state-society dynamics that the subunits find themselves at a critical stage of state formation. For Ziblatt, “federalism is possible only if state building is carried out in a context in which the preexisting units of a potential federation are highly institutionalized and are deeply embedded in their societies- and hence are capable of governance.”<sup>18</sup> This is due to the fact that “[o]nly subunits with high level of infrastructural capacity can deliver both to the core and the subunits the gains that were sought from state formation in the first place.”<sup>19</sup> Without this, he argues, the political core will absorb all the subunits to form a unitary state.<sup>20</sup>

Regardless of the different rationales for the origin of federalism, it is formed in three major ways. As Watts observes, the first is through the aggregation of former separate subunits, the second is through devolution from a former unitary state, and the third is through a combination of aggregation and devolution.<sup>21</sup> Alfred Stepan reduces federal formation into two processes: i.e. Coming-together federalism, and Holding-together federalism.<sup>22</sup> While Coming-together federalism refers to the formation of a federal state from prior sovereign states, Holding-together federalism refers to the formation of a federal state from the preexisting subunits in a former unitary state.<sup>23</sup> The classic examples for Coming-together federalism include the United States, Switzerland, and Australia, while many post-Second World War federal states such as Nigeria and Belgium are Holding-together federalism, whereas Canada and India combine the features of both Coming-together and Holding-together federalism.<sup>24</sup>

The other important theme in federalism studies is why federalism succeeds in some states while failing in others. Although approaching federalism in terms of success and failure is contested, the durability or longevity of the federal system in itself and the achievement of the original objectives of federalism stand out as major parameters against which success and failure can be measured.<sup>25</sup> While durability can be relatively easy to measure, as its essential question is whether the federal system still exists, measuring the achievement of the original purpose is extremely complex and difficult. This is because not only may every federal system have different purposes to achieve, such purposes and the mech-

- 18 *Daniel Ziblatt*, Rethinking the Origins of Federalism: Puzzle, Theory, and Evidence from Nineteenth-Century Europe *World Politics* 57 (1) (2004), p.71.
- 19 *Ibid.*
- 20 See *Daniel Ziblatt*, *Structuring the State: The Formation of Italy and Germany and the Puzzle of Federalism*, Princeton 2006. .
- 21 *Watts*, note 6, p.65.
- 22 *Alfred Stepan*, Federalism and Democracy: Beyond the U.S. Model, *Journal of Democracy* 10(4) (1999), p. 22.
- 23 *Ibid.*
- 24 *Watts*, note 6, p.65.
- 25 *Michael Burgess*, Success and Failure in Federation: Comparative Perspectives, in: Thomas J Courchene and others (eds.), *The Federal Idea: Essays in Honour of Ronald L. Watts*, Montreal 2011, p.194–204.

anisms for achieving them are embedded in the socio-economic, cultural, and political context of each federal system.<sup>26</sup> Furthermore, these contexts are dynamic and the assessment of success and failure along these lines will be relative and contingent in time and place.<sup>27</sup> Bearing this in mind, scholars offer some reasons for the success and failure of federalism.<sup>28</sup> After a careful review of the comparative federalism scholarship, Michael Burgess considers the commitment of the citizenry and the political class to the federal system, the practice of constitutionalism according to the federal spirit, and the existence of liberal democracy, among others, as the main reasons for federalism's success.<sup>29</sup>

### C. The Purpose and Formation of Federalism in Africa: New Pathways

The original logic of federalism in Africa significantly differs from that offered in classic federal theory. Indeed, the motivations for African states to adopt and maintain federal arrangements are not explained or captured fully through classic federal theory. Unlike the account of American federalism developed in the *Federalist Papers*, even if African federal states aspire to have a democratic system that ensures individual liberty, freedom, and prosperity (as is evident from their constitutional histories), they do not consider federalism to be a superior government arrangement for achieving these purposes. By the same token, there were no external military threats or opportunities that set Riker's federal bargain in motion in these states.

Although the theory of federalism as emerging from a tragic compromise (accommodating a disjuncture between political identity and the geographical aspect of a polity) has some relevance for Africa, it cannot explain why only *these states* adopt federalism, as this feature of disjuncture is common to most of sub-Saharan Africa, as territories were arbitrarily drawn by colonial powers. Even more, as the Nigerian political sociologist Peter Ekeh observed, such disjuncture runs deep in Africa. As the colonial state did not pay attention to the geography of precolonial African societies, the African postcolonial state hosts "two publics" rather than one public as states in the West. The first public is a primordial public based on "primordial groupings, ties, and sentiments [that] influence and determine the individual's public behavior."<sup>30</sup> This public is mainly based on ethnic affiliations. If Ekeh is correct, there are numerous primordial publics as there are ethnic groups within a state. The second public is the civic public implanted by the colonial state and is based on the civil

26 See *Thomas M Franck*, *Why Federations Fail: An Inquiry into the Requisites for Successful Federalism*, New York 1968.

27 Burgess, note 25, p. 194.

28 See *Riker*, note 4, Chapter 3, 4.

29 Burgess, note 25; *Richard Simeon*, *Preconditions and Prerequisites: Can Anyone Make Federalism Work?*, in: *Thomas J Courchene and others (eds.), The Federal Idea: Essays in Honour of Ronald L. Watts*, Montreal 2011, p. 213-222.

30 *Peter P Ekeh*, *Colonialism and the Two Publics in Africa: A Theoretical Statement*, *Comparative Studies in Society and History* 17 (1975), pp. 92–93.

structures of the colonial state such as the military, the civil service, and the police.<sup>31</sup> Mahmood Mamdani characterizes the existence of these two publics as the manifestation of the bifurcation of the state into the *native authority* and the *modern authority*.<sup>32</sup> Such disjuncture rather than bringing in federalism as an appropriate form of state organization, it provides the actors of the two publics “the material and ideological tools to live with, live well within, as well as defend the existence of this dual public.”<sup>33</sup>

Similarly, the institutional infrastructure theory cannot explain the formation of federalism in Africa, as the different ethnic groups that find themselves in territorial states have each had their own way of political organization before the advent of colonialism, in which the subunits in African federal states do not have a special institutional infrastructural capacity than any other state in the continent.<sup>34</sup> Instead, the primary purpose for the adoption of federalism in Africa is to accommodate the competing demands of ethnonational groups within a single state. The accommodation of diversity and the maintenance of territorial integrity are the twin justifications for federal formation, while the political strength of ethnonational groups during the constitutional moment is the determining factor. Now, I will explain these points in detail with respect to Nigeria, Ethiopia, and South Africa in this order.

Nigeria was established as a unitary state by the British.<sup>35</sup> The amalgamation of the different parts of Nigeria into a unified state was mainly motivated by economic considerations.<sup>36</sup> Because the aim of the amalgamation was due to this economic motivation, the British colonial rule neither developed common institutions of governance, nor allowed for the integration of the people across Nigeria.<sup>37</sup> As independence approached, regionalism, ethnic and religious differences, and economic concerns took center stage in the political negotiations for self-determination. Representing the main ethnic, regional, religious, and economic groups, the Hausa-Fulani (in the north), and the Yoruba and Igbo (in the south) feared each other’s domination in the post-independence period.<sup>38</sup> Therefore, while the Yoruba and Igbo advanced Nigerian nationalism and pushed for the independence of Nigeria, the Hausa-Fulani were hesitant for fear of a subordinate status in the new political or-

31 Ibid 92.

32 See Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, Princeton 1996.

33 Wale Adebawo, Africa’s “Two Publics”: Colonialism and Governmentality, *Theory, Culture & Society* 34 (2017), p. 76.

34 See Meyer Fortes and Edward Evan Evans-Pritchard (eds.), *African Political Systems*, Oxford 1940.

35 Richard Bourne, *Nigeria: A New History of a Turbulent Century*, London 2015, p.3.

36 Toyin Falola and Matthew M Heaton, *A History of Nigeria*, Cambridge 2008, p.68.

37 Toyin Falola, *The History of Nigeria*, Westport 1999, p.69.

38 Olawale Albert, *Federalism, Inter-ethnic Conflicts and the Northernisation Policy of the 1950s and 1960s*, in: Kunle Amuwo et al. (eds.), *Federalism and Political Restructuring in Nigeria*, Oxford 1998, p.51.

der.<sup>39</sup> For this reason, the Hausa-Fulani rejected the motion for independence in 1956 in the House of Representatives.<sup>40</sup> While the Southern representatives were prepared to travel to the North to campaign for independence, the Northern politicians not only mobilized their people against the campaign, but also revealed a plan for secession.<sup>41</sup>

These multi-layered dynamics created three regional political parties, which aimed to secure the interests of their own regions in the independence bargain and its aftermath. In pursuit of this, the Northern People's Congress of the Hausa-Fulani, the Action Group of the Yoruba, and the National Council of Nigeria and Cameroon of the Igbo negotiated the terms of independence.<sup>42</sup> Within this atmosphere of mistrust, fear, and competition, the potential for a unitary Nigerian state withered away and the adoption of a federal system that holds the three regions together, seemed to be the only option to achieve independence and experience self-government.<sup>43</sup>

Although the cumulative effect of British colonial legacy, pre -and post-independence ethnic politics, and resource and opportunity distribution have not given federalism an easy ride, Nigeria remains committed to the federal idea.<sup>44</sup> Despite changing constitutions, a bloody civil war, and military coups one after another,<sup>45</sup> federalism still has relevance and appeal for many Nigerians as a means to keep their country united.<sup>46</sup> The choice of federalism and its endurance in Nigeria is not explained by its contributions to good government, economic prosperity, and a culture of human rights, as noted in section 5, but is instead due to its normative appeal and institutional framework for ethnonational and religious groups to channel and advocate their interests. This has been true regardless of the theory of government, be it civil/military or democratic/undemocratic.

Although the history of Ethiopia is different from Nigeria,<sup>47</sup> the way federalism emerges and operates, and its continuous appeal is similar. The intellectual articulations and the political actions in the final years of Haile Selassie's imperial rule, on the one hand, and the hijacking of the 1974 revolution by the military junta and its subsequent institutionalization of military socialism and the *Ethiopia first* motto, on the other, were crucial for the birth of the federal idea in 1991. Although the military adopted the prevailing political ide-

39 *Larry Jackson*, Nigeria: The Politics of the First Republic, *Journal of Black Studies* 2(3) (1972), p. 278.

40 *Larry Diamond*, *Class, Ethnicity, and Democracy in Nigeria: The Failure of the First Republic*, Syracuse, NY 1988, p. 48–49.

41 *Ibid.*, p.49.

42 *Richard Sklar*, *Nigerian Political Parties: Power in an Emergent African Nation*, Trenton 2004, p. 87–140.

43 *Sebastine Tar Hon*, *Constitutional Law and Jurisprudence in Nigeria*, Port Harcourt 2004, p.7.

44 *Rotimi Suberu*, *Federalism and Ethnic Conflict in Nigeria*, Washington, D.C. 2001, p. 45.

45 See *Richard Joseph*, *Democracy and Prebendal Politics in Nigeria*, Cambridge 2014.

46 *Ladipo Adamolekun*, *The Nigerian Federation at the Crossroads: The Way Forward*, *Publius: The Journal of Federalism* 35 (3) (2005), p. 398.

47 *Bahru Zewde*, *A history of modern Ethiopia, 1855-1991*, Suffolk 2001.

ology of the time in Ethiopia,<sup>48</sup> it was neither able to deliver the promises of Marxism-Leninism, nor respond to the outstanding questions of ethnic groups.

Armed with the ideological weapons of Marxism-Leninism, the ethnonational groups of Eritrea, Tigray, and Oromo, and later the Somali, started liberation movements for independence. Viewing the relationship of their ethnicities to the Ethiopian state through the prism of colonialism and/or national oppression, the right to self-determination including secession became the overarching objective of their struggle.<sup>49</sup> The triumph of these ethnonational groups in 1991 not only made federalism the only viable option to hold the state together, but also institutionalized the socialist account of the right to self-determination including secession as a fundamental principle of the federal system.<sup>50</sup> As in Nigeria, the appropriateness of federalism for the Ethiopian state is agreed upon across the political divide although the form of federalism has been a point of contestation.<sup>51</sup>

Similarly, though the history of South Africa differs again from Nigeria and Ethiopia, the underlying rationale and objective for the origin of federalism share many characteristics with these states. When the apartheid system could no longer withstand the domestic resistance and international exclusion, a negotiated transition became a sensible option. During South Africa's transition to democracy, the competing political parties held opposing views about the ideal structure of the state. The National Party, the Inkatha Freedom Party (IFP), the Conservative Party (CP), Afrikaner Volsfront (AVF), the Freedom Front, and the Democratic Party all advocated for federalism, while the African National Congress (ANC) and the Pan-Africanist Congress of Azania advanced an argument for a unitary state.<sup>52</sup>

Among the federalists, the IFP advocated for a classical territorial federalism, while the conservative Afrikaners proposed self-government in their own *volkstaat*. The IFP, the CP, and the AVF formed the "Freedom Alliance," to advocate for (amongst other things) the constitution of a federal democracy. Failing this, the IFP opted for secession and the AVF for a civil war.<sup>53</sup> The open warfare in the KwaZulu-Natal between the ANC and IFP supporters, and the loyalty and support of to the AVF by retired military generals and serving

48 See *Donald Donham*, *Marxist Modern: An Ethnographic History of the Ethiopian Revolution*, Berkeley 1999.

49 See *Assefa Fiseha*, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, Nijmegen 2006.

50 *Semahagn Gashu Abebe*, *The Last Post-Cold War Socialist Federation: Ethnicity, Ideology and Democracy in Ethiopia*, Abingdon 2016.

51 See *Yonatan Tesfaye Fessha*, *The Original Sin of Ethiopian Federalism*, *Ethnopolitics* 16 (3) (2017), p. 232.

52 *Nicholas Haysom*, *The Federal Features of the Final Constitution*, in: *Penelope Andrews and Stephen Ellmann* (eds.), *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law*, Johannesburg 2001, p. 506.

53 *Nico Steytler and Johann Mettler*, *Federal Arrangements as a Peacemaking Device during South Africa's Transition to Democracy*, *The Journal of Federalism* 31 (2001) 31, p. 95.

members of the armed forces could not be ignored by the ANC.<sup>54</sup> As in Nigeria and Ethiopia, the quest to accommodate ethnic and racial diversity and the urgency to secure peace brought federalism in South Africa.

However, federalism is configured in South Africa in form and substance, but not in name. One cannot find the word federalism in the final Constitution. Indeed, the word federalism was avoided before the adoption of the final Constitution as the term itself created an impasse between federalists and unitarists.<sup>55</sup> Given the apartheid experience, federalism had gained a pejorative reputation, in particular in the eyes of the ANC, and was considered to be an obstacle for the overall transformation of the country.<sup>56</sup> In order to facilitate meaningful debate, the constitutional negotiators dropped the term federalism and ultimately institutionalized “Co-operative Government.”<sup>57</sup>

Thus, the main purpose of federalism in these states is the accommodation of ethnonational diversity and the maintenance of territorial integrity. It is introduced and formed in these states to regulate and manage their internal political dynamics. Hence, federalism is formed through the devolution of power to the center and to the constituent units of a formerly unitary state with the objective of holding the state together.

However, the accommodation of ethnonational diversity is not the only purpose of federalism in these states, nor is this purpose unique to African federal states. Rather, the argument here is that the main purpose and underlying logic of federalism in these states is the accommodation of ethnonational diversity. Other purposes such as safeguarding liberty, promoting prosperity, and ensuring democracy are derivative of the original purpose. Once ethnonational groups broadcast their respective ethnonational interests and ambitions within the channels of shared rule and self-rule, they can also aim to advance the values of liberty, prosperity, and democracy. At the same time, as discussed below, they may follow a different course as the Nigerian and Ethiopian experiences show. Also, as in Africa, federalism may hold new purposes in non-classic federal states, especially in the global south.<sup>58</sup>

The implication of federalism’s new purpose in African federal states is that it enshrines unique normative and institutional configurations while maintaining the general forms and discursive practices of classic federal theory. The other implication is that it changes the standards of assessment for the success or failure of federalism in these states. As federalism holds new purposes and follows new pathways, classic federal theory has a limited role in explaining the origin, purpose, and operation of federalism in Africa. I will expound each of these issues in detail in the remainder of this article.

54 Ibid, p. 95–96.

55 *Haysom*, note 52, p. 505.

56 *Christina Murray and Richard Simeon*, *Promises Unmet: Multilevel Government in South Africa*, in: *Varieties of Federal Governance: Major Contemporary Debates*, Cambridge 2011, p. 232.

57 *Haysom*, note 52, p. 504.

58 See *Sujit Choudhry*, *Classical and post-conflict federalism: Implications for Asia*, in: *Rosalind Dixon and Tom Ginsburg (eds.), Comparative Constitutional Law in Asia*, Cheltenham 2014.

#### D. The Fundamental Elements of Federalism in Africa: Syncretic Convergences, Adaptations, and Innovations

As federalism follows new pathways in Africa, some of the classical elements of federalism have been transformed and adapted through encounters with non-federal principles and practices. As former unitary states, Nigeria, Ethiopia, and South Africa draw heavily from the unitary theory of state organization, and the unitary impulse is evident in the design and operation of their federalism.<sup>59</sup> Furthermore, each state blends the federal spirit with its unique experiences. In this regard, while federalism has been fused with military principles of administration in Nigeria, it has been blended with ethnic and socialist ideologies in Ethiopia and has been configured with liberalism and Ubuntu in South Africa. Accordingly, the fundamental elements of federalism in Africa manifest convergences with classic federal theory with respect to forms, structures, and discursive practices, on the one hand, and shows divergences related to the syncretic normative and institutional adaptations and innovations, on the other.

While Nigeria and South Africa have a three-tiered division of power, Ethiopia has a two-tiered system. Each tier has some degree of sovereign power on designated matters.<sup>60</sup> In all these states, the constitutions are unilaterally unamendable. For example, in Nigeria, even if the National Assembly is empowered to amend the Constitution, it cannot do so without the approval of the Houses of Assembly of at least two-thirds of the states.<sup>61</sup> By the same token, in South Africa, the Constitution can be amended by the National Assembly, but requires the participation of the National Council of Provinces (NCOP) and approval by six of the provincial delegations.<sup>62</sup> In Ethiopia, constitutional amendment without the approval of a two-thirds majority of the states is impossible.<sup>63</sup>

Further, there are representational mechanisms of self-rule and shared rule in the multi-tiered government systems in these federal states. While States and Local Government Areas (LGAs) in Nigeria, Provinces and Local Government in South Africa, and States in Ethiopia are avenues for the experiment of self-rule, the federal legislative, executive, and judicial organs are spaces for the practice of shared rule. Furthermore, the Supreme Court in Nigeria,<sup>64</sup> the Constitutional Court in South Africa,<sup>65</sup> and the House of Federation (HoF—the upper house of parliament) in Ethiopia<sup>66</sup> are federal umpires. Moreover, the federalists

59 See also *J Tyler Dickovick*, *Federalism in Africa: Origins, Operation and (In)Significance*, *Regional & Federal Studies* 24 (5) (2014), p. 553.

60 Nigerian Constitution, Sec 2(2) & 3(6); South African Constitution, sec 40(1); Ethiopian Constitution, article 46 (1).

61 Nigerian Constitution, Sec 9(1) (2) & (3).

62 South African Constitution, Sec 44(1) (a) (b) & 74.

63 Ethiopian Constitution, article 105.

64 Nigerian Constitution, Sec 232(1).

65 South African Constitution, sec 167.

66 Ethiopian Constitution, article 62.

in these states often invoke the benefits and the rhetoric of federalism building on the experiences of established federal states to advance and safeguard their interests. To these extents, there is a convergence between classic federal theory and federalism in these states.

In spite of these formal convergences, there are a number of syncretic normative and institutional adaptations and innovations that make the federal experiment in Africa unique. For instance, Nigeria began experimenting federalism with three constituent units called regions at independence. In the fourth republic, however, Nigeria has 36 constituent units called States and 768 LGAs.<sup>67</sup> Against one of the fundamental elements of federalism, the federal civilian and military leaders created states and LGAs single-handedly.<sup>68</sup> The federal government created the Mid-western region as a fourth region in 1963. After the end of the first republic, the regions were further divided into 12 by Lieutenant-Colonel Gowon's military administration.<sup>69</sup> Brigadier Murtala Mohammed increased the number of states to 19.<sup>70</sup> During the Ibrahim Babangida administration, the number of states reached 30.<sup>71</sup> General Sani Abacha's regime added six new states and the number of states in the federation increased into the current 36.<sup>72</sup> As the case with states, LGAs are created by the federal civil and military leaders starting with 301 in 1976 and reached 768 in 1999.<sup>73</sup> The manner of creation of states and LGAs in Nigeria is almost akin to an act of decentralization of a unitary state.

In addition, the federal government centralized many of the powers of States. A comparison of the powers of States in the first republic and fourth republics shows how Nigerian federalism changed from decentralized federalism to centralized federalism. In the first republic, the powers of the federal government were limited to national defense, foreign relations, currency, mines and minerals, and main transportation and communication services.<sup>74</sup> Higher education, industry and power development, the judiciary, the police, and the regulation of labor, among other matters, formed the concurrent powers of the federal government and the regions.<sup>75</sup> Not only did the regions have a residual power, but they could also pursue their own socio-economic development policies by mobilizing their own

67 Nigerian Constitution sec 3(1) & (6).

68 See *Henry Alapiki*, State Creation in Nigeria: Failed Approaches to National Integration and Local Autonomy, *African Studies Review* 48 (3) (2005), p. 49.

69 *Suberu*, note 44, p. 85.

70 *Ibid.*, p. 90.

71 *Ibid.*, p. 98.

72 *Ibid.*, p. 101.

73 *Ibid.*, p. 106.

74 *Kalu Ezera*, Constitutional Developments in Nigeria, Cambridge 1964, p. 266–269; *John Mackintosh*, Federalism in Nigeria, *Political Studies* 10 (3) (1962), p. 223.

75 *Suberu*, note 44, p. 26.

resources.<sup>76</sup> Moreover, they had their own regional constitutions and regional police forces.<sup>77</sup> Further, the regional base of the political party system grounded political power in the regions rather than in the center.<sup>78</sup> Because of this constitutional and political configuration, the regions were stronger than the center in operating Nigerian federalism in the first republic.<sup>79</sup>

In the fourth republic, however, the locus of power changed from the regions to the center. The 1999 Constitution gives the National Assembly legislative powers in 68 broad items areas known as the Exclusive Legislative List (ELL).<sup>80</sup> The Constitution also empowers the federal government to legislate on matters that are not included in the ELL but are incidental and supplementary to any of the matters listed.<sup>81</sup> Among the ELL are items such as the creation of states,<sup>82</sup> regulation of police,<sup>83</sup> and political parties<sup>84</sup>. Most importantly, oil exploration and natural gas, the main engines of the Nigerian economy, are the exclusive domain of the federal government.<sup>85</sup> Moreover, not only do States operate under a single Constitution, they do not have Supreme Courts. States only have High Courts<sup>86</sup> in which their appeals go to the Court of Appeal,<sup>87</sup> which is second to the Supreme Court of Nigeria. Hence, Nigerian federalism blends the unitary principles and practices of the military logic of centralization with the federal spirit at its core, in its design and operation. Without accounting for these, one would be hard pressed to understand, and, at one's own peril, to explain Nigerian federalism.

In addition to a unitary impulse, Ethiopia configures federalism with ethnicity along with a socialist ideology. As a manifestation of the unitary impulse, although the states have their own constitution, Supreme Court, and regional police force,<sup>88</sup> unlike Nigeria, important government functions and prerogatives are the mandates of the federal government. In addition to the list of 21 broad areas such as national defense, foreign affairs, financial and monetary matters, transportation, health, education, science and technology, and land and natural resources as the exclusive legislative list of the federal government,<sup>89</sup> the Constitu-

76 *Adamolekun*, note 46, p. 386.

77 *Eghosa E Osaghae*, *The Status of State Governments in Nigeria's Federalism: A Study of the Changing Phases*, *The Indian Journal of Political Science* 52(2) (1991), p.244.

78 *Ibid.*, p. 186.

79 *Adamolekun*, note 46, p. 387.

80 Nigerian Constitution Sec 4(2) (3) & (4).

81 *Ibid.*, Schedule II Part I Item 68.

82 *Ibid.*, Schedule II Part I Item 14.

83 *Ibid.*, Schedule II Part I Item 45.

84 *Ibid.*, Schedule II Part I Item 56.

85 *Ibid.*, Schedule II Part I Item 39.

86 *Ibid.*, sec 270 (1).

87 *Ibid.*, sec 240.

88 Ethiopian Constitution, article 50(7), 52 (2(b &g) & 78 (3).

89 *Ibid.*, article 51.

tion empowers the federal government to formulate and implement the country's overall socio-economic and development policies, plans, and strategies.<sup>90</sup> This gives the federal government broader powers in implementing uniform socio-economic and development policies in the country and consequently reduces the autonomy of regional states in pursuing their own development policy. Even if states have residual powers and the Constitution specifically mentions the power of states to formulate and execute their own socio-economic and development policies, these should not be understood to prevail against the policy framework of the federal government.<sup>91</sup>

The powers and autonomy of states are further diminished by the adoption of a unicameral legislative organ. The House of Peoples' Representatives (HPR) is the sole legislative body of the federal government.<sup>92</sup> Unlike the case of some federal legislatures elsewhere (which adopt a bicameral legislative body in which the Senate represents the interests of the states, and the House of Representatives represents the interests of the general public in the legislative process),<sup>93</sup> Ethiopia does not confer a legislative mandate to HoF. As the people in direct and universal suffrage elect members of HPR, its members are responsible to their constituency.<sup>94</sup> The States do not have representatives in the legislative process.<sup>95</sup> Although the Constitution assures the equality of states, the Amhara and Oromia regional states (which given their population number form a democratic majority in the HPR due to their larger populations), put others in a perpetual minority in the legislative process.<sup>96</sup> This, in turn, channels majority rule without a safeguard for state interests in the legislative process, looking much like a unitary state.

Furthermore, the control of the major revenue sources by the federal government limits the autonomy of states in executing their constitutionally allocated powers and responsibilities.<sup>97</sup> The major source of revenue for the states comes from taxes from state and private employees, individual farmers, and cooperatives, with a very low tax base.<sup>98</sup> The fiscal centralization makes states dependent on the federal government for the funds necessary to operating their governments and run their administrations.<sup>99</sup>

90 Ibid, article 51(1).

91 Ibid, article 52(1) & (2(c)).

92 Ibid, article 55(1).

93 *Meg Russell*, The Territorial Role of Second Chambers, *The Journal of Legislative Studies* 7 (1) (2001), p. 105.

94 Ethiopian Constitution, article 54(1) & (2).

95 Ibid, article 54(3).

96 Ethiopian Constitution, article 47(4).

97 Ibid, article 96; *Yonatan Fessha and Coel Kirkby*, A Critical Survey of Subnational Autonomy in African States, *Publius: The Journal of Federalism* 38 (2008). p. 262.

98 Ethiopian Constitution, article 97.

99 See *Solomon Negussie*, *Fiscal Federalism in the Ethiopian Ethnic-based Federal System*, Nijmegen 2006.

As a manifestation of the socialist legacy, the right to self-determination of the ethnic groups is the building bloc of the federation. Ethnicity animates the very foundation of the Constitutional order and permeates its structural configurations. The ethnic groups are the founders, sovereigns, and constitutional adjudicators of the federal republic,<sup>100</sup> and ethnicity is the fundamental basis for the institutional architecture of self-rule and shared rule.<sup>101</sup> Even more, ethnic groups are entitled to the right of self-determination up to secession.<sup>102</sup> This centrality of ethnicity in the federation is dubbed “ethnic federalism”. The novelty aspect of Ethiopia’s ethnic federalism, (even more than its emphasis on ethnicity), is the introduction of a system for its own disintegration -- rather than the provision of a more perfect union as in the United States. As a result, the unitary impulse and the socialist legacy transform the fundamental elements and identity of federalism in Ethiopia.

Similarly, in addition to its own unitary impulse, South Africa established a cooperative government drawing from the German experience of integrated federalism and building on the value systems of Ubuntu.<sup>103</sup> The unitary impulse is evident in Schedule 4 and 5 of the Constitution that list areas of concurrent and exclusive jurisdiction among the spheres of government, respectively. The functional areas of concurrent jurisdiction are numerous, while the exclusive domain for the provinces and local government are limited. For instance, provinces are given exclusive jurisdiction only on ‘abattoirs, ambulance services, archives, museums, and libraries other than the national ones, liquor services, provincial planning, provincial roads and, traffic, culture, sports, recreation and amenities, and veterinary services excluding the regulation of the profession.’<sup>104</sup> South Africa centralizes judicial power and the police force.

While the Constitution establishes the NCOP as a guardian for provincial interests, its power and influence in the national legislative process are contingent upon the subject matter under consideration. When the parliament considers bills that amend the Constitution and affect the interests of the provinces, the NCOP is given an important power to defend provincial interests, as the support of two-thirds of the provincial delegations is required.<sup>105</sup> While for an ordinary bill affecting provincial interests to pass, a majority of the provincial delegations in the NCOP must agree.<sup>106</sup> Other than these, the National Assembly can pass a

100 Ethiopian Constitution, preamble, article 8, 61 & 62.

101 Ibid, article 46 & 47.

102 Ibid, article 39.

103 *Richard Simeon*, Considerations on the design of federations: The South African constitution in comparative context, SA Publiekreg = SA Public Law 13 (1) (1998), p. 60.

104 South African Constitution, Schedule 5 Part A.

105 Ibid, sec 74(1) (b).

106 Ibid, sec 76(1) (a).

bill on its own.<sup>107</sup> Also, the national legislature overrides provincial legislatures even on matters exclusively assigned to the provinces<sup>108</sup>.

The powers of the provinces are further reduced by fiscal centralization. Not only do the provinces have a limited tax base, they are also subject to national regulation. For instance, provinces have the power to impose “taxes, levies and duties other than income tax, value-added tax, general sales tax, rates on property or customs duties” and “flat-rate surcharges on any tax, levy or duty that is imposed by national legislation, other than on corporate income tax, value-added tax, rates on property or customs duties.”<sup>109</sup> However, the national parliament is given the mandate to ensure that provinces legislate in a manner that does not materially and unreasonably affect national economic policies and activities.<sup>110</sup>

Further, South Africa’s cooperative government incorporates the underlying principles of both Ubuntu and German federalism. Although the Constitution does not expressly mention Ubuntu, it played a critical role in bringing together the contending parties during South Africa’s transition to post-apartheid democracy. The interim Constitution, which was a basis for the final Constitution, included the importance of Ubuntu in the establishment of new South Africa when it stated that “despite the injustices of the past, there is need for understanding, not vengeance. A need for reparation, not retaliation...a need for ubuntu and not victimisation.”<sup>111</sup> As justice Yvonne Makgoro noted the founding values of democracy such as human dignity, equality, human rights, multi-party democracy, national unity, and group solidarity enshrined in the final Constitution can translate into and coincide with some of the key values and principles of Ubuntu.<sup>112</sup> In this respect, section 41 of the Constitution outlines ‘peace, national unity, security, effective, transparent and coherent government as a whole, and ‘fostering friendly relations, assisting and supporting one another, cooperation on matters of common interest, and avoiding legal proceedings’ in intergovernmental relations as the principles of cooperative government. This epitomizes the similarities between Germany’s integrated federalism and Ubuntu as the federal design in Germany is animated by consensus building and cooperative behavior within the tiers of government,<sup>113</sup> and consensus and cooperation are the central ethos of Ubuntu. Moreover, following the ethos of Ubuntu, sec 76(1)(d) of the Constitution requires the establishment of a Mediation Committee to solve intergovernmental disagreements. Thus, like Nigeria and Ethiopia, South Africa has adapted and blended federalism with non-federal principles and practices.

107 Ibid, sec 75 (2), sec 75(1) (c) (i).

108 Ibid, sec 146-148; see also *Murray and Simeon*, note 56, p. 237; *Ziyad Motala and Cyril Ramaphosa*, *Constitutional Law: Analysis and Cases*, Oxford 2002, p. 153–158.

109 South African Constitution, sec 228(1).

110 Ibid, sec 228(2).

111 *Yvonne Makgoro*, *Ubuntu and the Law in South*, Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 1(1) (1998), p.5.

112 Ibid, 9.

113 *Simeon*, note 103, p. 56.

### E. The Success and Failure of Federalism in Africa: Rethinking the Standards of Assessment

Without doubt, the standards of assessment are as important as the assessment of federalism itself. Just as there are syncretic configurations between classic federal theory and federalism in Africa, the standards of assessment in classic federal theory are neither adequate nor totally irrelevant for Africa. To the extent that convergence exists in forms, structures, and discursive practices, the tools of assessment in these respects can be deployed. Accordingly, the standards of longevity or durability of the federal system, and the desire of the citizenry and the political class for the federal system, can be standards of assessment.

On these counts, federalism in Nigeria, Ethiopia, and South Africa is a success. This is due to the fact that the federal system in Nigeria has existed since independence and there is a general support for the federal spirit from citizens and politicians alike. Although there are still contestations on the federal system in Nigeria,<sup>114</sup> the idea of a unitary solution seems to be a dead option with Decree No. 34 of 1966, which turned the country into a unitary state for a very brief period.<sup>115</sup> The current debate and discussions are within the range of federalism. Similarly, the federal system in Ethiopia has endured since its first installation and will likely exist for the foreseeable future given the commitment of citizens and politicians to the federal spirit. While there is a polarized debate on the current ethnic federal system, there is a broader consensus that federalism (not unitary system) is the way forward for Ethiopia.<sup>116</sup> By the same token, the South African federalism is a success not only because of its continuity, but also due to the existence of support for it.<sup>117</sup> Although the ANC was not in favor of the federal idea from the very beginning and later it considered abolishing the provinces, this is no longer the case now.<sup>118</sup> And the three-tier system is here to stay.

With respect to the achievements of the original objectives of federalism, however, the standards of assessment in classic federal theory will be of little help. As the syncretic incorporations give federalism a different purpose and function, these elements should be accounted in its assessment. Consequently, the principal objective against which federalism is assessed in Africa is not the achievement of democratic government, individual liberty, or economic prosperity, but the maintenance of territorial integrity and the accommodation of

114 *Richard L Sklar*, *Unity or Regionalism: The Nationalities Question*, in: Robert I Rotberg (ed.), *Crafting the New Nigeria: Confronting the Challenges*, Boulder 2004, p. 46; *Rotimi Suberu*, *The Nigerian federal system: Performance, problems and prospects*, *Journal of Contemporary African Studies* 28(4) (2010), pp. 475–476.

115 *Sebastine Tar*, *Constitutional Law and Jurisprudence in Nigeria*, Chennai 2004, p. 13.

116 See for instance, *Abebe*, note 50; *Yonatan Tesfaye Fessha*, *Ethnic Diversity and Federalism: Constitution Making in South Africa and Ethiopia*, Abingdon 2013; *Fiseha*, note 49.

117 *Murray and Simeon*, note 56, p. 245–246.

118 See *Nico Steytler*, *The Politics of Provinces and the Provincialisation of Politics*, in: *Tiyana Maluwa* (eds.), *Law, Politics and Rights: Essays in Memory of Kader Asmal*, Leiden 2013.

ethnonational and religious diversity. Democratic government, respect for human rights, and economic development are dividends rather than the original objectives of federalism in Africa. Precisely because of this, federalism's continuous viability is not contingent upon the existence of a democratic system that respects human rights and delivers economic development, nor is the impracticality of liberal democracy evidence of its failure. In these respects, the African experiment with federalism presents a paradox that cannot be explained by classic federal theory, for it holds that the existence of liberal democracy and constitutionalism are essential requirements for its success.

Nigeria is a fine example to demonstrate this paradox. Federalism has operated in Nigeria both in civil and military regimes. Indeed, much of Nigeria's post-independence period was under military rule and the military was the main architect of the present Constitution. By definition, military rule is in contradiction with constitutional government and liberal democracy as it installs itself with the displacement of constitutional rules and liberal democratic norms. Yet, Nigerian military rulers respected and protected the federal logic like their civilian counterparts. The difference is one of style and structure of administration.<sup>119</sup> Even after its transition to democracy, the performance of Nigeria with respect to democracy, human rights, and constitutionalism is poor.<sup>120</sup>

By the same token, Ethiopia's federalism has operated in a single party system run by the Ethiopian People's Revolutionary Democratic Front (EPRDF) with a blatant disregard of the Constitution and rejection of liberal democracy. While the Constitution has been often cited as a justification for the authoritarian and undemocratic actions of the EPRDF, its leading ideology of revolutionary democracy and the party practice of democratic centralism have played the real constitutional function in practice. Since the introduction of ethnic federalism, multi-party democracy, respect for human rights, and constitutionalism have been put aside and given way to the emergence of the EPRDF as the only viable political party in the country. Unsurprisingly, Ethiopia scores very low on measures of democracy, human rights, and constitutionalism, even compared with other African states.<sup>121</sup> While years of protest movements against such authoritarian regime have recently brought changes in members of the government and the party, the practice of constitutionalism and liberal democracy are yet to be seen. Regardless, federalism must remain if the state is to remain united.

The genius of federalism in Nigeria and Ethiopia is its ability to operate mainly in the absence of liberal constitutionalism. As far as the governance system accommodates ethnonational and religious interests at the national and subnational levels, the theory of government, whether civil/military or democratic/undemocratic, becomes either a secondary

119 *J Isawa Elaigwu*, *Nigerian Federalism under Civilian and Military Regimes*, Publius: The Journal of Federalism 18 (1) (1988), p. 173.

120 "EIU Democracy Index 2017", online: <<https://infographics.economist.com/2018/DemocracyIndex/>>.

121 *Ibid.*

consideration or a matter of style or form, informed by the dynamics of domestic and international politics.

Consider, for example, the full implementation of sharia in some Northern states of Nigeria. The sharia implementing states justify the full implementation of sharia based on federalism and it has been enforced with full grips with the federal structure. Ahmed Sani Yerima run for the governorship of Zamfara state under a promise to implement sharia through the state's legislature.<sup>122</sup> Two months after his inauguration, he set up a law review committee and based on its recommendation proposed a bill to fully implement sharia penal law in the state through the adoption of sharia penal and procedure codes, and the reorganization of the judiciary in line with the tents of sharia, which the House of Assembly of the state adopted.<sup>123</sup> Following Zamfara, 11 other Northern states adopted sharia into their criminal law domain.<sup>124</sup> These states neither declared sharia for the whole of Nigeria, nor even to Northern Nigeria. Moreover, even if Zamfara inspired other Northern states for the full implementation of sharia, neither all Northern states take sharia reforms, nor those which have taken the reforms adopt similar approaches.<sup>125</sup> Furthermore, the sharia implementing states (1) rely on the Nigeria Police Force for the implementation of their sharia criminal justice systems, (2) submit their legislative undertakings and judicial practices to higher courts of the federation, and most importantly (3) depend on the federal budget for the implementation of their sharia systems.

Although on normative grounds, the full implementation of sharia (1) defeats the principle of separation of state and religion, (2) extends the jurisdiction of sharia courts beyond what is constitutionally permissible, and (3) violates many of the human rights recognized by the Constitution, federalism provides Nigeria the normative and institutional infrastructure to accommodate sharia within an otherwise secular constitutional order. The full implementation of sharia in Nigeria may not be possible without violating some principles or values of liberal constitutionalism.

In Ethiopia too, in as much as EPRDF centralized the decision-making process within the party, its decentralized structure following the federal setup enabled member parties of the coalition to channel their political interests and ambitions within their respective constituencies. Without this decentralized political party structure, it would have been almost impossible to govern Ethiopia. As the new Prosperity Party (PP) replaces and dismantles the decentralized structure of the EPRDF in December 2019, it struggles to hold the country together. The Tigray People Liberation Front (TPLF), the then dominant political party

122 *Brandon Kendhammer*, The Sharia Controversy in Northern Nigeria and the Politics of Islamic Law in New and Uncertain Democracies, *Comparative Politics* 45(3) (2013), p. 294.

123 *Mamman Lawan*, Islamic Law and Legal Hybridity in Nigeria, *Journal of African Law* 58 (2) (2014), p. 310.

124 Mohammed *Bolaji*, Between Democracy and Federalism: Shari'ah in Northern Nigeria and the Paradox of Institutional Impetuses, *Africa Today* 59(4) (2013), pp. 93–94.

125 *Daniel Plang*, Sharia Penal Laws in Northern Nigeria: A Review, in: Etannibi EO Alemika (ed.), *Human Rights and Shariah Penal Code in Northern Nigeria*, London 2005, pp. 69–136.

within the EPRDF, refused to join the PP and other important political parties in Oromia including senior members of the PP in Oromia heavily opposed the replacement of EPRDF by PP. The main reason for such opposition to PP stems from the view that the coherence between the political party structure (as in the EPRDF) and the ethnic federal arrangement of the country may be lost. As noted above, this coherence was neither intended to institutionalize a liberal democratic system, nor aimed at safeguarding individual liberty and prosperity. Rather, the EPRDF structure provided member parties of the coalition the autonomy of action to channel their political ambitions and aspirations (even if undemocratic) within their constituencies, to maintain and consolidate their party interests as long as they are in line with the general visions of the coalition. The PP will not provide such (limited) autonomy for its members as it is a national political party with regional branches. While it is too early to judge whether PP will hold the center together with a unitary party structure, the federal logic in the organization of the EPRDF were critical for its operation for almost three decades even if it lacked the essential elements of democracy.

To sum up, in spite of the existence of ethnonational and religious tensions and agitations, the governing elite in Nigeria and Ethiopia are well aware of the benefits and costs of accommodation and integration and they strive to be as inclusive as possible (albeit to different degrees), to make governmentality possible without necessarily committed to liberal democracy. So far, federalism exists and performs its accommodative and integrative function largely without constitutionalism and liberal democracy in Nigeria and Ethiopia.

Although South Africa has introduced federalism as an accommodative and peacemaking device, it is part of a broader constitutional dispensation toward a post-apartheid and post-racial society. As such, like any other feature of the Constitution, federalism is fundamentally tied to the ideals of democratic values, social justice, and human rights. In particular, sections 152 and 153 of the Constitution specify the purposes of local government expressly as: the provision of democratic and accountable government, the promotion of socio-economic development, the protection and safety of the environment, and the performance of service delivery. By doing so, South Africa, (unlike Nigeria and Ethiopia), adds a democratic, human rights, and economic development tasks to federalism. As an accommodative and peacemaking device, federalism has enabled South Africa to transition from apartheid to democracy. In its classic tasks, federalism has been able to bring government closer to the people and ensure public participation in government, while unable to improve the economic well-being of the poor majority.<sup>126</sup> For its good democratic and governance performance, the practice of constitutionalism and liberal democracy have made a great contribution, without which self-government and participation in local government would have been wishful thinking like Nigeria and Ethiopia.

Thus, the inability of federalism to deliver constitutional democracy in Nigeria and Ethiopia does not make it a failure. Indeed, federalism succeeds in maintaining the unity and territorial integrity of these states. It has provided the normative appeal and the institu-

126 Murray and Simeon, note 56, p. 240.

tional architecture to channel, accommodate, and integrate diverse interests and ambitions within a single state, mainly in the absence of liberal constitutionalism. However, if federalism must bring constitutional democracy, it should be given such tasks along with its holding-together function as in South Africa and other classic federal states. To this end, in addition to the corporate ethnonational and elite interests, democratic values, human rights, and constitutionalism should animate the normative and institutional frameworks of both self-rule and shared rule. As federalism is incorporated with syncretic elements, it is not primarily responsible for the constitutional and democratic deficits in Nigeria and Ethiopia, nor does associating such deficits with federalism help the diagnostic prescriptions to these states. The fundamental problem in this regard is the theory of government that accompanies federalism and it is this which requires serious consideration.

## F. Conclusion

While federalism in Africa shares the forms, structures, and discursive practices of classic federal theory, its normative articulations and institutional frameworks are animated by syncretic configurations. These, in turn, transform the purpose, fundamental elements, and operation of federalism in Africa. As federalism follows new pathways in Africa, so do its systems of operation and standards of assessment. Against the central tenets of classic federal theory, federalism manages to operate and, to the extent possible, deliver its purpose without the existence of constitutionalism and liberal democracy, as evidenced by the experiences of Nigeria and Ethiopia. As the primary purpose of federalism in Africa is to accommodate ethnonational diversity and territorial integrity rather than the institution of constitutionalism and liberal democracy, it is not incompatible with undemocratic, including military, government as far as the government holds this federal logic. It is precisely because of this that federalism manages to operate and survive without liberal constitutionalism in these states. Hence, federalism is neither a failure on its own terms, nor a prime suspect for the constitutional and democratic deficits in Nigeria and Ethiopia, for these are not its primary purposes. Indeed, it is a success as it holds these states together against the centripetal and centrifugal forces of competing ethnonational interests. If federalism must ensure the practice of constitutional democracy in Nigeria and Ethiopia, it should be given such tasks as in South Africa and other established federal states. In addition to the corporate ethnonational and elite interests, democratic values, human rights, and constitutionalism should animate the normative and institutional frameworks of both self-rule and shared rule.