

Contemporary Governance Challenges in the Horn of Africa

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Chapter 3

Federal systems of governance in Africa

Patterns and pitfalls

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3 Federal systems of governance in Africa

Patterns and pitfalls

Nico Steytler

3.1 Introduction

Three of the countries comprising the Horn of Africa – Sudan, South Sudan, and Somalia (the 4 Ss) – were from 2018 onwards in the process of developing federal systems, with these systems largely intended as peace-making devices. Since the fall of President al-Bashir in 2019, the transitional government of Sudan gave itself 39 months to adopt a constitution in which a federal system of governance will play a key role. In 2018, the South Sudanese Comprehensive Peace Agreement established a transitional government of national unity, one which envisages a federal system. Similarly, the 2012 Transitional Federal Constitution of Somalia was, as the title suggests, the first step towards a full-fledged federal system, a process renewed in 2018. These constitution-making endeavours, in each of which federal arrangements feature strongly, all arose from years of civil war.

It should be remembered, though, that each of the 4 Ss has failed before in its attempts at federalism. In Somalia, the 2012 Transitional Federal Constitution was the result of a long peace-making project, the aim of which was to embed federalism as the mode of governance. Despite this, open warfare erupted in 2020 between the federal government and member states. The 2005 Comprehensive Peace Agreement and accompanying constitution set Sudan off to yet another round of federal government, but failed to prevent the secession of South Sudan and the continued conflict in the peripheral areas. Similarly, in South Sudan, the decentralised system of government which underpinned the 2011 Constitution gave way to civil war in 2013.

Since the end of the Cold War, many African countries have sought to use federal arrangements to end conflicts rooted in ethnic, linguistic, or religious mobilisation and as a means of furthering peace and economic development for their nations.¹ Federal, or federal-type, ‘solutions’ were pursued, for instance, in Ethiopia (1991/1995); South Africa (1994); Nigeria (1999, re-establishing earlier federal constitutions); the Democratic Republic of Congo (DRC) (2006); and Kenya (2010). As Markakis, Schlee, and Young rightly argue, post-independence was marked by a quest to remake countries in the Western image of the nation-state, and the 4 Ss are further examples of this.²

In the attempt, much effort was thus bestowed on ‘nation-building’ at the expense of recognising the force of ethnoculturalism. Nevertheless, the unitary ‘nation-state’ seems to have brought neither peace nor development, but rather worked to engender ‘ethnic’ conflicts – and the track record of ‘federalism’ in solving communal or identity conflicts is not good. For the past 30 years, it has been the case more often than not that conflicts have continued, and though federalism cannot be said to have failed (since the formal federal arrangements have never really been applied), the hoped-for benefits have not materialised. Even in South Africa – possibly the most successful ‘federalised’ country, and one in which racial oppression rather than ethnicity formed the core of the conflict – the service delivery and developmental potential of provincial government have been continually in question.

Since 2018, Ethiopia, after years of reasonable stability, has been rocked by ethnic-based protests, and, since 2020, by an outbreak of civil war in the Tigray region, this is addition to facing a range of other violent conflicts between regions.³ Nigeria’s centralised federal system is described as ‘constitutionally skewed, politically corrupt, ethnically contentious, and therefore chronically fragile’,⁴ with violent conflicts occurring in the northeast (with Boko Haram) and northwest (herders and farmers).⁵ As for the DRC, it has remained fragile since 2006 as conflicts in the east continue unabated,⁶ while Kenya’s disputed presidential election in 2017 nearly tore the country apart.

As the 4 Ss embark on another round of federal experimentation, this chapter hence poses the question of whether there are any lessons to be learnt from how other African federations have dealt with conflict, including ethnic conflict. Answering the question relies in the first instance on establishing the key characteristics of federal arrangements in Africa both in theory and in practice. Three arguments are put forward in this regard.

The first is that the main characteristic of such federalisation is its highly centralised model of governance. In this model, power and resources are located at the centre, with little autonomy allowed to subnational government, which plays only a limited role in shared rule. By contrast, different approaches to ethnic accommodation have been followed, either explicitly building the federation with ethnic blocks or minimising the salience of ethnicity.

Secondly, the absence of the key socio-political ‘success factors’ for federalism – including commitments to an ethos of democracy, the multiplicity of power centres, the practices of open bargaining, and compromise in decision-making, constitutionalism, and capability – significantly undermines the possibilities for the successful taking root of federalism.

Thirdly, and with a focus on federalism in the 4S’s, unless the federal arrangements work to become less centralised and the federal ‘success factors’ built in along with the establishment of the federations, the prospects of success are slim.

These arguments are based largely on the experiences of the four main ‘federations’ in Africa – South Africa, Ethiopia, Nigeria, and Kenya – though they also make some reference to events in the DRC.

3.2 Highly centralised federal arrangements

The practice in Africa for dealing with the two components of federalism – self-rule and shared rule – has been remarkably similar. In a review of federal arrangements in Africa, Jaap de Visser and I developed the theory of the three components of what we call ‘fragile federalism’.⁷

The first is that federal solutions represent a direct response to the fragility of countries confronting deep-seated conflicts. Secondly, federal arrangements are highly centralised, resulting in weak or ‘fragile’ self-rule and shared provisions in favour of subnational governments (SNGs). Thirdly, these arrangements in turn include the fracturing of ethnic communities into numerous small SNGs, with limited devolution of powers to SNGs (mainly through concurrent powers that are then dominated by the centre); the centralisation of taxation authorities in ways that render SNGs dependent on financial transfers; the existence of other extensive central intervention powers; and the central dominance of shared-rule institutions and processes.

3.2.1 Limited self-rule

In the pursuit of peace, the principal aim of federation has been to accommodate minority groups within territorial boundaries. This has been done largely by establishing subnational units of government, endowing them with certain powers, including fiscal powers and the ability to make financial claims, while subjecting them to forms of centralised supervision.

3.2.1.1 Internal boundaries and numbers

The first, and the most perplexing, question is how to accommodate ethnic minorities. While most countries have ethnic majorities, it is striking that these majorities are absent from all of the four federations under review. Governments in these countries can be formed only by coalitions between communal groups. This reality (strongly apparent in Kenya’s ruling parties) does not diminish the core issue of how to deal with ethnic diversity. This issue becomes particularly important when the dominant model of a homogeneous ‘nation-state’ is jettisoned. How can ethnoculturalism then be catered for?

While there has been no uniform answer to this question, three dominant responses can be discerned. The first provides for the explicit recognition of ethnic groups (as is the case in Ethiopia); the second entails the splitting of large ethnic groups into numerous units (witness Nigeria, the DRC, and Kenya); and the third is the strategy of drawing ‘soft’ ethnic boundaries, as in South Africa.

Ethiopia stands out as the only federal system which has consciously sought to use ethnicity as the principal criteria for drawing internal boundaries.⁸ However, even this endeavour bumped into the hard reality of the actual multiplicity of ‘nations, nationalities, and peoples’ in that country.⁹ Originally, only six of the regions were directly linked to ethnic communities (Amhara, Tigray,

Afar, Somali, Oromia, and Harar), with Sidama added as a new region in 2020. The remaining three are amalgams of a diversity of groups, as the southern region's name attests: the Southern Nations, Nationalities, and Peoples' Region. Even so, the homogeneity of the six ethnic regions is illusory, for each of these includes subregional local government institutions (special zones and districts) that provide governance space for minority ethnic groups.¹⁰

All in all, the attempt of aligning ethnicity with government institutions may not have been a great success. Since the decline of the Ethiopian People's Revolutionary Democratic Front's hegemonic control and centralising elite, the fault lines of this mode of territorial politics have led to disputes with regions about boundaries and the marginalisation of minorities.¹¹

In order to overcome the conflict-producing potential of ethnic engineering, the second approach has been to break the main ethnic groups into numerous smaller entities with the aim of producing a balkanisation of power. For instance, the federal history of independent Nigeria begins with a three-region federation based on the three major ethnic or religious groups (Hausa-Fulani, Yoruba, and Igbo). Ethnic or religious animosities between the south and the north of the country culminated in 1967 in the attempted secession of Biafra and an ensuing civil war. Since 1966 the main ethnic groups were balkanised, such that by 1996 Nigeria was made up of 36 states plus a capital territory.¹²

Despite the balkanisation of the political units, the main political ethos is still centred around the original three regions, while the accommodating convention that the presidency should alternate between the north and the south has not been generally respected. Igbo agitation for separation has not diminished, while the large number of states have not emerged as strong, self-standing institutions capable of performing the necessary range of tasks. The rise of the militant Boko Haram in the northeast may be regarded as evidence of the fact that the Islamic-oriented states have not proven effective in providing the required range of government services.

Kenya has taken balkanisation a step further. The 1963 independence constitution provided for a semi-federal system known as *majimboism*. This divided the country into eight regions, with each region defined largely by ethnicity.¹³ These federal arrangements (imposed by the departing British colonial master) lasted less than a year, after which a unitary state emerged and transmogrified into a one-party state. A second wave of democratisation saw the return of multi-party democracy and, later, devolution. A key issue for devolution was the levels and numbers of subnational governments:¹⁴ Were there to be two levels of devolution, with large regions and local authorities, or only one? The 2010 Constitution settled for one level of 47 counties, with these understood as something between regional and local government. One of the aims of this was to avoid the establishment of large ethnic-based regions in view of the inter-ethnic conflicts that erupted after the 2007 presidential election.

In fact, such balkanisation only incompletely side-lined ethnicity as the driving force behind territorial politics. The 47 county boundaries were based on the old British-drawn districts, which were themselves founded on ethnic

demographics.¹⁵ In addition, due to the smallness of their size, the counties' remit was little more than that of glorified local authorities. After yet another contested presidential election in 2017, one which saw the opposition leader Raila Odinga again being robbed of victory, opposition groups mobilised on specifically ethnic grounds, arguing, among other things, for the country to be split up along ethnic lines. The Building Bridges Initiative (BBI) brought Kenyatta and Odinga together in 2020, agreeing on constitutional changes to make a more inclusive national executive possible.

In South Africa, antipathy to ethnicity and federalism ran deep in the African National Congress (ANC). It was, after all, grand apartheid that had tried to separate the African majority population into ethnic minorities, with each governing a separate homeland. When the ANC was unbanned in 1990, and negotiations with the white minority government commenced, the structure of the state was high on the agenda. The white government, with allies in the homelands, argued for a federalism with strong provinces and a weak centre, while the ANC insisted on the need for a unitary state with a strong executive to undo the damage inflicted by apartheid.

The eventual compromise between the two positions was a weak form of federalism, one in which provinces had no direct links to ethnicity. The nine provinces were demarcated with regard to economic functionality rather than (majority) linguistic community, and though seven of the nine provinces did have clear linguistic majorities, their boundaries did not follow ethnic settlement patterns: the new provinces were examples of 'soft' ethnic boundaries.¹⁶ In the more than two decades since the establishment of the provinces, there has been no ethnic mobilisation around the provinces or their boundaries.

The balkanisation of large ethnic groups into small units has affected the allocation of powers to units. Due to their small size, they do not have the economies of scale necessary to perform major functions.

3.2.1.2 Powers of subnational governments

Ethnicity may form the bedrock for the building blocks of the putative 'nation-state', but civil peace is not achieved by granting subnational constitutional space to ethnic communities for the expression and development of their languages and cultures alone.¹⁷ Real brick-and-mortar powers are required to make SNGs something more than linguistic or cultural clubs. Inherent in the notion of self-government is the capacity to make decisions that regulate everyday life and provide public services. The depth of self-government is highly contentious, as it goes to the heart of the centralist state: How much power is the centre willing to share and devolve to SNGs? What is the range of policy matters on which subnational governments have the final say?

As argued above, the overall trend is that of dominance by the federal government. The federal government usually enjoys an extensive array of exclusive central powers, a limited number of exclusive subnational powers, and an extensive range of concurrent powers, leaving little scope for residual powers

to be allocated to SNGs. To illustrate this, let us turn to the examples of Ethiopia, Nigeria, South Africa, and Kenya.

In Ethiopia, there is a long list of exclusive federal powers and a brief list of regional competences (importantly including the drafting of a subnational constitution and establishing a state police force), together with an even shorter list of concurrent powers concerned mostly with taxing powers.¹⁸ All residual powers fall under the jurisdiction of the regions. However, given the broad powers allocated to the federal government ('It shall formulate and implement the country's policies, strategies and plans in respect of overall economic, social and developmental matters'),¹⁹ there is lively debate about whether the regional powers 'to formulate and execute economic, social and development policies, strategies and plans of the state' actually amount to much.²⁰

In Ethiopia, the real problem with the allocation of powers resides less in the Constitution itself than in the fact of a centralised policy directed by a hegemonic party. While Ethiopia's Constitution is generous with regard to the mandate of sub-national unit, to the extent that they enjoy an explicit mandate on national self-determination, these constitutional provisions are proving paper-thin. The federal government was supposed only to set standards and, for the rest, leave it to the states to design and implement policies that fit their contexts.

The Nigerian Constitution of 1999 follows a similar pattern. It contains a long exclusive list of federal powers (68 all told) and a short concurrent list of 12 items shared with the states, with residual powers belonging to the states. Again, the complaint is that there are few functional areas which the state could claim as its exclusive domain.²¹ Where the federal government fails to perform its wide array of functions adequately, states are calling for the transfer of specific powers, notably including policing. Already, some states have established semi-police forces and co-fund the federal police force, actions which Rotimi Suberu refers nicely to as 'constitutional infidelities'.²²

Meanwhile, in South Africa, the division of powers is approached from the bottom up.²³ Provinces have exclusive powers over strictly limited functional areas, including the drafting of a provincial constitution of restricted scope, together with a range of peripheral matters, for example, abattoirs, ambulance services, liquor licenses, provincial planning, and provincial roads. The really meaningful functional areas are shared with the national government, including education, health services, and social welfare. In addition to the concurrent list, the national government has exclusive powers over residual matters. This allocation of powers is accompanied by qualified override clauses in favour of the national government in respect of both the exclusive and concurrent provincial powers.

Has this division of powers been sufficient to satisfy the interests of SNGs? As eight of the nine provinces are governed by the ruling party, which is not an advocate of federalism, these limited powers have not provoked demands within the party for further powers. However, calls have come from the opposition-held province – the Western Cape – for greater powers in the field of policing and rail transport.²⁴

Although Kenya's 2010 Constitution contains lists of both national and county powers, the end result is very similar to that of the preceding examples, the only difference being that the counties are the least empowered. This can be attributed to the smallness of their size: they do not have the economies of scale to provide significant state services. There is a list of exclusive national competences, and a list which may give counties some exclusive powers, but certainly a host of concurrent powers. To that end, the qualified override clause in favour of the centre (similar to that provided for in the South African Constitution) is also used.²⁵ The upshot is that only limited substantive powers are allocated to counties, while functions such as education are omitted. Quite remarkably, despite their limited functions, the governors agreed to a bill amending the Constitution (in favour of strengthening the national executive) in exchange for an increase in their financial stake in the revenue raised nationally from 15 to 35 per cent.²⁶

Here we can see how the overall trend is that of the dominance of exclusive federal powers, limited exclusive subnational powers, and a list of concurrent powers of varying length. In the exercise of concurrent powers, the federal government also dominates.

3.2.1.3 Financial resources

As wryly noted by Markakis, Schlee, and Young, self-rule on matters relating to ethnoculture is not sufficient to ensure peace. 'More needs to be done to achieve peace, such as fairness in resource use and budget allocations,' they advise. 'Otherwise, ethnic pluralism does not lead to a plurality of equals, but to ethnic hierarchies.'²⁷ It is, however, in the field of resource distribution that the SNGs are granted the least autonomy. They have few original taxation powers, even less borrowing powers, and their financial sustainability is dependent on a share of revenue raised nationally but determined by the federal government.

In African federations, it is generally the case that SNGs are not empowered with any significant powers to raise taxes. This discourages both self-reliance and accountability to the electorate. Revenue is raised mainly by the central administration for its distribution to all levels of government through equalisation systems. In Ethiopia, the regions are dependent on national transfers for up to 75 per cent of their expenditure.²⁸ In South Africa, provinces rely on their own source revenue for only 3 per cent of their income, with the rest coming from their equitable share entitlement and conditional grants.²⁹ In Nigeria, the bulk of states' revenue comes from federal transfers, and these are sourced mostly from oil revenue. The only taxes that effectively belong to the states are low-yield ones such as vehicle registration fees. Kenya is no different. Here, all but ten per cent of revenue flows from the centre, and the counties' main source of own revenue is property taxes.

How the centre controls the SNGs through fiscal transfers is strongly influenced by the manner in which the division is made. In Ethiopia, the division

is a political decision, with the House of Federations ultimately deciding on the formula by which the allocation is made to the regions.³⁰ In the other three countries, there is an attempt to depoliticise the process (at least in part) by relying on the expert advice given by independent institutions. Ultimately, though, the decision is a political one made by the federal legislature. In South Africa, the Financial and Fiscal Commission has a constitutional mandate to advise Parliament on how to divide the national cake both vertically (between the national, provincial, and local governments) and horizontally (between the provinces and municipalities).³¹ Functioning as an equalisation system, the formula takes into account, and seeks to compensate for, unevenness in development, backlogs in services, and historical marginalisation. In Nigeria, the Revenue Mobilisation, Allocation and Fiscal Commission performs a similar function. Meanwhile, the Kenyan Commission on Revenue Allocation's role is simple: on the vertical division of revenue collected nationally, a minimum of 15 per cent of the national budget must be transferred to the counties as well as any further amounts the Commission may recommend.³²

In South Africa and Kenya, the transfers are composed of an entitlement to an equitable share of the revenue raised nationally (a block grant) plus further conditional grants by the national government, with these to be used strictly in pursuit of its policy priorities. In both countries, the equitable share can, in theory at least, be spent just as the SNGs please. In fact, the way the share is calculated largely predetermines how the funds have to be spent. Thus, for example, the formula uses the number of learners and teachers at schools and the number of health workers per population size, giving SNGs little choice but to use their block grant for these purposes.³³

In many fragile countries, conflicts often revolve around the ownership, sharing, and control of the benefits yielded by non-renewable natural resources, particularly so in the case of the highly lucrative resources of oil and gas. In Nigeria, it is thanks only to long and bitter struggle that some of the benefits of extractive industries reach the SNGs where the oil extraction occurred. The Constitution was amended recently to provide that 13 per cent of resource revenue is allocated to oil-producing states, yet nevertheless the conflict with the Ogoni people in the Niger delta has not been resolved. Although in terms of the Kenyan Constitution of 2010 'all mineral and mineral oils as defined by law' are deemed to be 'public land',³⁴ and thus fall under the central government's custodianship, the state need only 'ensure the equitable sharing of the accruing benefits'.³⁵

For macroeconomic reasons, the borrowing powers of SNGs are tightly limited. In South Africa, no borrowing is allowed to cover current expenditure; the same restriction is found in the Kenyan Constitution. In Nigeria, only the federal government may borrow on behalf of the states, while in Ethiopia the regional governments have no constitutionally entrenched borrowing powers.

The main consequence of such intergovernmental fiscal systems is that they undermine both subnational democracy and self-government. Political accountability is enhanced when a government imposes taxes directly on

its electorate because it must then account for how it has spent the monies raised. In the case of transfers, accountability leans towards the federal government because it is the source of revenue; however, poorly structured vertical accountability mechanisms, such as those of the Nigerian states, often have been accused of leading to reckless spending.

3.2.1.4 Federal intervention

A further feature of centrist federalism is the ease with which the federal government can intervene in SNGs in cases of state failure. Federal supervision, which comprises regulation, monitoring, support, and intervention (the most intrusive), is also an important feature of African federations. The reason for this is clear enough. Since the four federations under review emerged through a process of disaggregation (establishing new SNGs), state failure due to capacity problems, lack of resources and skills, political instability, and corruption was always a real possibility. In theory, the aim of intervention is to correct SNGs' failure to provide effective governance and services to their residents, though it is obvious to see that intervention could be abused for political reasons. As a result, attempts have been made to impose stringent legal conditions for any such interventions.

The Nigerian Constitution (1999) requires either mass violation of human rights or civil unrest to allow intervention. The Ethiopian Constitution sets a similarly high benchmark. Here, the second House of Parliament (the House of the Federation) 'shall order federal intervention if any State, in violation of this Constitution, endangers the constitution order'.³⁶ In terms of an enabling proclamation, an intervention is an armed response triggered when there is an uprising by a state, a conflict between states or nations, nationalities, or peoples that cannot be resolved by non-peaceful means, or a disturbance of the peace and security of the federal government.³⁷

The South African Constitution is more accommodating, requiring only failure by provinces and municipalities to comply with a constitutional or legal executive obligation of a certain magnitude (though it then subjects such intervention to the approval of the National Council of Provinces, the second House of Parliament). The Kenyan Constitution is even more generous, allowing the national government to intervene if a county is either unable to perform its functions or mismanages its finances.

3.2.2 Shared rule

Shared rule occurs when the SNGs themselves, or people from them, are allowed to participate in some federal decisions and become part of the different branches of the federal government (legislative, executive, judicial), other independent bodies, and the administration. The objective of shared rule is to create an inclusive federal government and national institutions that give a sense of belonging to the country's various members or communal groups.

Although shared rule is of equal value to self-rule, in practice it is often weak and neglected.

To promote peace and the political accommodation of minority groups, sharing in governance at the centre is key. This is so because, in the absence of strong self-rule institutions, the centre is where the well-being of all groups is shaped. There is no question that a strong centre is essential for holding a country together and necessary for the performance of functions only a central government can reasonably do (providing for a country's unity, security, and economic integration, and conducting international relations abroad). The issue is whether minority groups feel they are truly a part of the national endeavour. Do they have confidence that the federal government also belongs to them? Such confidence is the glue that holds a heterogeneous country together. In deeply divided societies, it is also a matter of enhancing the legitimacy of federal institutions. A more inclusive set of federal institutions (a second chamber, federal executive, an army, and so on) builds the necessary sense of belonging for the sub-units of the federal union.

Both in theory and in practice, SNGs enjoy limited power through shared institutions. Given the limited self-rule potential of the powers and resources allocated to them, they are not compensated by a significant role in the federal institutions. Indeed, dedicated institutions of shared rule often become spaces for federal self-rule.

3.2.2.1 National legislature

According to federal design, national legislatures comprise a first house elected by popular vote and a second house reflecting the electorate or the SNGs of regions. In our sample of federations, where an electoral system of constituency representatives is elected on a first-past-the-post basis, there are limited possibilities for the house to be inclusive of minorities, unless, of course, the latter are territorially concentrated. The focus is usually on the second house, which is touted as the legislative forum that brings SNGs' interests to the centre stage. Its usefulness in reflecting regional interests at federal level is predicated on it exercising real power in both law and practice. In this regard, the four federations under consideration provide some diversity, but the exercise of being a check and balance vis-à-vis the first house is still underdeveloped in a political ethos where the legislature itself operates in the shadow of the executive.

The Nigerian Senate is modelled after the US Senate and is, on the face of it, quite powerful. Made up of three senators elected directly by each of the 36 states, plus one senator from the federal capital territory, the Senate's role is to pass all legislation and, in addition, co-determine certain executive actions (a presidential declaration of war; use of armed forces outside Nigeria); confirm certain federal appointments (Supreme Court justices, cabinet ministers, ambassadors, members of the National Electoral Commission, and so on); and, when necessary, act to impeach the President by a two-thirds vote. As with its US model, party politics dominate the Senate's functioning.

The Kenyan Senate resembles the Nigerian Senate, but its powers are visibly more limited. It comprises one directly elected senator from each of the 47 counties, plus additional members to ensure prescribed gender representation (a third of members must be women). It participates in constitutional amendments and may approve or reject legislation, but only insofar as this affects the counties. It has powers of oversight of the national government, including the potential to impeach the President. As with Nigeria, Senate decision-making works according to party lines, which in turn reflect the alignment between parties and ethnic groups.

In South Africa, the second House of Parliament, the National Council of Provinces (NCOP), is modelled on the German second chamber, the *Bundesrat*, and is designed expressly to give voice to the provinces. Each of the nine provincial legislatures elects a ten-member delegation which carries a provincial mandate on specific matters when participating in law-making in Parliament. With regard to legislation affecting provincial interests, the NCOP must approve or reject (with a supportive vote of five provincial delegations) any bill adopted by the National Assembly, though the latter may, through a two-thirds majority vote, override any rejection. It also co-determines the ratification of treaties and states of emergency, and may veto any national intervention in provinces. Decision-making is influenced by party politics rather than provincial interests. Given that the ANC governs in eight of the nine provinces, there has been little conflict with the National Assembly.

Ethiopia's second house, the House of the Federation, is entirely different. It does not represent the ten regions but rather every ethnic community, with one person elected for each of the 50 recognised communities and there being an extra representative for every additional million of a nation, nationality, or people. The House has no law-making competences, but its power lies in its function as a supreme interpreter of the Constitution. The House determines the division of revenue between states, and, as noted above, can order the federal government to intervene in a state.³⁸

As is clear, the executive dominates the legislature in all four federations under discussion. The focus of attention therefore shifts to the executive where the real power and resources lie, thus raising the question: Are federal institutions (the political executive, administration, state-owned enterprises, and independent national institutions) a reflection of the diversity of the nation? Does the federal solution make unity attractive for previously marginalised groups? Do they feel part of the federal government, and do federal institutions actually reflect the 'federal character' of the country?

3.2.2.2 Executive

Achieving inclusiveness at the presidential level is far from easy but not impossible. In the presidential systems of Nigeria and Kenya, electoral rules are in place to ensure that presidential candidates have an appeal that goes beyond their ethnic home ground. In Nigeria, in order to be elected, a

president must gain the support of at least 25 per cent of the votes in at least two-thirds of the states. Similarly, in Kenya, in addition to winning a majority of the popular vote, a successful presidential candidate must gain at least 25 per cent of the votes in the majority of counties (that is, in at least 24 of the 47 counties).

The composition of the cabinet provides even greater opportunities for regional inclusion. In South Africa, after the first democratic elections of 1994, a Government of National Unity was established for five years. This included provision for a deputy president from a minority party with 20 per cent of the vote and cabinet posts for those with five per cent of it. After the first five-year period, there was some inclusion of minority parties, but only on a voluntary basis. Nigeria is the only federation in the group which requires that the Cabinet include one person from each of the 36 states. After the upheaval of the contested 2017 Kenyan presidential election, the Building Bridges Initiative led to a constitutional amendment bill. This will expand the executive through the introduction of the positions of Prime Minister and four deputy prime ministers, thus providing the President with the opportunity (though not the obligation) to be more inclusive at the centre.

3.2.2.3 *Administration*

The federal administration in its many facets (departments, diplomatic corps, military, state-owned enterprises (SOEs)) is a principal dispenser of positions and resources, and, as such, the main access point to wealth accumulation. All too visible in ostensibly 'neutral' administrations are figures such as military generals, diplomats, and the CEOs of SOEs. A lack of representativity adds to the many complaints about uneven development and marginalisation. Nevertheless, attempts have been made to advance inclusivity.

In Nigeria, the idea that the federal government must reflect the 'federal character' of the country's diversity is famously stated in the Fundamental Objectives and Principles of State Policy.³⁹ The Kenyan Constitution is less forthright: one of the 'values and principles of public service' is stated as being 'representation of Kenya's diverse communities'.⁴⁰ Article 241(4) puts this more specifically: 'The composition of the command of the Defence Force shall reflect the regional and ethnic diversity of the people of Kenya.' Similarly, inclusive principles are found in articles 39 and 87 of the Ethiopian Constitution.

Moving from paper to practice is, however, the real test, and this has not been readily achieved in the countries under discussion. Protests by the Oromo against the perceived dominance of the Tigrayans in the federal administration and their stranglehold over the EPRDF first brought Abiy Ahmed to power in 2018. Abiy then formed the Ethiopian Prosperity Party in 2019, which was followed by the dismissal of Tigrayan figures from federal institutions (including from both houses), resulting finally in the civil war with Tigray. In South Africa, the question of ethnic representativity has not come explicitly to the

fore, given that it is overshadowed by the primacy of the black–white racial divide.

3.2.2.4 Cooperative government

Cooperative government between executives has emerged as a key element of shared rule. In this arrangement, the federal government and the SNGs engage with each other as equals in the exercise of overlapping autonomous powers. The principle of cooperative government acts as a restraint on both federal government and SNGs in the exercise of their autonomous powers through the imposition of certain procedural requirements: before a government exercises its exclusive or concurrent powers, it must take into consideration how that decision may influence or affect the interests of the other government(s).

To do this, the decision-maker must have the necessary information about the other government's interests, and this is obtained through a process of consultation. A system of cooperative government therefore places a 'soft' constraint on the exercise of exclusive or concurrent powers. Wherever there are overlapping jurisdictions, each level of government exercises its autonomous powers with an input from another level of government. Such a process of consideration is regarded as the oil necessary to make a federation function smoothly.

The South African and Kenyan constitutions aim at cooperation between the national government and the SNGs. The South African Constitution sets the gold standard in its articulation of the principles of cooperative government and its description of the structures and processes necessary to make it a reality. It also requires that national legislation must establish structures and procedures to facilitate these objectives, as described in the Intergovernmental Relations Framework Act of 2004. Here, the principal structure is the President's Coordinating Council. This brings the President together with the provincial premiers and the head of organised local government, not as equals but in a consultative forum for the President.⁴¹ Similarly, the sectoral intergovernmental fora, which are made up of a national minister and his or her provincial counterparts, are also regarded as a top–down affair, rather than a meeting and conversation between equals.

The Kenyan Constitution closely follows the South African example. It also contains provisions which embed the goal of cooperative government and require legislation for the institutionalisation of regular meetings between the President and the country governors. This was done by the Intergovernmental Relations Act of 2012, which establishes two main bodies: the National Coordinating Summit (the president and the county governors) and the Council of Governors (the country governors).

The Nigerian Constitution is silent on the principles of cooperative government and provides no formal institutions for cooperation, although informal structures and procedures do exist. The absence of any structure for

intergovernmental relations is consequently a weak point in the Nigerian federal system.

As with Nigeria, the Ethiopian Constitution also lacks any mention of the goal of cooperative government. When the House of Peoples' Representatives sought to pass a proclamation on cooperative government structures and processes, the legislative power to do so could be based only on the implied need for a coherent approach to governing the country as a whole. Only after the demise of the EPRDF, and the end of its almost 30-year reign as a top-down party hierarchy, was the need for cooperation expressed, and a state institution formed to undertake that task.

In conclusion, even where there have been explicit constitutional provisions for cooperative government, these have not resulted in forms of real engagement between equals. Rather, the shared space of consultation has most often been used by the federal government as a mechanism through which to rule over SNGs.

3.3 Incomplete presence of federal 'success' factors – constitutionalism

The argument thus far is that constitutional federal arrangements have been highly centralised and that these arrangements have proved detrimental to the buy-in of minority groups who have not experienced a sufficient sense of both self-rule and shared rule. So far, no serious arguments have been put forward that the federal 'solution' is inherently inappropriate for communal accommodation and that the return to the unitary state is the only way to go.

At the same time, there have been only limited calls for strengthening the role of the SNGs in the federal system. Indeed, only in Ethiopia has the call for strengthening SNGs been on the table from the beginning. Now, in 2021, the question of strengthening stands as a key one for a country which is in danger of being torn apart because the centre is not responding to regional and minority demands. This question is crucial to understanding the 2015 protests and the numerous 'national liberation movements' that are still operative even after five decades of central government action.

3.3.1 Constitutionalism and federalism

Just as important as the need for appropriate federal arrangements in securing peace is the presence of specific socio-political conditions that enable them to prosper. Constitutions are but documents which stand at the beginning of the journey towards federalism and peace, and scholars of federalism have emphasised the importance of the socio-political context, as this may work either to support or to undermine the development of a federal dispensation. Watts has argued that there are 'significant characteristics of federal processes' which are necessary for the successful implementation of federalism. These include:

- a strong disposition to democratic procedures, one which presumes the voluntary consent of citizens in the constituent units;
- multiple centres of political decision-making that give expression to the principle of non-centralisation;
- the adoption of open political bargaining as a dominant means of reaching decisions; and
- respect for constitutionalism and the rule of law, given that each order of government derives its authority from the constitution.⁴²

I have argued elsewhere that a further element should be added to these, namely capability.⁴³ Even if all the other elements are present, the federal enterprise will simply not fly if the SNGs are not capable, or lack the capacity, to perform their functions (whether this is due to a lack of personnel, skill, or resources). The characteristics identified by Watts correspond to the basic elements of the politico-legal notion of constitutionalism.⁴⁴ These elements are:

- democracy, that is, the establishment of accountable government in terms of both representative and participatory mechanisms;
- limiting power, that is, the separation of powers provided for in checks and balances and an enforceable bill of rights; and
- the rule of law, that is, governance under rules and not by arbitrary discretion, which includes the supremacy of the constitution and its justiciability by an independent judiciary.

The interlocking connections between Watts's 'success factors' and constitutionalism are then:

- a commitment to democracy through free and fair elections;
- limited government, now, in addition to the separation of powers and a bill of rights, the establishment of 'multiple centres of political decision-making' which can act as a safeguard against the tyranny of the centre;
- the rule of law, requiring the supremacy of a constitution setting the parameters of the powers of all governments; the constitution, as the solemn pact between the centre and the constituent units, which cannot be amended by the centre's acting on its own; that the laws authorised by the constitution be obeyed; that governments of both orders must act in terms of clear, predetermined rules; and that trust in the constitution and laws must be vindicated by an independent judiciary which is respected and obeyed by all governments.

The evidence gleaned from the practice of African federations suggests that the incomplete presence of all or any of these elements is harmful to the development of a federal system.

3.3.2 Democracy

Since the constitutional reforms of the 1990s, multi-party elections have been held routinely in almost all African countries.⁴⁵ Current concerns focus on the quality of the elections: Are they free and fair, authoritarian, or rigged? With a few noteworthy exceptions (Botswana, Mauritius, and South Africa), the past 30 years have seen the emergence of a strong authoritarian trend across most federations.⁴⁶ The EPRDF's authoritarian rule made a mockery of free and fair elections at all levels of government in Ethiopia and led to protest actions and dissent,⁴⁷ while the postponement of the 2020 federal and regional elections was the proximate cause of the civil war in Tigray.⁴⁸ In Nigeria, free and fair elections (at presidential, national, and state levels) have been marred since 1999 by evident corruption and the rigging of votes.⁴⁹ The rigging of the Kenyan 2017 presidential election almost tore the country apart, while the DRC also saw a president reluctantly leaving office, all of two years after his term had expired.

Leaving aside the example of South Africa (which has held free and fair elections since the first democratic elections in 1994), it would be difficult to say that an ethos of democracy pervades the federations and provides the basis for political inclusion and stability.

3.3.3 Limited government

Federal executive power is limited, through legislatures and courts, by the separation of powers and bills of rights. The vertical division of powers also functions as a powerful limitation on the use and abuse of power by federal executives. In a milieu where the separation of powers is weak and a bill of rights has few teeth, the ethos of tolerating multiple centres of political decision-making that exercise real powers (although limited in scope) was evident in South Africa, Nigeria, and Kenya.

Ethiopia is the exception where separation of powers and the justiciability of the bill of rights are, in any event, weak. When an opposition party captured control of Addis Ababa in 2005, the elected government was promptly dismissed and the opposition politicians were persecuted. Since then, through authoritarian rule, the EPDRF succeeded in winning every seat at every level in all regions. This was, of course, only until the Tigray region bucked the trend in 2020. In the ensuing conflict, the federal government disposed of the regional government through military action.

At the other end of the spectrum, South Africa's ruling party, which for a period of five years governed all provinces (2004–2009), handed over the Western Cape Province to the main opposition party without demur. The ANC governing party also acknowledged defeat in 2016 and 2021 when opposition parties displaced it in some metropolitan councils. Since Nigeria's return to civilian rule, there has been a change in ruling parties and opposition-held states are tolerated, although not at the level of local government.⁵⁰

In Kenya, opposition-held counties are treated no differently to counties where the ruling party is in charge.

Although the elections in the latter three countries are fiercely contested, and much done to favour the ruling parties, opposition victories nevertheless have been respected, albeit with reluctance.

3.3.4 Rule of law

The rule of law (generally understood as governance under rules and not by arbitrary discretion) includes both the supremacy of the constitution and constitutional review by an independent judiciary. The rule of law also implies routine adherence to the rules of governance that underpin both federal governance and governance in general. Given a reluctant acceptance of non-centralism in practice, the courts themselves at times have entered the fray as guardians of the constitution.

In Ethiopia, the House of Federation stands as the interpreter of the Constitution. Ultimately, though, this is a political body that is intended to give content to the Constitution's broadly framed provisions, and this is a task that it has not performed in the past, given the hegemony of the ruling party in the House of Federation itself.⁵¹ The South African Constitutional Court, on the other hand, has played an important role in upholding the Constitution, although it may at times have favoured a centrist reading of some federal arrangements.⁵²

The new Kenyan Supreme Court has proved to be a different institution from the highly corrupt and compliant one that existed prior to 2010. It has shown itself remarkably able in enforcing the constitutional compact, particularly so with regard to devolution. In comparison, the report card of the Nigerian Supreme Court is much less flattering, even though the Court has managed to play 'an important role in mediating and moderating Nigeria's overly centralised federal system, helping to arbitrate potentially disruptive conflicts and securing a modicum of sub-national and other constitutional rights'.⁵³

While constitutionalism may be respected by the apex courts, governments at all levels do not routinely rule by the rule book. All too often, the state is treated as a feeding trough for the ruling elite. Indeed, the patrimonial state is so pervasive in the main federations that the consequent bleeding of resources places not only the federal system at risk but the country as a whole. The federations in our survey all have serious problems with corruption. In the ranked listing of the 180 countries covered by the Transparency International Corruption Perception Index of 2020, South Africa stands at 69, Ethiopia 94, Kenya 124, Nigeria 149, and the DRC 170.⁵⁴

3.3.5 Capability

The successful implementation of federal arrangements requires the necessary human skills at both federal and subnational levels as well as the provision of adequate material resources at the latter level. If skills and resources are lacking

at the subnational level, the federal project has no chance of working. This challenge is particularly acute in fragile countries where new SNGs have been created through a process of disaggregation. The lack of human skills in the federations under discussion is widely recognised, and training programmes are much in demand. Yet however large or small the skills deficit may be, a lack of financial resources is fatal. Such a lack may result from desultory transfers of funds due to the waste of available revenue through mismanagement and corruption, something which (as noted above) is a reality that bedevils African federations. Furthermore, poor and corrupt governance by SNGs undermines constitutionalism and places federalism itself at risk.⁵⁵

3.4 Concluding remarks

The key question posed by this chapter is what, if any, ‘lessons’ Somalia, South Sudan, and Sudan could learn from the prior experience of African federations in dealing with conflict, including ethnic conflict.

A first observation is that where federal solutions have been tried, highly centralised federal arrangements are evident. Any overemphasis on ethnicity as a building block in a federal compact might not achieve the end goal of peace if it becomes a mobilising force for centrifugalism.

Secondly, to judge the efficacy of federal arrangements in constitutions, they must first be implemented. Implementation depends on a broader embrace of constitutionalism, including commitments to democracy, to separation of powers, to limited government, the rule of law, and the possession of capability. The implementation of federal arrangements is just as important as the arrangements themselves. This means that the building of the political ethos as well as the mechanisms for enforcement (an independent judiciary) need to take place alongside the construction of the federation.

Can these experiential ‘lessons’ have relevance to creating a federal future for the 4 Ss in the quest to address their deep-seated conflicts? Will highly centralised federal arrangements be the likely outcome of current constitution-making processes, or will it prove possible for different, more decentralised systems to emerge? More complex still is the question whether the absence of the four ‘success factors’ (also captured in the notion of constitutionalism) could turn out to be the decisive factor in disabling these attempts at a federal solution to endemic conflict.

3.4.1 Federal arrangements

Whether federal arrangements are to be centralised or decentralised depends largely on the balance of political forces at the constitution-making table. Do the incumbent federal governments hold all the aces and concede only limited powers to the regions in a gesture towards accommodation, or is the balance of forces more evenly spread, allowing for a more genuinely decentralised system? Each of the countries under discussion presents a different picture.

In Somalia, the federal government (mainly representing Mogadishu and surrounds) is weak and holds little sway over the regions (and, in the case of Somaliland, none at all).⁵⁶ For there to be any possibility of the regions' yielding their power to collect export duties to the federal government, formal legitimation is certainly required of their existing but only informally recognised powers.

In South Sudan, a similar situation prevails. The country is effectively divided among the two parties or ethnic groups. These form the current government of national unity. The promised federal government would have to cede considerable powers to Neuer regions in the Rick Machar camp for there to be any chance of success.

In Sudan, the picture is murkier still. The bargaining position of the communities and the militia around the periphery is unclear. The final outcomes of the peace agreements reached in 2020 with rebel movements from Darfur, South Kordafan, and Blue Nile still need to be fleshed out in actual federal arrangements.⁵⁷ Meanwhile, the current transitional council, made up of both military and civilian components, is itself a battleground between the centralised approach favoured by the military and the limited-government approach championed by civil society groups.

Two elements in the federal arrangement require the closest attention. The first is the role of the accommodation of ethnic or cultural interests in state formation. Given the history of ethnic-driven conflicts in the Horn, the argument is against making ethnicity the explicit building block for federation – but neither should ethnicity be ignored. Ethnic dividing lines could, perhaps, be softened.⁵⁸ Although Somalia is one of the most ethnic and religiously homogeneous countries in Africa, its clan system remains as powerful as ethnic mobilisation in the other two countries.

Secondly, even if more decentralised federal arrangements do emerge, specific attention should be paid to the shared-rule component of federalism. The centrality of the federal government and administration with respect to access to opportunities and resources is likely to remain a prominent characteristic. In competitive multi-party democracies, if the end result is a winner-takes-all scenario, instability may become built-in to the system as a whole. The centre needs to be seen to be owned by the constituent units and working to unite rather than divide them.

3.4.2 Constitutionalism

In a situation in which the 4 Ss are only just emerging from conflict and the existing peace agreements are fragile, even a modicum of federal success factors and constitutionalism proves hard to find.

There have been no democratic elections for quite some time. In Somalia, the elections to the federal legislature are determined by clan elders, while the fact of the overdue presidential election is engendering conflict in 2021; neither Sudan nor South Sudan have experience of elections of any kind. There

has been no federal practice of non-centralism in Sudan and South Sudan, while in Somalia, there has been too much, with the centre proving unable to hold the country together. In Sudan and South Sudan, the centrist government of the ruling elite is precisely a cause of the conflict. Given that conflict denotes an absence of the rule of law, rule-bound behaviour and independent courts enforcing the rules are simply not to be found, and peace agreements are breached at will.

In brief, in countries which are emerging from war-like conflicts, the implementation of federal arrangements has significant obstacles to overcome. In such countries, trust cannot be assumed as a precondition for federation; at best, it may be created as a result of the implementation of federal arrangements.

The first and obvious response to these challenges is to try and establish favourable conditions in which federal arrangements have a chance to take root. Such conditions take time to create, since it is a question of building trust where none exists. The implementation of federal arrangements must itself create the conditions for the survival of these arrangements. The aim is for democracy (however defined) to be embedded, non-centralism respected, and the rule of law built from the top down. The approach is based on the construction of institutions (elections, constitutions, courts) that together cohere to produce a functioning system.

A second, but even more challenging, response is to see whether one can initially side-step the institutional approach (while the institutions are under construction) by means of a system based on bargaining and a balance of brute power. Could the current system in Somalia (of openly bargaining from positions of strength) be formalised? The balance of a four-plus-a-half voting system based on clan strength (not numbers) is an example of such a bargain. And so, bargains must be struck on the distribution of powers (as is already provided in the Transitional Constitution). A grand bargain with Somaliland has to be struck. In Sudan, the bargaining may not be one that takes place between parties of equivalent strength. Where deals are made through bargaining, what are the enforcement mechanisms in the absence of courts? If resorting to armed force is not to be countenanced (and where the first peace modality is the integration of all militias into a national army), what keeps the bargain in place? Internationally, boundaries are frozen, which does prevent a bargaining party from readily walking away through secession.

A bargained relationship is formed ideally because there is a measure of dependency between the partners: in the bigger scheme of a country, the centre is dependent on the constituent parts, and vice versa. However, if interdependency is present, it is something created not by design but through the alignment of a number of factors. Marginalised communities take up arms because their marginalisation points to a lack of dependency; if peace is the actual ultimate goal, then interdependence is firmly in place.

As the processes of constitution-making unfold in the 4 Ss, it is more important than ever to understand the foundations on which federal pacts can be built successfully. It would be foolhardy indeed to imagine – aided by all the

accompanying detail that looks so good on paper – that a federation can arise simply from the ashes of conflict without also building a broader enabling political environment.

Notes

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