

Federal Theory and Federalism in Africa

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Abstract

This article examines the African experiment of federalism in light of classic federal theory with the objective to identify and illuminate the reasons and ways of convergence and divergence and the consequences thereof. Classic federal theory offers an explanation of the origin, formation, fundamental elements, 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 from 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, able to deliver its purpose mainly in a system of “unconstitutional constitutionalism”. This article suggests that if federalism has to ensure the practice of constitutional democracy in Africa, democratic values, human rights, and constitutionalism considerations should animate its normative and institutional underpinnings as in classic federal theory.

1. Introduction

In our time, federalism has been suggested as an effective system with the normative appeal and institutional sophistication to manage complex socio-economic, cultural, and political issues at national, regional, and international levels.¹ 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 regional organizations, such as the European Union, to follow a similar course or to incorporate federalist principles and practices.

¹ Andrew Arato, Jean Cohen & Astrid von Busekist, “Introduction” in Andrew Arato, Jean Cohen & Astrid von Busekist, eds, *Forms of Pluralism and Democratic Constitutionalism* (Columbia University Press, 2018) at 5–8.

Despite these receptions, African states are either less interested or have a general distaste for federalism. Even the word federalism is an “anathema” in the lexicon of African politics.² Out of the 54 states, only a handful of them adopt federalism. While Nigeria, Ethiopia, and South Africa are established African federal states, the Union of Comoros, Sudan, South Sudan, the Democratic Republic of Congo, and Somalia can be considered as federalist states.³

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, in light of classic federal theory, which develops from the experiences of established systems such as the United States, Canada, Australia, and Switzerland. The investigation aims to illuminate both the reasons and ways of convergence and divergence between classic federal theory and federalism in Africa, and the consequences thereof.

In order to examine the African federal experiences with the 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 formation. 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

² Rotimi Suberu, “Federalism in Africa: The Nigerian Experience in Comparative Perspective” (2009) 8:1 *Ethnopolitics* 67 at 67.

³ Adem Kassie Abebe, “Umpiring federalism in Africa: Institutional mosaic and innovations” (2013) 13:4 *African Studies Quarterly* 53 at 54.

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.

2. Classic Federal Theory: Origin, Purpose, Fundamental Elements, and Success and Failure

Drawing from the experiences of established federal systems such as the United States, Canada, Australia, and Switzerland, federal theory 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 emanate from its very conceptions or definitions. In this respect, offering the conceptions or definitions of the three towering figures in federalism suffice 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.”⁴ Daniel Elazar defined federalism simply as “self-rule plus shared rule” in a polity.⁵ Ronald Watts, like Elazar, defined federalism as “the advocacy of multi-tiered government combining elements of shared-rule and regional self-rule.”⁶ From these definitions and the scholarship on federalism,⁷ 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

⁴ William H Riker, *Federalism: Origin, Operation, Significance* (Little, Brown, 1964) at 11.

⁵ Daniel J Elazar, *Exploring Federalism* (University of Alabama Press, 1987) at 12.

⁶ Ronald Watts, *Comparing Federal Systems* (3rd ed, McGill-Queen's University Press, 2008) at 8.

⁷ Thomas O Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Inquiry* (2nded, University of Toronto Press, 2015) at 31–36.

supreme written constitution with horizontal and vertical division of power, (c) representation mechanisms of self-rule and shared rule, and (d) an umpire.⁸

With respect to the original logic or purpose of federalism, scholars offer multiple explanations. In this regard, there are four major explanations why states opt for federalism. The first is the explanation 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 ensure security (the Federalist No. 2 & 15), provide individual liberty, prosperity, and freedom, and guarantee a democratic form of government (the Federalist No. 9, 10, & 17).⁹ The *Federalists'* account is a widely accepted explanation on why states should adopt federalism. In this regard, Elazar further develops the democratic, liberty, equality and freedom justifications of federalism. He argues that federalism maximizes individual liberty, equality, freedom, and ensures and enhances democratic self-government in a polity.¹⁰ He contends that federalism aims to institute a workable political arrangement based on a just moral order.¹¹ Hence, according to this view, the superiority of federalism, as a system of state organization, to bring a workable polity with a just moral order is the reason why states adopt or should adopt federalism.

The second theory focuses on the existence of external military or diplomatic threat for the origin of federalism. The chief architect 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

⁸ Watts, *supra* note 6 at 9.

⁹ Alexander Hamilton, John Jay, and James Madison, 'Federal Theory in *The Federalist*' D Karmis & W Norman, *Theories of Federalism: A Reader* (Palgrave Macmillan, 2005) at 105–133.

¹⁰ Elazar, *supra* note 5 at 83–91.

¹¹ *Ibid* at 104.

result of a bargain between politicians who offer the bargain and those who accept it.¹² 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,” on the one hand, 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,” on the other.¹³ Thus, for Riker, the cumulative existence of these conditions, that is “the expansion” and “the military condition,” creates federalism.¹⁴

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. According to them, 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 comes into being due to the misfortunes of “conflicts in political identity.”¹⁵ For them, the fundamental reason for the origin of federalism is “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.”¹⁶ In the absence of these conditions, either federalism cannot arise in the first place or, if arisen, it “will become vestigial.”¹⁷

¹² Riker, *supra* note 4 at 12.

¹³ *Ibid.*

¹⁴ *Ibid* at 13.

¹⁵ Malcolm Feeley & Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (University of Michigan Press, 2009) at 39.

¹⁶ *Ibid* at 38.

¹⁷ *Ibid* at 38–39.

The fourth theory attributes the origin of federalism to the level of institutionalization and 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 federal bargain as Riker argued; instead, it is related to the state-society dynamics the subunits find themselves in 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.”¹⁸ 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.”¹⁹ Absent this, he argues, the political core will absorb all the subunits to form a unitary state.²⁰

Regardless of the different rationales for the origin of federalism, it is formed through 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.²¹ Alfred Stepan reduces these processes of federal formation into two; i.e. Coming-together and Holding-together federalism.²² 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

¹⁸ Daniel Ziblatt, “Rethinking the Origins of Federalism: Puzzle, Theory, and Evidence from Nineteenth-Century Europe” (2004) 57:1 *World Politics* 70 at 71.

¹⁹ *Ibid.*

²⁰ See Daniel Ziblatt, *Structuring the State: The Formation of Italy and Germany and the Puzzle of Federalism* (Princeton University Press, 2006).

²¹ Watts, *supra* note 6 at 65.

²² Alfred Stepan, “Federalism and Democracy: Beyond the U.S. Model” (1999) 10:4 *Journal of Democracy* 19 at 22.

preexisting subunits in a former unitary state.²³ 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.²⁴

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 stand out as major parameters against which success and failure are measured.²⁵ 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 mechanism of achieving them are embedded in the socio-economic, cultural and political context of each federal system.²⁶ Furthermore, these contexts are dynamic and the assessment of success and failure along these lines will be relative and contingent in time and place.²⁷ Bearing this in mind, scholars offer some reasons for the success and failure of federalism.²⁸ After a careful review of the comparative federalism scholarship, Michael Burgess considers the commitment of the

²³ *Ibid.*

²⁴ Watts, *supra* note 6 at 65.

²⁵ Michael Burgess, "Success and Failure in Federation: Comparative Perspectives" in Thomas J Courchene and others, *The Federal Idea: Essays in Honour of Ronald L. Watts* (The McGill-Queen's University Press, 2011) at 194–204.

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

²⁷ Burgess, *supra* note 25 at 194.

²⁸ See Riker, *supra* note 4 at Chapter 3 & 4.

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.²⁹

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

The original logic of federalism in Africa significantly differs from those offered in classic federal theory. Why African states adopt federalism in the first place and why they are committed to its continuous operation could not be explained and captured fully through classic federal theory. Unlike 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 as a superior government arrangement to achieve 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. Furthermore, although the theory of federalism as a tragic compromise due to the disjuncture between political identity and the geographical aspect of a polity has some relevance for Africa, it cannot explain why these states adopt federalism as this feature of disjuncture is common to sub-Saharan Africa, as territories were arbitrarily drawn by colonial powers.

Similarly, the institutional infrastructure theory cannot be a helpful explanatory tool for the formation of federalism in Africa as the different ethnic groups that find themselves in territorial states have 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

²⁹ Burgess, *supra* note 25; Richard Simeon, "Preconditions and Prerequisites: Can Anyone Make Federalism Work?" in Thomas J Courchene and others, *The Federal Idea: Essays in Honour of Ronald L. Watts* (The McGill-Queen's University Press, 2011) at 213-222.

infrastructural capacity than any other state in the continent.³⁰ 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 explain these in detail with respect to Nigeria, Ethiopia, and South Africa in this order.

Nigeria was established as a unitary state by the British.³¹ The amalgamation of the different parts of Nigeria to a unified state was mainly motivated by economic considerations.³² Precisely because the aim of the amalgamation was economic, the British colonial rule neither developed common institutions of governance nor allowed for the integration of the people across Nigeria.³³ As independence approached, regionalism, ethnicity, religion, and economics took center stage in the political negotiations for self-determination. And the Hausa-Fulani, the Yoruba, and the Igbo, representing the main ethnic, regional, religious, and economic groups, feared each other's domination in the post-independence period.³⁴ While the Yoruba and Igbo advanced Nigerian nationalism and pushed for the independence of Nigeria, the Hausa-Fulani were hesitant for fear of Yoruba and Igbo domination.³⁵ Due to this fear, the Hausa-Fulani rejected the motion for independence in 1956 in the House of Representatives.³⁶ When the Southern representatives

³⁰ See Meyer Fortes and Edward Evan Evans-Pritchard, eds, *African Political Systems* (Oxford University Press, 1940).

³¹ Richard Bourne, *Nigeria: A New History of a Turbulent Century* (Zed Books, 2015) at 3.

³² Toyin Falola & Matthew M Heaton, *A History of Nigeria* (Cambridge University Press, 2008) at 68.

³³ Toyin Falola, *The History of Nigeria* (Greenwood Press, 1999) at 69.

³⁴ Olawale Albert, 'Federalism, Inter-ethnic Conflicts and the Northernisation Policy of the 1950s and 1960s,' in Kunle Amuwo et al, *Federalism and Political Restructuring in Nigeria* (Spectrum Books, 1998) at 51.

³⁵ Larry Jackson, "Nigeria: The Politics of the First Republic" (1972) 2:3 *Journal of Black Studies* 277 at 278.

³⁶ Larry Diamond, *Class, Ethnicity, and Democracy in Nigeria: The Failure of the First Republic* (Syracuse University Press, 1988) at 48–49.

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.³⁷

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.³⁸ Within these atmospheres of mistrust, fear, and competition, the future of a unitary Nigerian state withered away and the adoption of a federal system, which holds the three regions together, seemed the only option to get independence and experience self-government.³⁹

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 is committed to the federal idea to date.⁴⁰ Despite changing constitutions, experiencing a bloody civil war, and military coups one after another,⁴¹ federalism has still relevance and appeal for many Nigerians if their country is to stay united.⁴² The choice of federalism and the allegiance to it in Nigeria is not because federalism has brought good government, economic prosperity, and a culture of human rights, as noted in section 5, but it has offered a normative appeal and institutional framework for ethnonational and religious

³⁷ *Ibid* at 49.

³⁸ Richard Sklar, *Nigerian Political Parties: Power in an Emergent African Nation* (Africa World Press, 2004) at 87–140.

³⁹ Sebastine Tar Hon, *Constitutional Law and Jurisprudence in Nigeria* (Pearl Publishers, 2004) at 7.

⁴⁰ Rotimi Suberu, *Federalism and Ethnic Conflict in Nigeria* (United States Institute of Peace Press, 2001) at 45.

⁴¹ See Richard Joseph, *Democracy and Prebendal Politics in Nigeria* (Cambridge University Press, 2014).

⁴² Ladipo Adamolekun, "The Nigerian Federation at the Crossroads: The Way Forward" (2005) 35:3 *Publius: The Journal of Federalism* 383 at 398.

groups to channel and advocate their interests regardless of the theory of government, be it civil/military or democratic/undemocratic.

Although the history of Ethiopia is different from Nigeria,⁴³ the way federalism emerges and operates, and its continuous appeal is similar to Nigeria. 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, were crucial for the birth of the federal idea in 1991. Although the military adopted the prevailing political ideology of the time in Ethiopia,⁴⁴ 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, 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 become the overarching objective of their struggle.⁴⁵ 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.⁴⁶ Like Nigeria, the appropriateness of federalism for the Ethiopian state is agreed across the political divide

⁴³ Bahru Zewde, *A history of modern Ethiopia, 1855-1991* (James Currey, 2001).

⁴⁴ See Donald Donham, *Marxist Modern: An Ethnographic History of the Ethiopian Revolution* (University of California Press, 1999).

⁴⁵ See Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study* (Wolf Legal, 2006).

⁴⁶ Semahagn Gashu Abebe, *The Last Post-Cold War Socialist Federation: Ethnicity, Ideology and Democracy in Ethiopia* (Routledge, 2016).

although the form of federalism has been a point of contestation.⁴⁷

Similarly, even though the history of South Africa is different from Nigeria and Ethiopia, the underlying rationale and objective for the origin of federalism share a lot of commonalities with these states. When the apartheid system could no longer withstand the internal resistance and international exclusion, a negotiated transition became a sensible option. The actors during South African transition to democracy held opposite views about the future of South Africa. The National Party, the Inkatha Freedom Party (IFP), the Conservative Party (CP), Afrikaner Volsfront (AVF), the Freedom Front, and the Democratic Party advocated federalism, while the African National Congress (ANC) and the Pan-Africanist Congress of Azania advanced a claim for a unitary state.⁴⁸

Among the federalists, the IFP advocated federalism and the conservative Afrikaners proposed self-government in their own *volkstaat*. The IFP, the CP, and the AVF formed a Freedom Alliance, amongst other demands, for the constitution of federal democracy, absent this, the IFP opted for secession and the AVF for a civil war.⁴⁹ The open warfare in the KwaZulu-Natal between the ANC and IFP supporters and the loyalty and support of the AVF by retired military generals and serving armed forces could not be ignored by the ANC.⁵⁰ Like 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, not in name.

⁴⁷ See Yonatan Tesfaye Fessha, “The Original Sin of Ethiopian Federalism” (2017) 16:3 *Ethnopolitics* 232.

⁴⁸ 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* (Witwatersrand University Press, 2001) at 506.

⁴⁹ Nico Steytler and Johann Mettler, ‘Federal Arrangements as a Peacemaking Device during South Africa’s Transition to Democracy’ (2001) 31 *Publius: The Journal of Federalism* 93 at 95.

⁵⁰ *Ibid* at 95–96.

One could not find the word federalism in the final Constitution. Indeed, the word federalism was avoided before the adoption of the final Constitution as it created an impasse between federalists and unitarists.⁵¹ Given the apartheid experience, federalism gained a pejorative name, in particular in the eyes of the ANC, and was considered as an obstacle for the overall transformation of the country.⁵² In order to facilitate meaningful debate, the constitutional negotiators dropped the term federalism and ultimately institutionalize “Co-operative Government”.⁵³

Thus, with its new task of accommodation and integration of diverse ethnonational groups within a single state, federalism holds new purposes and follows new pathways in Africa. 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 constitute units from a former unitary state with the objective to hold the state together and concomitantly enable subnational units to broadcast their own respective ethnonational interests and ambitions within the channels of shared rule and self-rule. As a holding together device, federalism in Africa enshrines unique normative and institutional configurations, to which I now turn.

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

As federalism follows new pathways in Africa, some of the fundamental elements of federalism known to classic federal theory have been transformed and adapted with non-

⁵¹ Haysom, *supra note* 48 at 505.

⁵² Christina Murray & Richard Simeon, “Promises Unmet: Multilevel Government in South Africa” in *Varieties of Federal Governance: Major Contemporary Debates* (Cambridge University Press, 2011) 232.

⁵³ Haysom, *supra note* 48 at 504.

federal principles and practices. As former unitary states, Nigeria, Ethiopia, and South Africa heavily draw from the unitary theory of state organization and the unitary impulse is evident in the design and operation of their federalism.⁵⁴ Furthermore, each state blends the federal spirit with its unique experiences. In this regard, while federalism has been fused with the military principles of administration in Nigeria, it has been blended with ethnicity and socialist ideologies in Ethiopia, whereas it 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 government arrangement, Ethiopia has a two-tiered system; each tier with some degree of sovereign power on some matters.⁵⁵ In all these states, the constitutions are unilaterally unamendable. In Nigeria, even if the National Assembly is empowered to amend the Constitution, it cannot do so without the approval of the House of Assembly with no less than two-thirds of all the states.⁵⁶ By the same token, in South Africa, the Constitution can be amended by the National Assembly mainly with the participation of the National House of Provinces (NHOP) and approval by six of them.⁵⁷ In Ethiopia, constitutional amendment without the approval of a two-thirds majority vote of the states is impossible.⁵⁸

⁵⁴ See also J Tyler Dickovick, "Federalism in Africa: Origins, Operation and (In)Significance" (2014) 24:5 *Regional & Federal Studies* 553.

⁵⁵ Nigerian Constitution, Sec 2(2) & 3(6); South African Constitution, sec 40(1); Ethiopian Constitution, article 46 (1).

⁵⁶ Nigerian Constitution, Sec 9(1) (2) & (3).

⁵⁷ South African Constitution, Sec 44(1)(a) (b) & 74.

⁵⁸ Ethiopian Constitution, article 105.

Further, there are representation 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,⁵⁹ the Constitutional Court in South Africa,⁶⁰ and the House of Federation (HoF), the upper house of parliament, in Ethiopia⁶¹ are federal umpires. Moreover, the federalists 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 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 constitute units called regions at independence. In the fourth republic, however, Nigeria has 36 constituent units called States and 768 LGAs.⁶² Against one of the fundamental elements of federalism, the federal civilian and military leaders created states and LGAs single-handedly.⁶³ 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.⁶⁴ Brigadier Murtala Mohammed increased the number of states to 19.⁶⁵ During

⁵⁹ Nigerian Constitution, Sec 232(1).

⁶⁰ South African Constitution, sec 167.

⁶¹ Ethiopian Constitution, article 62.

⁶² Nigerian Constitution sec 3(1) & (6).

⁶³ See Henry Alapiki, "State Creation in Nigeria: Failed Approaches to National Integration and Local Autonomy" (2005) 48:3 African Studies Review 49.

⁶⁴ Suberu, *supra* note 40 at 85.

⁶⁵ *Ibid* at 90.

the Ibrahim Babangida administration, the number of states reached 30.⁶⁶ General Sani Abacha's regime added six new states and the number of states in the federation increased into the current 36.⁶⁷ As the case with states, LGAs are created by the federal civil and military leaders starting with 301 in 1976 and reached 768 in 1999.⁶⁸ 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 in the fourth republic 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.⁶⁹ Higher education, industry and power development, the judiciary, the police, and regulation of labor, among others, form the concurrent powers of the federal government and the regions.⁷⁰ Not only did the regions have a residual power, but also they can peruse their own socio-economic development policies by mobilizing their own resources.⁷¹ Moreover, they had their own regional constitutions and regional police force.⁷² Further, the regional base of the political party system made political power to be in the regions rather than in the

⁶⁶ *Ibid* at 98.

⁶⁷ *Ibid* at 101.

⁶⁸ *Ibid* at 106.

⁶⁹ Kalu Ezeru, *Constitutional Developments in Nigeria* (2nd ed, Cambridge University Press, 1964) at 266–269; John Mackintosh, "Federalism in Nigeria" (1962) 10:3 *Political Studies* 223.

⁷⁰ Suberu, *supra* note 40 at 26.

⁷¹ Adamolekun, *supra* note 42 at 386.

⁷² Eghosa E Osaghae, "The Status of State Governments in Nigeria's Federalism: A Study of the Changing Phases" (1991) 52:2 *The Indian Journal of Political Science* 242 at 244.

center.⁷³ Because of this constitutional and political configuration, the regions were stronger than the center in operating Nigerian federalism in the first republic.⁷⁴

In the fourth republic, however, the nucleus of power changed from the regions to the center. The 1999 Constitution confers on the National Assembly to have legislative powers on 68 broad items known as the Exclusive Legislative List (ELL).⁷⁵ Moreover, the Constitution 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.⁷⁶ Among the ELL, the creation of states,⁷⁷ regulation of police,⁷⁸ and political parties⁷⁹ are included. Most importantly, oil exploration and natural gas, the main engines of the Nigerian economy, are the exclusive domain of the federal government.⁸⁰ Moreover, not only States operate under a single Constitution, they did not have Supreme Courts. States only have High Courts⁸¹ in which their appeals go to the Court of Appeal,⁸² which is second to the Supreme Court of Nigeria. Hence, Nigerian federalism blends unitary principles and practices along with the military logic of centralization with the federal spirit at its core in its design and operation. Without accounting for these, one should be hard pressed to understand and, at one's own peril, explain Nigerian federalism.

In addition to the unitary impulse, Ethiopia configures federalism with ethnicity along with a socialist ideology. As a manifestation of the unitary impulse, although states have their

⁷³ *Ibid* at 186.

⁷⁴ Adamolekun, *supra* note 42 at 387.

⁷⁵ Nigerian Constitution Sec 4(2) (3) & (4).

⁷⁶ *Ibid*, Schedule II Part I Item 68.

⁷⁷ *Ibid*, Schedule II Part I Item 14.

⁷⁸ *Ibid*, Schedule II Part I Item 45.

⁷⁹ *Ibid*, Schedule II Part I Item 56.

⁸⁰ *Ibid*, Schedule II Part I Item 39.

⁸¹ *Ibid*, sec 270 (1).

⁸² *Ibid*, sec 240.

own constitution, Supreme Court, and regional police force in Ethiopia,⁸³ unlike Nigeria, important government functions and prerogatives are the mandates of the federal government. In addition to the list of 21 broad items 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,⁸⁴ the Constitution empowers the federal government to formulate and implement the country's overall socio-economic and development policies, plans, and strategies.⁸⁵ This gives the federal government a wider power in implementing uniform socio-economic and development policies in the country and consequently shrink 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 against the policy framework of the federal government.⁸⁶

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.⁸⁷ Unlike the case with a federal legislature elsewhere,⁸⁸ which adopts a bicameral legislative body composed of the Senate, representing the interests of the states, and the House of Representatives, representing the interests of the general public, in the legislative process, Ethiopia does not confer a legislative mandate to HoF. As the people in direct and universal suffrage elect members of HPR, they are

⁸³ Ethiopian Constitution, article 50(7), 52 (2(b &g) & 78 (3).

⁸⁴ *Ibid*, article 51.

⁸⁵ *Ibid*, article 51(1).

⁸⁶ *Ibid*, article 52(1) & (2(c)).

⁸⁷ *Ibid*, article 55(1).

⁸⁸ Meg Russell, "The Territorial Role of Second Chambers" (2001) 7:1 *The Journal of Legislative Studies* 105.

responsible to their constituency.⁸⁹ States do not have a representative in the legislative process.⁹⁰ Although the Constitution assures the equality of states, the Amhara and Oromia regional states, given their population number form a democratic majority in the HPR, put others in a perpetual minority in the legislative process.⁹¹ This, in turn, channels majority rule without a safeguard to state interests in the legislative process like unitary states.

Furthermore, the control of the major revenue sources by the federal government limits the autonomy of states in executing the constitutionally allocated powers and responsibilities.⁹² 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.⁹³ The fiscal centralization makes states to depend on the federal government for their financial expenditures in operating their government and run their administration.⁹⁴

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.⁹⁵ Furthermore, ethnicity is the fundamental basis for the institutional architecture of self-rule and shared rule.⁹⁶ Even more, ethnic groups are entitled to the right to self-determination up to secession.⁹⁷ Due

⁸⁹ Ethiopian Constitution, article 54(1) & (2).

⁹⁰ *Ibid*, article 54(3).

⁹¹ Ethiopian Constitution, article 47(4).

⁹² *Ibid*, article 96; Yonatan Fessha and Coel Kirkby, 'A Critical Survey of Subnational Autonomy in African States' (2008) 38 *Publius: The Journal of Federalism* 248 at 262.

⁹³ Ethiopian Constitution, article 97.

⁹⁴ See Solomon Negussie, *Fiscal Federalism in the Ethiopian Ethnic-based Federal System* (Wolf Legal Publishers, 2006).

⁹⁵ Ethiopian Constitution, preamble, article 8, 61 & 62.

⁹⁶ *Ibid*, article 46 & 47.

⁹⁷ *Ibid*, article 39.

to the centrality of ethnicity in the federation, it is dubbed “ethnic federalism”. The novelty of Ethiopia’s ethnic federalism, more than its emphasis on ethnicity, is the introduction of a system for its own disintegration rather than the provision of promise for 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.

In a similar vein, in addition to the unitary impulse, South Africa establishes a cooperative government drawing from the German experience of integrated federalism and building on the value systems of Ubuntu.⁹⁸ 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 road, traffic, cultural, sport, recreation and amenities, and veterinary services excluding the regulation of the profession.’⁹⁹ South Africa, like Nigeria, 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. Concerning Bills that amend the Constitution and affect the interest of the provinces, the NCOP is given an important power to defend provincial interests as the

⁹⁸ Richard Simeon, “Considerations on the design of federations : the South African constitution in comparative context” (1998) 13:1 SA Publiekreg = SA Public Law 42 at 60.

⁹⁹ South African Constitution, Schedule 5 Part A.

support of two-thirds of the provinces is required.¹⁰⁰ While for a bill affecting provincial interests to pass the NCOP must agree.¹⁰¹ Other than these, the National Assembly can pass a bill on its own.¹⁰² Also, the national legislature overrides provincial legislatures even on matters exclusively assigned to the provinces.¹⁰³

The powers of the provinces are further reduced by fiscal centralization. Not only do provinces have a limited tax base, these are also not immune from national regulation. For instance, provinces can 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.”¹⁰⁴ However, the national parliament is given the mandate to ensure that provinces legislate in a manner not materially and unreasonably affecting national economic policies and activities.¹⁰⁵

Further, Section 41 of the Constitution incorporates the underlying principles of German Federalism and Ubuntu. It outlines ‘peace, national unity, security, effective, transparent and coherent government as a whole, on the one hand, and ‘fostering friendly relations, assisting and supporting one another, cooperation on matters of common interest, and avoiding legal proceedings’ in intergovernmental relations, on the other, as the principles of cooperative government. Indeed, this epitomizes the phenomenological similarities between Germany’s integrated federalism and Ubuntu. This is due to the fact that the federal

¹⁰⁰ *Ibid*, sec 74(1)(b).

¹⁰¹ *Ibid*, sec 76(1)(a).

¹⁰² *Ibid*, sec 75 (2), sec 75(1) (c) (i).

¹⁰³ *Ibid*, sec 146-148; see also Murray and Simeon, *supra note* 52 at 237; Ziyad Motala and Cyril Ramaphosa, *Constitutional Law: Analysis and Cases* (Oxford University Press, 2002) at 153–158.

¹⁰⁴ South African Constitution, sec 228(1).

¹⁰⁵ *Ibid*, sec 228(2).

design in Germany is animated by consensus building and cooperative behavior within the tiers of government,¹⁰⁶ 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 adapts and blends federalism with non-federal principles and practices.

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

Without doubt, the standards of assessment are equally important as the assessment of federalism itself. As there are syncretic configurations between federal theory and federalism in Africa, the standards of assessment in 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 to 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 exists since independence and there is a general desire for its continuity from citizens and politicians alike. Similarly, the federal system in Ethiopia endures since its first installation and will likely exist for the foreseeable future given the commitment of citizens and politicians to the federal spirit. 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.¹⁰⁷

¹⁰⁶ *Ibid* at 56.

¹⁰⁷ Murray and Simeon, *supra* note 52 at 245–246.

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 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 neither 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 of 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.¹⁰⁸ Even after the transition to democracy, the performance of Nigeria with respect to democracy, human rights, and constitutionalism is poor.¹⁰⁹

By the same token, Ethiopia's federalism, as a matter of fact, 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 democracy, human rights, and constitutionalism even compared with other African states.¹¹⁰ While years of protest movements against such authoritarian regime have brought change in persons of the government and the party recently, the practice of constitutionalism and liberal democracy are yet to be seen. Regardless, federalism is to stay if the state is to remain united.

The genius of federalism in Nigeria and Ethiopia is its ability to operate in a system of "unconstitutional constitutionalism". In so far as the governance system accommodates ethnonational and religious interests at the national and subnational levels, the theory of government, be it civil/military or democratic/undemocratic, becomes either a secondary consideration or a matter of style or form informed by the dynamics of internal and

¹⁰⁸ J Isawa Elaigwu, "Nigerian Federalism under Civilian and Military Regimes" (1988) 18:1 *Publius: The Journal of Federalism* 173 at 173.

¹⁰⁹ "EIU Democracy Index 2017", online: <<https://infographics.economist.com/2018/DemocracyIndex/>>.

¹¹⁰ *Ibid.*

international politics. 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 try to be inclusive to the extent possible, *albeit* to different degrees, to make governmentality possible. In light of federalism, the unconstitutional constitutionalism is an aberration. Consequently, federalism exists and performs its accommodative and integrative function without constitutionalism and liberal democracy in Nigeria and Ethiopia.

Although South Africa 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, section 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 of the 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 task to federalism. As an accommodative and peacemaking device, federalism has enabled South Africa to transit 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.¹¹¹ For its good democratic and governance performance, the practice of constitutionalism and liberal democracy have a great contribution, without which self-

¹¹¹ Murray and Simeon, *supra* note 52 at 240.

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 institutional architecture to channel, accommodate, and integrate diverse interests and ambitions within a single state in a system of “unconstitutional constitutionalism”. Nonetheless, if federalism has to 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 considerations 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.

6. Conclusion

While federalism in Africa shares the forms, structures, and discursive practices from 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, is able to deliver its purpose

without the existence of constitutionalism and liberal democracy, as evident from the experiences of Nigeria and Ethiopia. As the primary purpose of federalism in Africa is the accommodation of 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 in a system of “unconstitutional constitutionalism” in these states. Hence, federalism is neither a failure nor 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 competing ethnonational interests. If federalism has to 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 considerations should animate the normative and institutional frameworks of both self-rule and shared rule.