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## Governance in Deeply Divided Societies: A Comparative Analysis of the Federal Structure of the Constitution of Kenya 2010 and Federalism in the Federal Republic of Ethiopia

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### Abstract

In literal terms, the constitution of Kenya does not define Kenya as a federal nation or a federation. In this study however, I examine the federal structure of the Kenyan government under the Constitution of Kenya 2010 in comparison with that of the Federal Republic of Ethiopia. The study focuses on the constitutive criteria of a federal state as examined against Watts' *variations in federations*.<sup>†</sup> The first part of the paper distinguishes or draws similarities between countries like Kenya on one hand which are not federations in their constitutional definitions and countries like Ethiopia on the other hand which are well defined in their constitutions as federations. In answering the big questions, 'what is federalism?' the paper draws a line between quasi federal states and defacto federal states. While maintaining the theme of what drives the definition of a federal state, the second part of the paper delves into the formations of decentralized countries of Kenya and Ethiopia. Being driven by pre- and post-independence politics in Kenya, the paper further examines the regional governments under the Independence constitution and the defining constitutional changes that abolished regionalism while comparing the text with the historical development of ethnic federalism in Ethiopia. Thirdly, the paper focuses on elements of self-rule as compared with elements of shared rule which are defining components of federations. Besides focusing on the comparator, Ethiopia, Kenya's regionalism under the independence constitution is compared to devolution under the Constitution of Kenya 2010. Fourth, a key aspect of federalism is revenue and expenditure. This highlight on fiscal federalism while drawing basic assumptions from two scenarios. On one hand are countries where taxes are collected and put in a national revenue fund out of which each level is paid according to its expenditure needs whereas on the other hand are countries where taxes are assigned to various levels of government allowing them to cover their expenses. The main goal is economic equilibrium. While drawing a conclusion that Kenya meets the criteria set by Watts in typologies of federalism, this paper concludes by demystifying the thorny issue of secession as a radical solution in federations where conflicts are not solved between the levels of government.

**Keywords:** BRICS, G7, Global crisis, Geopolitics, Geostrategic competition, NATO, Soft lie diplomacy, Taiwan, Ukraine

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<sup>†</sup> Ronald, L. Watts (2001). *The Models of Power Sharing*. *International Social Science Journal*, 53, 23-32. [10.1111/1468-2451.00289](https://doi.org/10.1111/1468-2451.00289).

## 1. Introduction

Many scholars have attempted to define and explore the theoretical nature of federalism.<sup>1</sup> Much has been written about it but there seems to be no clear and commonly used definition of the term. In comparison other systems of governance such as democracy, dictatorship, aristocracy have a single and distinct understanding among the scholars. However, in examining federalism every scholar seems to have their own angle and view despite the few similarities. The challenge of having one distinct definition is the difference of academic approaches on the study and particularly difference in perspectives of constitutional law, political science or economics of the country in study.<sup>2</sup>

The solution to these challenges is the comparison of federal systems as a surer method of developing the theory of federalism.<sup>3</sup> Despite the differences all the attempts to try and define federalism have studied a small pool of federal systems and therefore comparison between these systems will enable us identify the main characteristics of a federal system.<sup>4</sup> It is for this reason that this article seeks to understand federalism by comparing the governance of two countries with an almost similar history. The main purpose of the article is to define federalism and the main characteristics to look out for in order to categorize a country as federal.

## 2. Part 1: Defined and Undefined Federations

Scholars have struggled to agree on a single definition for what a federation is or what federalism entails.<sup>5</sup> The difficulty could be attributed to the different perspectives and academic theories of constitutional law, political science and economics.<sup>6</sup> Despite the differences, most if not all theories of federalism are based on a small pool of prototypes that serve as model federal systems. The analysis of these prototypes allows us to conceptualize the main characteristics of a federal system.<sup>7</sup>

To start with, all definitions or attempts to define federalism, agree that it is a principle that applies to systems that have a minimum of two semi-independent constituent parts, but together form the system as a whole. It combines the principles of unity and diversity.<sup>8</sup>

Notably, the most accepted method of defining federalism is through comparison of the different systems.<sup>9</sup> This comparison method has enabled scholars on the subject of federalism to single out the crucial elements of a federal system and in the end be able to identify a system of government as federal or not. It is for this reason that this article compares governance in Ethiopia and Kenya in a bid to understand and define federalism.

### 2.1. *Federal Republic of Ethiopia versus "Federal" Republic of Kenya*

The major distinguishing feature of the Republics of Ethiopia and Kenya, is the outright naming of Ethiopia as the Federal Democratic Republic of Ethiopia (FDRE). However, the omission of the 'Federal' designation in Kenya's constitution does not entirely remove Kenya from the meaning of a federal state.

A federal state, simply called a federation, consists of strong constituent units of government and a strong general government each empowered directly by the people through the constitution.<sup>10</sup> Both units deal directly with the people in the exercise of their legislative, administrative and taxing powers.<sup>11</sup> They are directly elected and are accountable to their citizens.<sup>12</sup> As discussed later in this paper, these defining traits are existent in Kenya, and therefore despite lacking the designation, Kenya actually has characteristics of a federal state.

<sup>1</sup> Ronald, L. Watts (1999). *Comparing Federal Systems*, 6, 2<sup>nd</sup> Edition.

<sup>2</sup> Anna Gamper. (2019). *Global Theory of Federalism: The Nature and Challenges of a Federal State*, Cambridge University Press.

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

<sup>4</sup> Cheryl Saunders and Katy Le Roy. (2006). *Global Dialogue on Federalism*. Project of the Forum of Federations and the International Association of Centers for Federal Studies.

<sup>5</sup> *Ibid.*, note 3.

<sup>6</sup> *Ibid.*, note 3.

<sup>7</sup> *Ibid.*, note 5.

<sup>8</sup> *Ibid.*, note 5.

<sup>9</sup> *Ibid.*, note 3.

<sup>10</sup> Ronald Watts. (2002). *Models of Federal Power Sharing*. <https://onlinelibrary.wiley.com/doi/abs/10.1111/1468-2451.00289> as accessed on July 15, 2023.

<sup>11</sup> Article 52 of The Constitution of the Federal Democratic Republic of Ethiopia.

<sup>12</sup> Article 47 of The Constitution of the Federal Democratic Republic of Ethiopia

## 2.2. Sub National Units and Central Government in Federations

It is unanimously adopted that federalism is all about a balanced mix of self-rule and shared rule of sub national units where each country chooses its own formula.<sup>13</sup> This article discusses this phenomenon and in doing so classify the comparators against the criterion set for federal states.

The FDRE has its national government led by the Prime Minister with Executive Powers and a President as head of state albeit with ceremonial Powers. The Prime Minister and President are elected by the Members of Parliament in the House of People's Representative. The Members of Parliament are elected directly by the people making the Prime Minister and President enjoy power delegated to them by the people through their MP's. This is a minor deviation of the definition by Watts, that a federation's units of government are directly elected by the citizens. Nevertheless, Ethiopia recognizes itself and is generally defined as a federal state.

Kenya on the other hand has a central government headed by the President who is the head of the executive. The president is directly elected by the people. The legislative arm of government has the Members of Parliament who are also directly elected by the people. The constituent units in Kenya are referred to as Counties and headed by governors also elected directly by the people. The constituent units are formed by Members of the County Assemblies (MCAs) who form the legislative arm of the devolved/sub- national units and are also elected directly. These constituent units form the devolved government.

Just like the national government, the devolved government has power to make laws affecting the counties at the local level, collect taxes and perform other administrative functions. On the national level, laws affecting the devolved governments have to pass through the Senate, which is the second-part of the bicameral legislature. The senate is comprised of Senators representing each constituent unit and elected directly by the people.

Noticeably, Kenya despite not having the definition of a federal state in its constitution seems to have the exact characteristic of a federal state. That is there is both the national government and sub national units known as counties. Both units derive their power from the citizens through elections and once elected, the elected officials exercise direct power to the citizens, At the national level, there is the National Assembly whereas at the county level there are the County Assemblies. There is the national executive and the county executive and in terms of fiscal functions, revenue is collected at the national and county levels.

Unlike Kenya, Ethiopia identifies itself, through its constitution as a federal state albeit not entirely fulfilling the constitutive criteria of a federal state i.e., the heads in the central government of Ethiopia enjoy delegated power. Ethiopia, just like Kenya has a bi-cameral parliament. The House of People's Representatives is the Lower House with 547 members elected directly by the People. The Upper House known as House of Federation has 108 members chosen by the regional councils. Here we see another deviation from the tenets of a federal state, where representatives of an arm of the central government are chosen through delegated power rather than being directly elected by the people.

These similarities and distinctions beg the question *what is federalism?* On one hand a country does not define itself as a federal state but checks most if not all of the tenets, while on the other, a country defines itself as a federal state but does not fit as one when subjected to all the tests.

The definition of Federalism, seems to give the impression that a federal state, need not be bound by the an elaborate checklist but rather the intentions of the country when sharing power. Federalism has been defined as a normative term that refers to a state with different layers of government, where these layers are created with the goal of fostering unity by recognizing diversity.

In the foregoing, Kenya's constitution can then be said to have borrowed from the theory of federalism despite not using explicit terms. Article 174 of the Constitution of Kenya provides that the objects of devolution are inter alia:<sup>14</sup>

<sup>13</sup> Francesco. and Karl Kossler. (2017). *Autonomy of Subnational Units in Comparative Federalism*, 1<sup>st</sup> Edition, Bloomsbury Publishing.

<sup>14</sup> Article 174 of the Constitution of Kenya (2010).

- a) To promote democratic and accountable exercise of power.
- b) To foster national unity by recognizing diversity.
- c) To give powers of self-governance to the people and enhance participation of the people in the exercise of the powers of the state and in the making decisions affecting them.

### 2.3. Quasi-Federal States and De-facto Federal States

In a quasi-federal state, the central government is vested with more power despite there being two clear levels of government. A de facto federal state on the other hand, is one which exists in reality as a federal state despite not being entrenched in law. Therefore, Kenya can confidently be defined as a de facto federal state. The same cannot be said of Ethiopia.

Ethiopia expressly gives the nine (9) unit states power to self-determine when the need arises. This distribution of power means that Ethiopia's governance cannot be placed under the Quasi-federal state category. Once again, the conclusion that federalism is a normative term referring to a state with different layers of government geared to foster unity by recognizing diversity is affirmed.

## 3. Part 2: From Unitary to Federal Governments

There are vast similarities in the creation of federations in Kenya and Ethiopia. The federal arrangement in Kenya was adopted following a hotly contested election in 2007/2008 and the Post Election Violence witnessed thereafter. With a history of tribal clashes and election related hostilities, the top two presidential candidates agreed to share power and form a government of national unity. The two signed a power sharing agreement and enacted the agreement through the National Accord and Reconciliation Act of 2008.<sup>15</sup> In an effort to avert another election crisis, the Prime Minister and the President led a campaign to form a constitution that sought to share national power by acknowledging diversity. It is noteworthy that the constitution making process had been ongoing for a while but the Post Election Violence (PEV) of 2007/2008 became the catalyst that fast tracked the constitution making process.

The constitution review process was finalized with the promulgation of the new constitution in 2010. Among the goals of the constitution was to cure rampant marginalization of communities which did not have representatives in the senior levels of the national government. The constitution was a testament to every Kenyan, that they no longer had to solely depend on the national government for all services. The people gave themselves the power to elect leaders who were closer to them and who would be equipped with resources to serve them. This was to neutralize the winner takes it all attitude in Kenya's elective politics. Citizens could have their leaders even at the local (county) level.

Similarly, in Ethiopia, the constitution that defined it as a Federal State was promulgated in 1995 after decades of war, deposing of leaders and increasing resistance from various ethnic and regional movements against the centralized state at the time. The combined efforts of the ethnic and regional movements led to the fall of the centralized military rule in May 1991. The new regime, which was dominated by regional parties commenced the transformation of Ethiopia leading to creation of the Federation in 1995.

From the foregoing, the two states adopted a form of governance as a compromise to either avert crisis or to achieve prosperity or both. Federalism has been described by some authors as a system of governance that comes in to being due to 'the misfortunes of conflicts in political identity'. The Kenyan constitution for example expressly noted that the goal of forming two tiers of government was to achieve unity and most importantly recognize diversity.<sup>16</sup>

### 3.1. Pre and Post-Independence Politics

Federalism is not a new phenomenon Kenya. At Independence the constitution provided for a devolved government called *majimbo* which is Swahili for regions. It was named *majimbo* due to the government's

<sup>15</sup> National Accord and Reconciliation Act, Act No. 4 of 2008. [https://dbpedia.org/page/National\\_Accord\\_and\\_Reconciliation\\_Act\\_2008](https://dbpedia.org/page/National_Accord_and_Reconciliation_Act_2008) as accessed on July 14, 2023.

<sup>16</sup> Article 174 of the Constitution of Kenya.

intention to devolve political power to different regions. The regionalism dream was however short-lived as it was done away with in the third post-independence constitutional amendment in 1965.<sup>17</sup> The results of the amendment were that the provincial assemblies were scrapped, the senate was dissolved and the members absorbed into a unicameral national assembly. Thereafter, the idea of decentralizing the government's power remained a political discussion rather than a realized dream until 2008. Devolution in the 2010 Constitution of Kenya 2010 was just another name for *majimbo* or federalism.

Ethiopia on the other hand, has transformed from a centralized monarch to a federal republic. As a monarchy, it goes back to the first centuries AD, when the empire of Axum ruled. The Modern-day Ethiopia took shape in the second half of the 19<sup>th</sup> century. It was during this period when the territory under central governance expanded significantly. This brought several ethnic groups under one umbrella government, laying the foundations for a centralized state. This denied the ethnic groups, that existed even before the centralized state, the sense of freedom that they once enjoyed. The ethnic groups' disgruntled feeling persisted and led to resistance movements that eventually deposed Haile Selassie in 1974. The centralized state continued to rule as the sole system of governance, the resistance movements did not relent either. In 1995, the military rule fell and a new constitution creating a federal state was adopted.

The transformation of these two states into federations has been totally out of necessity. The two countries sought achieve the same goal and in the wisdom of the leaders at the time, the systems that existed were not sufficient. This compelled the leaders to change the system of governance to a model that would bring the divided societies together. In Kenya, tribalism and negative ethnicity had to be contained and what a better way than through the devolved units. It was believed that if government was devolved to the grassroots, it would enhance a feeling of inclusion nationally. The national cake would therefore reach every corner of the republic.

Notably, Kenya and Ethiopia had functioning systems that allowed them to adopt federalism as solution to their governance crisis. Kenya for example was already divided into a provincial administration that had eight (8) units headed by provincial commissioners.<sup>18</sup> The provincial commissioner was immediately assisted by District Commissioners who represented the central government in the 47 districts in Kenya. Below the district commissioners were the chiefs and sub-chiefs. These administrators however did not enjoy any financial or authoritative autonomy; their power was donated from the national government and their actions were controlled from above.<sup>19</sup>

Governance in Kenya before independence existed in form of chiefdoms and kingdoms that were based on tribes. It would be inaccurate to claim that the system then was perfect and that there was no conflict. On the contrary, conflicts would arise as they fought over different issues including the control of natural resources, security concerns and the need to expand their territories. However, the governance relevant to this article starts from the advent of colonialism.

The boundaries created by colonialists did not represent the harmony that existed between communities in Kenya. The colonial administration relied on a divide and rule strategy that confined Kenyans in distinct areas called 'Reserves'.<sup>20</sup> They then distributed resources including land and employment to those who bowed down to their authority.<sup>21</sup> Hence, at the time of independence, there was a class of Kenyans who had more access to resources than others.

To cement their administrative units, the colonialists went further and, in the independence constitution made provisions for the creation of regional authorities. There was a proposal to divide Kenya into three (3) regional authorities (Rift Valley, Western and Coast) to ensure equal sharing of power between the large ethnic groups and reduce chances of conflict.<sup>22</sup> However, as elaborately described in the first part, it was eventually, the Kenya African Democratic Union's (KADU) party proposition to have a *majimbo* system creating eight (8)

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<sup>17</sup> Constitution of Kenya (Amendment) Act (No. 14 of 1965).

<sup>18</sup> Cherry, Gertzel. (1966). *The Provincial Administration in Kenya*. *Journal of Commonwealth & Comparative Politics*, 4(3), 201-215.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> Peter, Kagwanja. and Willy, Mutunga. (2021). *Is Majimbo Federalism? Constitutional Debate in a Tribal Shark-tank*, May 20.

provinces that was adopted by the Kenya African National Union (KANU) after winning the independence election.<sup>23</sup>

The ruling party, KANU was however hesitant to adopt the *majimbo* system as was proposed.<sup>24</sup> It instead consolidated power and used the regional units as an extension of the executive power.<sup>25</sup> This made Kenya adopt a unitary form of governance with power centralized in the executive. The regional units created were denied autonomy and instead used to enhance central governance. The national resources, revenue and development was then awarded to the most collaborating regions. KADU's push for regionalism was ideally out of mistrust of consolidated power in the hand of KANU. KADU aimed at preventing domination of minority tribes by dominant tribes. They aimed to forestall the dangers of concentration of power in the majority<sup>26</sup>. At the end of the day, KANU being the majority party brought to an end KADU's clamor for regionalism which could not see the light of day in the wake of strategic positioning by the KANU big wigs.

After the abolishment of the *majimbo* system, any reference to it was viewed as anti- government or incitement towards division of the new republic. Regionalism in Kenya became a taboo, a system of government associated with rebellion. The government delt harshly with anyone who was viewed as pro- *majimbo*. KADU's President, Ronald Ngala sneered at the system as a 'breach of faith.'<sup>27</sup> *Majimbo* was dead and buried but would subtly find its way in the new constitution under a new name- devolution.

Ethiopia on the other hand was not properly colonized like other African Countries. They however did fight for their independence and retention of control of their territory. Despite not being colonized they were not immune to the British governance style, culture and even religion. Before the advent of the colonial masters, Ethiopia was governed by an Emperor who was believed to have come from the lineage of a mythical king from the tenth (10<sup>th</sup>) century before Christ. Due to this age-old culture and tradition of the monarch, its systems were functional and strong enough to resist the European colonial expansion.

First to be defeated was the Italian colonial claim to the Ethiopian state in 1896. This victory over the Italians strengthened the monarchy and expanded its territory which was followed by an increased central state power.<sup>28</sup> The culmination of the centralized imperial power of the monarch was attained during the reign of Emperor Haile Selassie (1930-1974). However, the factors that contributed to the rise of the imperial authority were also the same ones that led to its downfall.<sup>29</sup> The territory had become too big and therefore some regions feeling neglected and desiring to rule themselves had organized armed resistance to the imperial power. In 1974 the emperor was deposed after being unable to keep up with the protests coupled up with demands arising from International and national events.<sup>30</sup>

After the end of the monarch, the military took over and the new rulers established a "People's Democratic Republic of Ethiopia" and sought to adopt a more decentralized exercise of state power.<sup>31</sup> However, just like Kenya, this goal remained on paper as the state power was still strongly centralized. Despite undertaking some radical social measures, the military did not satisfactorily offer solutions to the protests and demands that had led to the empire's downfall.<sup>32</sup> The neglect resurrected the armed resistance and led to the eventual defeat of the military in May 1991.<sup>33</sup>

The new power holders, after the downfall of the military, immediately transformed Ethiopia from a unitary state to a federal one with nine (9) member states. The decision to adopt this transformation was passed in a

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<sup>23</sup> *Ibid.*, note 19.

<sup>24</sup> *Ibid.*, note 19.

<sup>25</sup> *Ibid.*, note 19.

<sup>26</sup> Muigai, Githu. and Dan, Juma. (2022). *Power, Politics and Law. Dynamics of Constitutional Change in Kenya, 1887-2022, 196-200.* Kabarak University Press.

<sup>27</sup> *Ibid.*, note 19.

<sup>28</sup> Christophe Van der Beken. (2007). *Ethiopia: From a Centralized Monarchy to a Federal Republic.* *Afrika Focus*, 20(1-2),13-48.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

national conference attended by twenty-seven (27) Ethiopian political groups and organizations from different ethnic groups. The conference gave birth to a transitional charter that would serve as the supreme law of the land for the duration of the transition.<sup>34</sup>

As the proverb goes, necessity is the mother of invention. In both countries there was a need to continue functioning thus the need for unity amidst diversity. It was therefore resolved that the leaders would give the people what they wanted; a share of power. In summary, decentralized governance in both countries grew out of circumstances that called for keeping the deeply divided societies together perhaps to maintain the boundaries set by the colonialists.

#### 4. Part 3: Elements of Self-Rule and Shared-Rule

As already established, each federal state is composed of two or more orders of government operating under the guidance of the national constitutional framework.<sup>35</sup> The framework provides a certain degree and sense of shared rule through common institutions and powers at the central government.<sup>36</sup> The national constitution also grants powers to the subunits whilst limiting the scope and jurisdiction of the unit, hence allowing self-rule for those units.<sup>37</sup> The scope of the powers granted differs from one federal system to another.

Generally, self-rule is a system of governance where an entity exercises all necessary functions of regulation without intervention from an external authority.<sup>38</sup> Self-rule can take several forms including; having power to make policy decisions even when they are contradictory to the upper-tier government, having the capacity to raise revenue at the risk of fueling cross-regional tax competition, having the freedom to take or refuse federal funding of specific projects and the power to contextualize national rules according to the region's specificities.<sup>39</sup>

Contrastingly, shared rule, can refer to three different forms of governance organization depending on what is being shared. The first dimension of shared rule is the level to which the regional units or states participate in decisions affecting the whole nations and not just their territory.<sup>40</sup> The second dimension is the horizontal cooperation between the regional units at the exclusion of the national federal government.<sup>41</sup> The third and final dimension is one advanced by Elazar (and probably the most adopted and practiced in Kenya and Ethiopia) which defines shared rule as the coming together in a federal union, through delegation of some powers to the new entity and retention of other powers exclusive to the donating jurisdiction (Self-rule).<sup>42</sup>

In using the above definitions as a yard stick to determine governance in Kenya and Ethiopia, we look at the following elements of self-rule and share-rule and their presence in the two systems. In looking at the criteria set in the definition of federalism, it is the presence of such elements that distinguishes between federal and non-federal states. However, it is not cast on stone that a federal state has to meet all the set criteria in order to be referred to as a federation.<sup>43</sup> There are federations such as Austria and South Africa that have, for example, a centralized judiciary. More accurately, the division of jurisdictions, powers and responsibilities in a federal state is aimed at mirroring the 'state nature' of both national and subnational governments up to the allowed or agreed extent.<sup>44</sup>

<sup>34</sup> Terence, Lyons. (1966). *Closing the Transition: The May 1995 Election in Ethiopia*. *Journal of Modern African Studies*.

<sup>35</sup> Palermo, Francesco. and Karl Kossler. (2017). *Comparative Federalism*. 1<sup>st</sup> Edition, Bloomsbury Publishing.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> Eva, Sorensen. and Peter, Triantafillou. (2009). *The Politics of Self Governance*, 1<sup>st</sup> Edition.

<sup>39</sup> Mueller, S. (2017). *Self-rule and Shared Rule*. *50 Shades of Federalism*. <http://50shadesoffederalism.com/theory/self-rule-shared-rule/>

<sup>40</sup> Hooghe, Liesbet., Gary Marks., Arjan H. Schakel., Sandra Chapman Osterkat., Sara Niedzwiecki. and Sarah Shair-Rosenfield. (2016). *A Post functionalist Theory of Governance*. Volume I: *Measuring Regional Authority*, Oxford University Press, Oxford. [Data at [https://www.arjanschakel.nl/regauth\\_dat.html](https://www.arjanschakel.nl/regauth_dat.html)]

<sup>41</sup> *Ibid.*

<sup>42</sup> Elazar, Daniel J. (1987). *Exploring Federalism*, University of Alabama Press, Tuscaloosa, AL.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

In assessing the level of self-rule, we shall look at the following;<sup>45</sup>

- i. The institutions depth, i.e., the extent of autonomy of the regional units;
- ii. The policy scope, i.e., the range of policies the regional unit is responsible for;
- iii. The Fiscal autonomy, i.e., the extent to which the regional unit can tax its population;
- iv. Whether the regional unit has power to borrow and to what extent;
- v. Whether the regional unit has an independent legislature and executive.

In assessing the presence of shared-rule we shall look at the following aspects;<sup>46</sup>

- i. Law making, i.e., the level of influence of regional representatives in determination of national legislation;
- ii. Executive control, i.e., the level of influence of regional governments in determination of national policy in intergovernmental meetings;
- iii. Fiscal control, i.e., the level of influence of regional representatives in determination of distribution of national tax revenues;
- iv. Borrowing control, i.e., the level of influence of regional representatives in regional and national borrowing constraints;
- v. Constitutional reform, i.e., the level of influence of regional representatives in constitutional reform.

#### **4.1. Constitutional Reform**

Autonomy of constitutions within sub national units is the most important aspect to consider when analyzing a country's governance to determine whether or not it is a federation.<sup>47</sup> Constitutional autonomy can either be that the units are allowed to adopt their own constitutions or that their existence is guaranteed by the national constitution. Aggregative federal states adopt the former while the later means that constituent units do not have their own constitution as their powers and responsibilities are regulated by the national constitution. The level of constitutional autonomy chosen often depends on the historical formation of the federation.<sup>48</sup> The aggregative federal states opted for the former mode often because the subnational units were already in existence before the formation of the whole state.<sup>49</sup> This was the case in Ethiopia.

Another factor is making changes to the National Constitution. The constitution of Ethiopia provides that by a third of the State Councils voting in favor of a proposed amendment, then that amendment shall be submitted to the public for discussion and voting. It further provides that if the amendment relates to the rights and freedoms of the people, then a majority of the State Councils have to approve that amendment.

In Kenya, the constitutional reform process involves the people directly in that any person may present a bill in parliament seeking to amend the constitution.<sup>50</sup> Where, the bill touches on the designated issues that can only be decided through a referendum, then that bill will succeed to amend the constitution if it is passed by at least twenty five percent of the registered voters in each of at least half of the 47 counties.<sup>51</sup> In this aspect, both countries involve the units of the federations in the process of constitution reform. For Kenya, specifically this criterion places it as a federal state.

#### **4.2. Legislative Autonomy**

Kenya's constitution enables the 47 units to come up with laws that will enable operation at the county level. These laws are passed by the county assembly consisting of members (MCAs) directly elected by the people.

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<sup>45</sup> *Ibid.*, note 40.

<sup>46</sup> *Ibid.*, note 40.

<sup>47</sup> *Ibid.*, note 36.

<sup>48</sup> *Ibid.*, note 43.

<sup>49</sup> *Ibid.*, note 36.

<sup>50</sup> Article 256 of the Constitution of Kenya (2010).

<sup>51</sup> Article 255 (2)(a) of the Constitution of Kenya (2010).



Consequently, the population of the county are empowered by the constitution to rule themselves to a certain level. However, the constitution has limited the areas that the county governments can legislate on among them; provision of water services, health services and the county's budget making process.

The independence of the counties' legislative authority is strongly recognized by the fact that bills originating from the national government have to be counter-checked by the senate. The rationale for counter-checking is to confirm that any provisions affecting the county governments is deliberated on to protect the interests of the counties. It is at this verification stage that the voice of the people of the different regions will be heard in the law-making process. This flow of the process ensures that the counties powers to control their legislative mandate is not interfered with by the National Government.

At the national level the legislative arm is divided into two with the National Assembly dealing with the National legislation and the Senate dealing with legislation affecting the county governments. The Senate constitutes of 47 senators each elected by the 47 counties to represent the county's legislative interests at the national legislation scene. The National Assembly constitutes of 350 members (290 elected from constituencies, 47 women representatives from each county and 12 nominated members from different political parties).

The above analysis confirms the elements of shared rule in Kenya; particularly at the national level, the county governments are invited through the senate to voice their opinion on the general direction of the country from the legislative front. To cap it all, the constitution allows any members of the house or the general citizens to table a motion in the National Assembly regarding issues affecting their county government that cannot legally be executed without the intervention of the National government.

For legislative purposes, Ethiopia has two Federal houses, namely: The House of People's Representatives and The House of the Federation.<sup>52</sup> Article 50 of the Ethiopian constitution grants the nine-member states power to legislate on matters falling under the state jurisdiction. Generally, all powers that are not directly granted to the Federal government in the constitution are reserved for the state.<sup>53</sup> Just like Kenya, Article 52 (2) of the Ethiopian provides the nine states with power to enact and execute the state constitution and other laws and to formulate economic, social and development policies.<sup>54</sup>

There is a house of people's representatives in Ethiopia. The legislators in this house are elected directly by the people for a term of five years. They are elected by popular vote from among the candidates in each electoral district on the basis of the population of that district. However, their total population cannot exceed 550 with the minority districts having at least 20 reserved seats. The electorate has power to recall a member whom they have lost confidence in.

The Members have the power to legislate in all matters assigned by the constitution to the Federal jurisdiction. Such matters include; utilization of land and other natural resources, Inter-state commerce and foreign trade, Transport, enforcement of political rights, labor code, penal code for matters not covered by the Federal penal legislation among other matters. Just like Kenya we see an assignment of legislative powers to the sub-units of the state.

Secondly, Ethiopia has the house of the federation which is composed of representatives of Nations, Nationalities and Peoples each having at one member. Each Nation or Nationality shall be represented by one additional representative for one million of its population. The Members shall be elected by the State Councils either by themselves or by holding elections to have them elected directly by the people.

The House has powers to inter alia; interpret the constitution, solve disputes that may arise between states, determine the division of revenues derived from joint Federal and State tax sources.

On the legislative dimension we see that both countries have set up a legislative jurisdiction at the national level and at the state/unit level.

#### **4.2.1. Executive Autonomy**

In Kenya the executive authority of the county government is bestowed upon the county executive committee

<sup>52</sup> Article 53 of the Constitution of the Federal Democratic Republic of Ethiopia.

<sup>53</sup> Article 52 (1) of the Constitution of the Federal Democratic Republic of Ethiopia.

<sup>54</sup> Article 52 (2) of the Constitution of the Federal Democratic Republic of Ethiopia.

chaired by the Governor, assisted by the Deputy Governor.<sup>55</sup> The committee further consists of members appointed by the governor, with approval of the County Assembly. The national government has no influence over the process of creation of the executive arm of the county governments. The elements of self-rule are existent in this front. The County Governments are granted significant autonomy in setting up their executive arm of the government.

Nationally, executive power is bestowed upon the President and his Cabinet. The President is elected through a universal suffrage system and on being declared the winner chooses a cabinet of between fourteen and twenty-two members. The counties are given a voice in the election of the President by Article 138 of the constitution which requires that the winning candidate must have at least 25% of the total votes in at least half of the counties. This provision protects the fabric of the federation from disintegrating by ensuring that the person leading the Nation is sufficiently popular and acceptable in each county.

The executive branch of the government of Ethiopia vests on the Prime Minister, President, the State Council and the Council of Ministers. As discussed in the first part of this article, the executive power is not directly from the people as the prime minister is elected by the House of People's Representatives. As such the degree of the shared rule under the executive power is minimal as the states are not directly involved.

## 5. Part 4: Revenue and Expenditure in A Federal State

### 5.1. Fiscal and Borrowing Control

Sharing of revenue is a key factor in federal governments. The questions here revolve around collection and division of revenue which are aspects of fiscal control. Where there is no balance, there is the risk of uneven growth of the subnational units within a federation. These units do not usually have equal man power, natural resources and productive power. Therefore, modern economies have resorted to fiscal equalization programs to ensure equitable provision of resources and public services.<sup>56</sup> Fiscal equalization programs are meant to correct subnational differences of revenue raising capacity.<sup>57</sup>

Ideally, the common elements of a federal state are inter alia; that the state has a clear stipulated formula in the constitution that ensures revenue sharing between the orders of the government and give a level of autonomy for each order.<sup>58</sup> In Kenya for example, there is established a revenue fund for county governments under Article 207 of the Constitution. The county has control over the fund through enactment of legislation from either the County Assembly or the National Parliament. The National Government has control over the general public funds through the Equalization fund and the Consolidated Fund.<sup>59</sup> The National Government is further required to share with the county governments the national revenue collected annually subject to a minimum of 15% of the revenue.

When it comes to expenditure the county governments in Kenya are expected to draw and adopt their budgets outlining the proposed expenditure for the following year. The budget is financed by the allocation of the national government through the Revenue Fund. Other than the minimum 15%, the criteria for the allocation is set out in Article 203 of the constitution and list inter alia; the interest of the nation, the need to ensure that county governments are able to perform optimally and the need for affirmative action in respect of disadvantaged areas and groups.<sup>60</sup>

Moreover, the county governments are further strengthened financially by the provisions of Article 212 of the constitution and the Public Finance and Management Act which allow the counties to borrow.<sup>61</sup> The section provides that the Cabinet Secretary can guarantee a loan to the county government if the:

<sup>55</sup> Article 179 (1)(2) of the Constitution of Kenya (2010).

<sup>56</sup> Thomas, O. Hueglin. (2015). *Comparative Federalism: A Systematic Inquiry*, University of Toronto Press.

<sup>57</sup> *Ibid.*

<sup>58</sup> William H. Riker. (1964). *Federalism: Origin, Operation, Significance*, Little, Brown and Company.

<sup>59</sup> Article 204 & 206 of the Constitution of Kenya (2010).

<sup>60</sup> Article 203 of the Constitution of Kenya (2010).

<sup>61</sup> Section 58 of the Public Finance and Management Act.

- i. The loan is for a capital project.
- ii. The borrower is capable of repaying the loan and paying any interest or other amount payable in respect of it.
- iii. The terms of the guarantee comply with the fiscal responsibility principles and financial objectives of the National Government. Where Parliament has passed a resolution setting a limit for the purpose of this section.
- iv. The financial position of the borrower over the medium term is likely to be satisfactory.

This provision provides the counties with an opportunity to develop and grow with a level of financial independence. This is a manifestation of the element of shared-rule in Kenya. Despite, the law providing the counties with the power to borrow, they need approvals from the Cabinet Secretary who is under the control of the national government. This could be a weakness in the efficacy of the federal system since the independence is compromised by the need for approvals. This weakness however can only be exploited through political influence. This is because Section 140 of the PFMA act provides for the considerations before the approval can granted, they include;<sup>62</sup>

- i. Evidence that the project could not have been financed without borrowing.
- ii. Demonstration by the county that they have adopted an acceptable project cycle management approach.
- iii. Proof that the conditions precedent for project implementation have been met for instance, approval of project designs.
- iv. Demonstration that not less than 15% of the project funds will be contributed from their own resources.

The manifestation of shared-rule is further seen through the provision that where a county intends to borrow externally, such borrowing should not cause the government to exceed the statutory public debt limit.

The Constitution of Ethiopia under Article 51, empowers the federal state to levy taxes, collect revenue and control the budget-making process for the Federal level. The nine (9) states are also allowed the same role for the duties on revenue sources that are exclusive to the state. The states are also allowed to draw up and administer the state budget.

Ethiopia's fiscal systems is almost similar to that of Kenya. The nine regional states are allowed to borrow, with a set of limitation; they are only allowed to borrow on domestic market, with the supervision and approval of the federal state which holds the decision in terms of amount that is to be borrowed according to the region's capacity.<sup>63</sup> Despite this allowance the fiscal system of Ethiopia is highly centralized, the federal government holds much of the decision-making powers.<sup>64</sup>

The Ministry of Finance harmonizes the fiscal relationship between the two tiers of government. It prepares the national budget and subsidies for regional governments using a formula approved by the House of the Federation. Here we see how the fiscal system threaten the fabric of the federation in Ethiopia. As stated in Part I, the House of Federation enjoys delegated power and the Prime Minister who chooses the Minister of Finance is not also elected directly by the people. Contrasted from Kenya, the fiscal system in Ethiopia appears to have an elitist feel.

Particularly, the Ministry relies on the Macroeconomic and Fiscal Framework (MEFF) for determining the resource envelope for a period of three years. The Ministry determines how much each region can borrow considering the national fiscal macroeconomic policies. The regional governments are required provide sufficient information to the ministry including; their foreign currency needs, to aid in decision making.

## 5.2. *The Thorny Issue of Secession*

The most obvious threat a federation faces is that having autonomy in the sub national units is always a pointer towards division. The fact that a subnational unit may want to break away though sealed in the

<sup>62</sup> Section 140 of the Public Finance Management Act.

<sup>63</sup> Firew, Bekele. (2021). *Debt Sustainability and Management in Ethiopia Lessons from China*. UNCTAD Project.

<sup>64</sup> *Ibid.*

constitution is a subject that cannot be wished away. Secession may be a threat but also a solution where peace is elusive such as was the case with South Sudan which had to break way from Sudan following decades of civil war. The Ethiopian constitution under Article 47 (2) allows the 9 member states forming the federal state, the right to form their own state at any time.

The decision on whether to address secession in the constitution or not depends on a particular country's historical and geographical context.<sup>65</sup> A country may decide to allow, prohibit or be silent on the decision of a region to secede.<sup>66</sup> If a country allows unit of the Federal state to secede and go ahead to even to provide the procedure, it risks the usage of that right by political forces to blackmail the federal government for more benefits.<sup>67</sup> In a bid to arrest this risk most countries have chosen to prohibit secession indirectly by declaring territorial integrity or indivisibility of the state.<sup>68</sup>

Kenya, for example, indirectly prohibits secession by declaring its territory being under the state<sup>69</sup> and prohibiting any other person not allowed by the constitution from claiming or exercising state authority.<sup>70</sup> Moreover, Kenya subjects itself to the general law forming part of International Laws.<sup>71</sup> It further subjects itself to the provisions of treaties or conventions that have been ratified. As such Kenya is subject to the decision of the International Court of Justice in 2010, that unilateral secession is not by definition illegal.<sup>72</sup> This is further justified by the theory of self-determination which allows secession of people from its existing mother state as a matter of last resort. This can only take place when the mother state no longer represents the interest of such people. In literal terms such was the case of the Sudan.

It is on this 'protection' by international law that few Kenyans have toyed with the idea of secession. Though done as a mockery of the then regime, this was the threat presented across when Raila Amolo Odinga swore himself in as the People's President on January 30, 2018.<sup>73</sup> The threat coming seventeen (17) years after the promulgation of the constitution that was meant to achieve unity only confirms that secession is still a threat in a federal state. Not new to such threats, the Mombasa Republican Council (MRC) – an abolished movement in the coastal city of Mombasa has always toyed with the idea of secession on the grounds that successive regimes have not met their interests as Kenyans. Driven by their slogan, '*pwani sio Kenya*' which translates to the coastal region is not part of Kenya, this separationist movement has always argued that only secession from Kenya will liberate the coastal people from marginalization by successive regimes.

The 'mock' swearing in ceremony, the MRC and David Ndi's highly politicized opinion<sup>74</sup> in the run up to the 2017 elections on there being a need for two republics in Kenya are just but a few pointers to the real threat of secession within a federation and in particular in the Kenyan context. In other countries, reasons may be diverse but one major common ground is the always elusive unity in highly divided societies.

In creating devolution, the COK 2010 assumed that the winner takes all politics would be a thing of the past. However, three presidents later and the presidency is still a highly lucrative affair with politicians close to the presidents reaping huge benefits. Opposition regions are still highly disenfranchised and it is because of such that elections remain a do or die with the recurrent talks of secession from regions which are fully aware that they may never make produce a president. Despite devolution, it is still believed in Kenya that for a region to develop, it has to clinch the presidency, a fact that paints a grim picture to the smaller ethnic groups. So, to speak, ethnicity remains a key factor in Kenyan politics.

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<sup>65</sup> Tom, Ginsburg. (2018). [Secession. Institute for Democracy and Electoral Assistance.](#)

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> Article 5 of the Constitution of Kenya (2010).

<sup>70</sup> Article 2 (2) of the constitution of Kenya (2010).

<sup>71</sup> Article 2 (5) of the constitution of Kenya (2010).

<sup>72</sup> International Court of Justice. *Accordance with International law of the Unilateral Declaration of Independence in respect of Kosovo. Advisory Opinion.* 2010 I.C.J. 404 (July 22).

<sup>73</sup> Oyunga, Pala. (2019). *The Peoples' President? Raila Odinga and the "Tunaapisha Movement."* Institute of African Studies Carleton University, Ottawa, Canada.

<sup>74</sup> Oduor, Reginald, M. (2023). *The Right to Secession in the Kenyan Context. Philosophical Reflections with Specific Reference to Non-Dominant Ethnic Groups.* <https://www.politika.io>, February 8, 2019, doi.org/10.26095/genj-yf30. Accessed on September 26, 2023.

Ethiopia on the other hand was recently faced with its own threat of secession by the State of Tigray, one of the nine-member states. The calls for secession arose after the national government postponed the 2020 general elections due to the Covid-19 pandemic, from August 29 to an undetermined date. The Tigray People's Liberation Front (TPLF), the most influential political party in the state of Tigray, rejected the extension of the existing government terming the move as unconstitutional. They organized their own general elections in protest. The central government considered the election illegal and responded by slashing federal funding to the region.

The TPLF chairman, Debretsion Gebremichael announced that the decision to deny Tigray funding was an act of war. Thereafter the TPLF led militia attacked the Ethiopian National Defense Force command bases within Tigray and from there on it was simply chaotic. The TPLF had popular support within the state of Tigray and this propelled the calls for secession. Eventually, it was the AU Commissioner's Mousa Faki led peace talks in Pretoria, South Africa that bore a peace agreement and ended the war.

Once again, we see a federation's unity being threatened despite being founded on the pillars of unity and recognition of diversity. The analysis of the governance in these two countries proves that actions threatening the fabric sustaining the unity of a federation are likely to bear immediate consequences. Further, the reality that the units forming a federation have a level of autonomy is also the threat to its disintegration.

## 6. Conclusion

Historically, states have existed and originated often through annexing the territory of others.<sup>75</sup> States were initially identified with the ruling dynasty, however with time the majority community became the identifying factor.<sup>76</sup> Over time and with community/ethnic wars over resources and territory, coupled with the growth of the notion of human rights, states began to go for win-win solutions to their woes. Extreme situations required signing of peace-treaties or eventual secession while less volatile situations would be solved by power-negotiation deals between the leaders of the warring communities.

For example, the secession of South Sudan from Sudan was one of those extreme situations where the leaders and the people could not see eye to eye.<sup>77</sup> Ten years since the secession, South Sudan remains a relatively stable and thriving nation compared to its counterpart in the north although ethnicity remains a key point of conflict in the new state. Kenya on the other hand is a good example of a less volatile example where a power-sharing deal arrangements have been used so solve emerging cracks in national unity. The 2008 government of national unity was a historical moment as it was out of that that the country witnessed a momentum in constitutional change. The other two instances are the 2013 *serikali ya nusu mkate* and the 2017 *handshake*.<sup>78</sup> This brings to reality the challenges in governing highly divided societies with a major one being the sharing of the national cake.

From the foregoing, understanding federalism requires us to look at historical formation of the state and the eventual crystallization of the existing model of governance. The common theme of federations seems to arise from the desire to enjoy the promised benefits; that is, the advantages of being a homogenous and small polity, alongside the security of being in a larger society whilst avoiding the disadvantages of being too small or too large.<sup>79</sup> For example, a larger society offers an opportunity to have economic prosperity and stronger military, while a smaller one allows for effective self-democratic governance.<sup>80</sup>

Watts conclusion that federalism is a normative term describing a multi-layered government that combines elements of self-rule and shared-rule, has stood the test of the analysis of the governance of Kenya as compared to Ethiopia. Despite not terming itself as a federal state, Kenya checks the criterion of defining a federation from having two layers of government to granting the lower-level government autonomy in its legislative and executive powers.

<sup>75</sup> Yash, Ghai. (2020). *Practicing Self Government: A Comparative Study of Autonomous Regions: Introduction: Nature and Origins of Autonomy*, Cambridge University Press.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> These terms refer to coalition government comprising of the ruling party and the opposition party.

<sup>79</sup> Berihun. A. Gebeye. (2023). *The Four Faces of Ethiopian Federalism*, University College London, Faculty of Laws.

<sup>80</sup> *Ibid.*, note 76.

## References

- Anna Gamper. (2019). *Global Theory of Federalism: The Nature and Challenges of a Federal State*, Cambridge University Press.
- Cherry, Gertzel. (1966). *The Provincial Administration in Kenya*. *Journal of Commonwealth & Comparative Politics*, 4(3), 201-215.
- Christophe Van der Beken. (2007). *Ethiopia: From a Centralized Monarchy to a Federal Republic*. *Afrika Focus*, 20(1-2), 13-48.
- Elazar, Daniel J. (1987). *Exploring Federalism*, University of Alabama Press, Tuscaloosa, AL.
- Eva, Sorensen. and Peter, Triantafillou. (2009). *The Politics of Self Governance*, 1<sup>st</sup> Edition.
- Mueller, S. (2017). *Self-rule and Shared Rule*. *50 Shades of Federalism*. <http://50shadesoffederalism.com/theory/self-rule-shared-rule/>
- Hooghe, Liesbet., Gary Marks., Arjan H. Schakel., Sandra Chapman Osterkatz., Sara Niedzwiecki. and Sarah Shair-Rosenfield. (2016). *A Postfunctionalist Theory of Governance*. Volume I: *Measuring Regional Authority*, Oxford University Press, Oxford. [Data at [https://www.arjanschakel.nl/regauth\\_dat.html](https://www.arjanschakel.nl/regauth_dat.html)]  
<https://onlinelibrary.wiley.com/doi/abs/10.1111/1468-2451.00289> as accessed on 15/07/2023.  
[https://dbpedia.org/page/National\\_Accord\\_and\\_Reconciliation\\_Act\\_2008](https://dbpedia.org/page/National_Accord_and_Reconciliation_Act_2008) as accessed on 14/07/2023
- Is Majimbo Federalism? Consitutional Debate in a tribal shark-tank by Peter Kagwanja and Willy Mutunga, 20<sup>th</sup> May 2021.
- International Court of Justice. *Accordance with International law of the Unilateral Declaration of Independence in respect of Kosovo*. *Adviosry Opinion*. 2010 I.C.J. 404 (July 22)
- Oyunga, Pala. (2019). *The Peoples' President? Raila Odinga and the "Tunaapisha Movement."* Institute of African Studies Carleton University, Ottawa, Canada.
- Ronald, L. Watts (1999). *Comparing Federal Systems*, 6, 2<sup>nd</sup> Edition.
- Terence, Lyons. (1966). *Closing the Transition: The May 1995 Election in Ethiopia*. *Journal of Modern African Studies*.
- Tom. Ginsburg. (2018). *Secession*. Institute for Democracy and Electoral Assistance.
- William H. Riker. (1964). *Federalism: Origin, Operation, Significance*, Little, Brown and Company.

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