

Ethiopia'S 'Unusual Constitutional Umpire': Revisiting The Role Of The House Of Federation

Abstract

Ethiopia has an 'unusual' system of constitutional umpire in which a political organ – the House of Federation, the upper of House of the Parliament – is charged with resolving constitutional disputes. In the past there were debates on the appropriateness of the country's constitutional umpire. Cases were made both for and against it. However, the entire political space being controlled by a single political party – the EPRDF – there were no major intergovernmental constitutional disputes that put the system of constitutional adjudication to a serious test. With EPRDF no more and the country's political scene unrecognisably transformed, it has now become clear that the Ethiopian system of constitutional umpire is not only unusual but also deeply flawed and that it needs to be reformed.

Introduction

A federal system entails an umpire that settles constitutional disputes since it is principally a 'constitutional arrangement' that involves the division of functions and powers between at least two orders of government. All federations therefore have some kind of constitutional umpire although there are differences in structure and umpiring processes. The highest courts in the classical federations, such as the US, Canada and Australia, retain the power to make final decisions on constitutional issues without however precluding lower courts from interpreting the countries' constitutions when deciding specific cases. European federations, such as, Germany and Belgium, have a centralised constitutional review system in which a constitutional court is entrusted with an exclusive power of resolving constitutional disputes. The power of constitutional adjudication is, almost always, given to a judicial or, as is the case in Belgium, a semi-judicial organ, as opposed to a political one. One federation – Ethiopia – is an exception in this regard. The House of Federations (HoF), the second house of the country's Parliament, is entrusted with the power to interpret the Ethiopian federal Constitution and resolve constitutional disputes.

An intergovernmental constitutional dispute has been a non-issue in Ethiopia in the past 27 years since a single political party, the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), has had exclusive control on all levels of government which it has ruled on the basis of 'democratic centralism'. Thus not even a single intergovernmental dispute ever resulted in a constitutional dispute that entailed the HoF's intervention. Indeed the HoF's role has mainly been limited to deciding on issues revolving around demands by a group of people for recognition as distinct ethnic community and for own state and ethnic local government. However, more recently, the situation has changed. The political scene of the country has unrecognisably transformed on account of the three years of uninterrupted public protests against what many describe as 'an authoritarian rule' of the EPRDF.

The new political situation in the country, I argue, has in turn made much clearer than ever before that the Ethiopian constitutional adjudication system is not only unusual, but also deeply flawed and that it needs to be reformed. I will first explain the Ethiopian system of constitutional adjudication and why it was adopted in the first place. I will then discuss how three years of public protests transformed the Ethiopian political environment followed by a discussion on how the country's system of constitutional adjudication is less than ideal for resolving constitutional issues emerging under the new political context, followed by suggestions on the way forward.

The Ethiopian Constitutional Umpire

The HoF, the institution which is charged with interpreting the Ethiopian Constitution, is composed of 'representatives' of the ethnic communities of the country. Each ethnic community is represented by one representative, regardless of its population size, and by an additional representative for each million people belonging to it. This is because the Ethiopian federal system is conceptualised as a 'federation of ethnic groups' and its more than 80 ethnic communities are assumed to have consented to join the 'federal union'. The Constitution is viewed as a covenant entered into by the ethnic communities. The logic behind the country's system of constitutional adjudication is thus that the Constitution is a legal and political document that the ethnic communities of the country authored, and so unelected judiciary could/should not be entrusted with its interpretation, lest it should embark on 'judicial adventurism' and upset the federal equilibrium that the Constitution has carefully put in place. As a federal institution in which all ethnic communities are represented it was assumed appropriate that the HoF was charged with interpreting the Constitution. Indeed members of the HoF are not necessarily trained lawyers. The gap in this respect is supposedly filled with the establishment of an organ called the Commission of Constitutional Inquiry (CCI), composed of judges, lawyers and politicians, which assists the HoF by providing expert opinion on how certain constitutional issue should be resolved. The Constitution is off limits to ordinary courts and they are even prevented from applying it when resolving ordinary legal disputes, let alone those having political implications.

Public Protests and Political Transformations in Ethiopia

In the last two and half decades, the EPRDF enjoyed exclusive control on all levels of government in Ethiopia. It was able to do so by deploying a 'menu of institutional manipulations', including, an electoral system favourable to it, an acquiescent election administration organ, and local authorities that were instruments of party control. These helped the party to increasingly exclude its political opponents from any form of representations in government. The political exclusion, coupled with the rising corruption and inequality, caused public anger which in turn led to nationwide public protests that went on from 2015 to 2018. The protests began in Oromia, the largest and the most populous state, and quickly spread to the other states. The public protests and the manner in which the government dealt with them gradually caused rifts within the EPRDF. A group emerged within the party, including Abiy Ahmed, the current Prime Minister, that raised a reformist agenda. This group succeeded in overcoming the group that sought to maintain the *status quo*. The 'reformers' also rebranded the party with a new name (Ethiopian Prosperity Party (EPP)), ideology (abandoned revolutionary democracy) and structure (transformed the coalition into a single party with deconcentrated regional branches). The Tigray People Liberation Front (TPLF), the most influential and the founding member of the EPRDF and which sought to maintain the *status quo*, was effectively sidelined.

The reformers introduced a number of institutional reforms with the declared aim of transforming the country into a democratic state including amending or repealing different pieces of legislation that the EPRDF used to exclude other political views. No constitutional amendment has taken place thus far despite the several demands in this regard from different political groups. This is postponed for after the sixth national elections which, as many anticipate, would be the culmination of the democratic transition.

Emerging Constitutional Issues and Why the HoF is Unfit to Solve Them

Critics of the country's constitutional adjudication system have been pointing to the different structural problems that make the HoF a less than ideal constitutional umpire. It is a political organ as opposed a judicial one. It has no full-time members since members of the HoF are officials of state governments who meet only three times a year. The 11 members of the CCI are also engaged elsewhere on full time basis and constitutional interpretation is a part-time job for them. The system has reduced the relevance of the Constitution in everyday life of ordinary citizens. The constitutional umpire, coupled with the political dominance of the EPRDF, had also rendered lifeless the federal system. I maintain that the emerging constitutional issues have made it stark clear how flawed the Ethiopian system of constitutional umpire is.

Several constitutional issues have emerged in Ethiopia in the past few months including those that are linked with the global spread of novel corona virus (COVID-19) and the postponement of the sixth national elections. The national elections, which were supposed to take place in May 2020, were postponed to August since, among others, the breakdown in law and order in different part of the country, which ensued the three year public protests, did not allow the elections to be held as per the original plan. However, after the World Health Organisation (WHO) declared the COVID-19 outbreak a global pandemic and the first case of COVID-19 was confirmed in Ethiopia, the National Elections Board of Ethiopia (NEBE) determined that it will not be able to administer the elections in August. The Tigray state declared a statewide state of emergency to contain the spread of the virus. The federal government also declared its own countrywide state of emergency suspending all political activities for five months effectively postponing the elections. These have raised three major constitutional issues.

First, as per Article 58(3) of the Constitution, Parliament has a five year term and elections have to be held at least a month before the expiry of the term of Parliament. The term of the current Parliament and state councils will come to an end on 10

October 2020 and that the next elections will not be held before this date. The Constitution does not provide any guidelines on how the country would be governed when such an emergency prevents the holding of the general elections. Four options were proposed for dealing with the impending constitutional crisis one of which, and the one that the government opted for, was asking the HoF for its constitutional opinion. The House of Peoples Representatives (HPR), the lower of house of Parliament, thus officially requested an advisory opinion from the CCI and HoF on, come 10 October, what the fate of the current Parliament and government would be and how and by whom the country would be governed until it is possible to hold the general elections.

Secondly, the TPLF, as part of its political tit-for-tat with the federal government and the EPP, is insisting on elections being held before the expiry of the term of Parliament and state councils. It maintains that postponing the elections would be unconstitutional and would lead to power vacuums since, according to the TPLF, the mandate of the current Parliament will come to an end on 10 October and under no circumstance can the term of Parliament be extended. Importantly, it has resolved to hold statewide elections in Tigray, sometime before 10 October, should the national elections be postponed beyond the set date. After the National Electoral Board of Ethiopia (NEBE) rejected its request to administer statewide elections in Tigray, the Tigray state has adopted its own election law and established a state election administration organ. Under the FDRE Constitution all matters relating to elections and political parties are within the competences of the federal government. Moreover, the Constitution establishes a single election administration organ – the NEBE – with the mandate to administer both national and sub-national elections. The TPLF/the Tigray state's resolution in this respect raises several constitutional issues including whether a state can conduct its own elections using its own election administration organ.

Thirdly, as indicated above, both the federal and the Tigray state government have declared a state of emergency. The SoE proclamation of the federal government provides that the federal SoE has a nationwide application and that it supersedes contradicting laws and decisions by a state. Yet the Constitution does not provide that a federal SoE will automatically prevail over a state SoE which can potentially result in a constitutional dispute between the Tigray state and the federal government.

The CCI/HoF decided that the sixth general elections could be postponed until, with the advice of the Ministry of Health and the National Electoral Board of Ethiopia (NEBE), the HPR determines that it is safe to hold elections. In the meantime the current Parliament and government, as well as the current state councils and state governments, could and should continue governing the country. This decision could be viewed as 'self-dealing' or 'self-serving' from the point of view of HoF since its term coincides with that of HPR and by extending the term of Parliament beyond 10 October 2020, it also extended its own term. In addition, it is obvious that the federal government decided to approach the HoF for constitutional interpretation for it was certain that it has sufficient support to secure the kind of constitutional opinion it desires. Predictably, that was precisely what it received.

The HoF (CCI) – [putting aside the numerous flaws in its reasoning](#) – did not put a definite time regarding when the elections should be held, nor did it require this matter to be decided by an independent institution. It did not also entertain the possibility of holding elections even if COVID-19 was not quickly and fully contained. Put differently, the HoF has allowed the current government to decide if and when to hold the sixth national elections and, therefore, to continue governing the country for an undetermined period of time. Moreover, it has authorised the government to exercise undiminished authority during the extended period. These demonstrates beyond any doubt how partisan and, therefore, unfit this institution is to umpire constitutional disputes.

Furthermore, the HoF cannot be considered as a neutral umpire on the issues of double SoE and the constitutionality of the move by the Tigray state to conduct its own elections. After losing its dominant position at the federal level, the TPLF is now acting as an opposition party and defying the federal government and the EPP at every turn. The HoF, which is almost fully controlled by the EPP, cannot be expected to impartially resolve these two constitutional issues should they be taken to it for resolution. It is curious though how, as the party that conceived and implemented the Ethiopian constitutional umpire, the TPLF failed to foresee that the system might someday work against it.

Further Reading

- Assefa Fiseha (2007) 'Constitutional adjudication in Ethiopia: Exploring the experience of the House of Federation (HOF)' 1(1) Mizan Law Review 1-32
- Nicholas Aroney and John Kincaid (eds) *Courts in federal countries: Federalists or unitarists?* Toronto: University of Toronto Press
- Yonatan Fessha (2008) 'Whose power is it anyway? The courts and constitutional interpretation in Ethiopia' 22 (1) Journal of Ethiopian Law 128-144