Why the FDRE Constitution Does not Permit Unilateral Secession

By Destaw Andargie (Jan 3, 2011)

1. Introduction

Neither international law nor the constitution of any country in the world recognizes secession as a right. Only the constitution of the Federal Democratic Republic of Ethiopian (the constitution for short) appears to hold the distinction of cherishing secession as the darling of rights.¹ Article 39(1) of the constitution declares: ‘[e]very Nation, Nationality, and People in Ethiopia has unconditional right to self-determination, including secession.’ This provision appears to put secession as a natural extension of the right to self-determination. Not only that, perhaps the most bizarre and unfathomable thing is this: the constitution puts ‘the right to secede’ beyond the reach of the emergency power of the government.² But does this mean, for example, that if I and other members of ‘my ethnic group’ decide to leave you, you have no legal way whatsoever of stopping us?

Secession is such a radical claim to put in rights language. No wonder, thus, that article 39 has become the hot button of the constitution. EPRDF has characteristic obsession about secession, while many (in my view an overwhelming majority of Ethiopians) would outrightly reject such things as a ‘right’ to bid farewell to mother Ethiopia at will. But both sides would agree that the constitution permits unconditional right to secede. But does it?

In what follows I will argue that the FDRE Constitution does not actually permit unconditional secession. My position may sound bizarre, but so is article 39. I will try to

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¹ Well, the other one ever to recognize secession as a right was the now defunct constitution of the former Soviet Union (see Articles 70 cum 72 of the 1977 USSR Constitution)
² See Art 93 (4) (c), FDRE Constitution
demonstrate why secession is conceptually and normatively incongruent with the right to self-determination both under international law and the Ethiopian constitution itself. My hope is to provoke debate as there appears an acute dearth of intellectual scrutiny that matches the perplexing nature of the issues and the danger it poses.

2. Secession does not follow from self-determination

Self-determination is not a novel invention of the FDRE constitution. It is a right that evolved under international law. Thus, self-determination should be understood in its complete and conventional meaning under international law. It should be conceded that self-determination has no crystal clear definition, as different shades of meaning have been attached to it in different contexts. Still, two related things are unmistakably clear: one, self-determination and secession are distinct concepts under international law; and two, as a consequence, while self-determination is an indisputably established right both under treaty law and customary international law, secession is not. Indeed, international law and international relations in general is underpinned by an overriding principle of state sovereignty. Recognizing a right to secede would thus be not only suicidal to states, but also defeats the principle of sovereignty along which the very state system and the international community in general is organized.

State practice too corroborates that where the central government opposes unilateral secession (as normally happens) states do not recognize secessionists. Eritrea accorded recognition primarily because the international community was left with no other option as Ethiopian itself-thought its unelected president, for reasons yet to be known to us, requested the world to recognize the independence of its former province. Absent that, no single country has recognized the self-declared Somaliland in spite of its de facto existence as an independent state. If secession was a right, recognizing Somaliland would have made much sense not only because it has managed to maintain law and order in one of the most troubled nooks of the world but also because Somalia has no central government as such to cause diplomatic upsets. But States do not recognize secessionists
simply because secession is contrary to one of the organizing principles of the international state system—sovereignty.

International law does not permit unilateral secession not only because indefinite fragmentation of states threatens world peace and stability, and hence is contrary to the UN Charter, but also because states have an inherent right to protect their territorial integrity. Secession is not merely the repudiation by a group of its political allegiance towards a state and the formation of a new political entity; it also involves a claim over territory that rightfully belongs to the whole people of the larger state. ‘When a group seeks to secede, it is claiming a right to a particular piece of land, and one must necessarily inquire into why it is entitled to that particular piece of land, as opposed to some other piece of land - or no land at all.’\(^3\) In other words, any justification for secession must offer satisfactory account of why people in the larger state should lose part of its territory in favor of secessionist group, especially where the territory is of high strategic or economic significance, as access to the sea in for Ethiopia.

In short, the right to self-determination is a legal right entrenched in the UN Charter, the two international human rights covenants, many other international documents as well as many national constitutions. By contrast, secession is just a dubious political claim nowhere recognized as a right. There is no any coherent normative framework that remotely relates secession to self-determination. While the right of self-determination lies at the core of constitutional democracy, no democratic theory satisfactorily explains secession. On the contrary, secession has corrosive effect on deliberative democracy. In Reference re Secession of Quebec (1998), the Canadian Supreme Court dismissed Quebec’s claim to separate from Canada on the grounds that secession is inconsistent with the rule of law, constitutionalism and deliberative democracy, among other things.

3. Does article 39 mean what it says?

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Article 39 of the Ethiopian constitution grants ‘unconditional’ right to self-determination, including secession.’ Yet, a close look at the provision and the whole of the constitution reveals that the term *unconditional* applies to the right to self-determination, not to secession. First, the same article 39(4) (a-e) explicitly puts a set of conditions that should be met before a group secedes. So the question of unconditional secession must end there. To be sure, there is some confusion here. EPRDF has historically confused the right to self-determination with the right to secede, and that confusion is reflected in art 39 of the constitution. Article 39 (4) of the provision speaks of self-determination and secession in a manner that gives the impression that the conditions enshrined were required to exercise ‘both rights’. Yet, none of those conditions are actually required to exercise the right to self-determination. Indeed, *nations, nationalities, and peoples*, whatever they are, we are told, are already enjoying the right to self-determination. But no nation, nationality, or people in Ethiopian has ever gone through the procedures specified under article 39(4) (a-e). Thus, article 39(4) (a-e) clearly separates secession from self-determination by placing conditions on the former but not on the latter. This is instrumental in understanding the whole provision.

**Bottom line:** no such thing as unconditional secession! Evidence? Article 39 itself!

Second, the conditions under 39 (4) (a-e) are open-ended. The ‘right’ to secede comes into effect when, *inter alia*, the ‘Federal Government will have transferred its powers to the Council of Nations, Nationalities or People who have voted to secede…’\(^4\) But what does this provision actually mandate? Almost nothing! Unlike sub 4(b) that commands that the federal government must (emphasis added) organize referendum within three years following the submission of the demand for secession, sub 4(d) neither makes transfer of power by the federal government mandatory nor puts any time frame within which the transfer of power shall be effected. Technically, the federal government may

\(^4\) See art 39 (4) (d), FDRE Constitution
take forever before handing over power to the seceding entity, if it so wishes. Thus, read in conjunctive harmony, art 39 of the FDRE does not grant unconditional right to secession. Nor does it impose unambiguous obligation on the central government to hand over power to the nation, nationality, or people that voted to secede.

**Bottom line:** secession ultimately depends on the will of the central government!

Third, although the constitution appears to grant to all nations, nationalities, and peoples a right to secede, it does not leave any clue about which groups in Ethiopia constitute a nation, a nationality, or a people. As bizarre as it sounds, the FDRE Constitution does not know the people of Ethiopia. It knows only *nations, nationalities, and peoples* of Ethiopia. National sovereignty resides in these entities, the nation and its natural resources, including land belong to them and what not. But what precisely do we know about these entities? Neither the constitution nor any other legal documents clearly tells us what the concepts nations, nationalities, and peoples represent. How many nations do we have in Ethiopia? How many nationalities or peoples? Is, for example, Oromo a nation? nationality or people? How about Kemissie or Guji Oromo? Can an ethnic group at the same time represent a nation, nationality, and people? These are concepts imported verbatim from Stalin’s revolutionary rhetoric, but they remain obscure and indeterminate in the Ethiopian context. Stalin knew what the ‘self’ was when he wrote and spoke about self-determination. The Bolsheviks have vigorously advocated the idea of self-determination, albeit disingenuously, for they had economic, political and ideological interest in challenging colonialism and imperialism.\(^5\) The invoked self-determination and secession in reference either to colonial people or formerly independent nations that formed the USSR. So, they have a clear idea of what the self was. However, in our context, we don’t know what the holders of the right are.

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\(^5\) Indeed, the USA too championed the idea of self-determination. Crucially, these two powers had no colonies themselves meant that they were at an economic/trade disadvantage compared to European colonial empires that could reap the resources of their colonies. As a result, while the USSR actively advocated decolonization, the US too had ideological, political, and economic reasons to see colonialism dismantled, although it had also to weigh up its relations with its colonial allies across the Atlantic.
**Bottom line:** talking about self-determination without a clear idea of what constitutes the ‘self’ is devoid of legal substance.

Forth, and most importantly, secession is in near absolute contradiction with other ideals the constitution embraces. For example, land and natural resources are common properties of nations, nationalities, and peoples. This is not about this part of the country belonging to this or that nationality or so. It’s is about the totality of the country ad its resource belonging to all nations, nationalities, and peoples. Conversely, every nation, nationality, or people has interest in every part of the country, as it should. The constitution grants everyone to work and establishes livelihood anywhere in the country. Above all, the ‘nations, nationalities, and peoples’ of Ethiopia have decided to live in one economic community. Secession contradicts all of these and other rights and commitments enshrined in the constitution.

**Bottom line:** secession contradicts with self-determination itself and other constitutional principles.

**4. Leeway**

Article 13 (2) of the constitution explicitly commands that fundamental rights and freedoms in the constitution (of which the right to self-determination is one) shall be interpreted in conformity with international human rights instruments adopted by Ethiopia, implying the normative supremacy of international human rights treaties over constitutional provisions. It also requires standardization of rights and freedoms through interpretation in light of international rights norms. The two International Human Rights Covenants and the African Charter of Human and Peoples’ Rights are particularly relevant as far as self-determination is concerned. The right to self-determination is interestingly enshrined in the opening articles of both covenants. Article 20 (1) of the African charter elevates self-determination to the status of an inalienable right. Yet, none of these instruments permits unilateral secession.

**5. Conclusion**
Ethiopia has never had a constitution that survived its makers. Not just because they were all imposed, but also because none could fetter the arbitrary powers of its makers. A constitution that does not serve as a common normative standard of behavior for both the governors and the governed is dead in spirit. The FDRE constitution is not in a different category. Hence, its fate may not be any different. This casts a doubt if discussion about something which is dead in spirit is worth doing. But the constitution also embraces a catalogue of liberal rights and important foundational principles upon which constitutional democracy can be built. No constitution is the world is complete for that matter. Where there is independent judiciary, where there is commitment to democracy and the rule of law, even unwritten principles of constitutionalism underpin and sustain the oldest democratic system in the world (India? No, the UK). Thus, while the legitimacy of the constitution may be an issue in its own right, I believe it is also important to seriously scrutinize the conceptual and normative content of ‘rights’ such as secession incorporated in the constitution.

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