

## First draft

# Decentralisation and Constitutionalism in Africa: Concepts, Conflicts and Challenges

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## 1. Introduction

A central quest in post-Cold War Africa has been to bring the Leviathan – the untrammelled ruler – to heel through constitutionalism, and, to a lesser extent, also decentralisation.<sup>1</sup> The unbridled power of the imperial presidency, the one party state, and military regimes, has resulted, contrary to their projected justification of unifying and developing the new ‘nation’ bequeathed by the departing colonisers 30 years before, in underdevelopment, marginalisation of minorities, and in many countries fragility and conflict. When the proxy wars and the propping up of dictators, petty tyrants and kleptocrats came to an end, a vision and hope of governance in terms of constitutionalism and decentralisation emerged in some, if not most, parts of the continent; it would bring peace, democracy, good governance and development. This vision of decentralisation and constitutionalism has, however, only been partially realised over the past 25 years. The story of the Arab Spring of 2011 is similar in hope and outcome.

Within this context, this conference seeks to examine the relationship between decentralisation and constitutionalism, giving rise to three interrelated questions: First, has the quest for decentralisation been dependent on a legal-political environment of constitutionalism? Put differently and prospectively, are any efforts towards decentralisation doomed in the absence or partial realisation of constitutionalism in a particular country? Secondly, is there a mutually supporting relationship between decentralisation and constitutionalism, where the former bolsters and buttresses the latter? Thirdly, in the absence or partial realisation of constitutionalism, has the quest for decentralisation been a vehicle for the building of constitutionalism? Or, more prospectively, does decentralisation hold the potential as a governance strategy, among others, that may advance the vision of constitutionalism.

As with any ‘ism’ constitutionalism encapsulates values and goals. . In its liberal democratic form constitutionalism bears the following meaning: through a constitution state power is limited, exercised in a democratic accountable manner, and executed in a non-arbitrary way through a system of enforceable rules. In the African context the argument is that such a goal is too limited; constitutionalism should also entail the purposive use of state power to transform society to be more egalitarian and prosperous. Decentralisation, even though not sporting an ‘ism’, is no less value laden and idealistic. Decentralisation is championed for deepening democracy, enhancing development, countering the abuse of centralised governance, and accommodating diversity. It is thus readily apparent that decentralisation fits snugly in the glove of an African perspective of constitutionalism. If the notion of limited government is a practice, then tolerance of the vertical limitation of central powers should follow. If democracy is a reality, then local democracy is merely the deepening of it. If the rule of law is the praxis, then decentralisation as a rule driven system of division of powers, should thrive. If transformative development is the national goal, then decentralisation is its primary agent. In this scenario, decentralisation would provide a secure encasement of the

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<sup>1</sup> See Nico Steytler, ‘Domesticating the Leviathan: constitutionalism and federalism in Africa’ (2016) 24 *African Journal of International and Comparative Law* 272-292.

national project of constitutionalism. What if none of the four elements is present; is decentralisation then ineluctably doomed? Could decentralisation build constitutionalism from the bottom up?

Practice over the last 25 years tells us that constitutionalism is not deeply rooted and evenly spread across the continent. Progress has been made: elections are held, election results lead to regime changes, courts are asserting their jurisdiction, and at an African Union level constitutionalism norms have been adopted. However, the gap between such AU Charters and similar sounding constitutions, and practice remains huge. In this context decentralisation has not flourished. Whether decentralization has fostered constitutionalism, the argument is much less secure; perhaps the conference results will provide some nuggets of good news.

Before delving in to the relationship between the two concepts, the preliminary step of defining them awaits. Constitutionalism is given different content, but is also rejected as a value in itself. Decentralisation is also contested terrain and the notion of it encompassing autonomous decision-making at a subnational level, is not uniformly shared. Much of the contestation may be attributed to the fractured nature of the African continent, a jostling of Anglophone, Francophone (which includes Lusophone) and Islamic constructs of the state. In sections 2 and 3 constitutionalism and decentralisation are defined, while in section 4 the challenges decentralisation encounters in the face of superficial constitutionalism are examined. In section 5 the focus is on whether decentralisation can be a catalyst for constitutionalism.

## **2. Constitutionalism and the contest for content**

At least three broad approaches to constitutionalism can be discerned in the literature and state practice in Africa. The first is the classical ‘Western’ liberal-democratic notion of constitutionalism. The second, building on the first, adds a transformative element, while the third, ‘Islamic constitutionalism’, is ambivalent about the very basis of the first.

Although there is no fixed and universally accepted definition of constitutionalism, the Western notion of constitutionalism is essentially one of limited government, with at least three basic elements enshrined in a constitution that are not readily amendable.<sup>2</sup> The first is democracy – the establishment of accountable government both in terms of representative and participatory mechanisms. The second element is that of limited government which entails the separation of powers which provides checks and balances and an enforceable bill of rights. The third element is the rule of law – governance under rules and not by arbitrary discretion - which includes the supremacy of the constitution, and its justiciability by an independent judiciary.<sup>3</sup>

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<sup>2</sup> B.O. Nwabueze *Constitutionalism in Emerging States* (Hurst, 1973) 11; Charles M. Fombad, ‘Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa’ (2007) 55:1 *American Journal of Comparative Law* 1-45; Charles Manga Fombad ‘Post-1990 Constitutional Reforms in Africa: A Preliminary Assessment of the Prospects for Constitution Governance & Constitutionalism’ in Alfred Nhema and Paul Tiyambe Zeleza (eds) *The Resolution of African Conflicts: The Management of Conflict Resolution & Post-Conflict Reconstruction* (James Curry 2008) 179-199; Charles Manga Fombad ‘Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects’ (2011) 59 *Buffalo Law Review* 1007-1108.

<sup>3</sup> Drawing on the work of Louis Henkin (‘Elements of Constitutionalism’ (1998) 60 *The Review* 1122), Fombad (‘Post-1990 Constitutional Reforms in Africa’, n 2) adds to the list of ingredients independent state institutions protecting constitutionalism, such as an ombudsman and a human rights commission. It is argued that such institutions are a nice to have but that their absence is not fatal to constitutionalism. Much more important is, as Fombad also suggests, the vigilant civil society and other institutions outside the state.

Although this construction is labelled ‘Western’ in origin, there are still significant differences in emphasis between the Anglophone and Francophone versions. In the latter, based on the Gaullist model of the Fifth Republic of France, the elements of the separation of powers and judicial review are much more attenuated than those in the Anglo-American model. The Gaullist model, which was slavishly copied in Francophone Africa as well as Lusophone and Maghreb countries,<sup>4</sup> comprises a weak separation of powers, in which a strong presidency dominates both the legislature and the judiciary,<sup>5</sup> legislating by decree the majority of laws and appointing judges (which come through the civil service and are timid in the enforcement of constitutional norms). For the French a US Supreme Court style of constitutional review was ‘a remote and alien phenomenon’.<sup>6</sup> Constitutional review is thus limited most often to an abstract pre-promulgation review by institutions such as the *conseil constitutionnel* that are not part of the judiciary and populated also with ex-politicians.<sup>7</sup> Moreover, it’s a process which is not accessible to the public, only the legislature.<sup>8</sup> This approach, Charles Fombad suggests, is ‘significantly influenced by the obsessive Gallic fear of the threat of legal dictatorship through a “government of judges”’.<sup>9</sup>

The Western notion of constitutionalism is, as Yash Ghai points out, embedded in the emergence of capitalism which required and gained a limited state, protecting property and contract.<sup>10</sup> But this is as far as the liberal democratic vision of constitutionalism goes: let the market-driven economy distribute social goods, rather than the state. The new constitutional enterprise in Africa sees a larger role for the state – a transformative one – where equal citizenship is the goal through enforceable socio-economic rights and substantive equality. South Africa’s Constitution has thus been called transformative as it is more than regulating the distribution of power, but seeks to use that power for the transformation of a highly unequal society.<sup>11</sup> Transformative constitutionalism means that a constitution and its implementation by the state apparatus, including the courts, are committed to the transformation of a society towards social justice. This changes the state from a passive regulator of power to a ‘developmental’ one, where the constitution is a bridge from conflict and past injustices to an inclusive and just society. The notion of the ‘developmental state’ raises, however, the question whether it does not directly contradict the key element of a liberal democracy – the limited state. This seeming contradiction is more apparent than real; it does not sacrifice any of the liberal democratic values of democracy, separation of powers, human rights or the rule of law. Within a rational-legal framework it deepens democracy and

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<sup>4</sup> Fombad, ‘Constitutional Reforms and Constitutionalism in Africa’ (n 2), 1090; Fombad, ‘Post-1990 Constitutional Reforms in Africa’ (n 2), 188-189.

<sup>5</sup> Ibid.

<sup>6</sup> Cibli Mallat ‘On the Specificity of Middle Eastern Constitutionalism’ (2006) 38:1 *Case Western Reserve Journal of International Law* 13-57, 14.

<sup>7</sup> Fombad, ‘Constitutional Reforms and Constitutionalism in Africa’ (n 2), 191; Serfes Djoyou Kamga ‘An Assessment of the Possibilities for Impact Litigation in Francophone African Countries’ (2014) 14 *African Human Rights Law Journal* 449-473.

<sup>8</sup> Fombad ‘Constitutional Reforms and Constitutionalism in Africa’ (n 2), 191.

<sup>9</sup> Ibid.

<sup>10</sup> Yash Ghai ‘Chimera of constitutionalism: state, economy, and society in Africa’, Unpublished paper. University of Pretoria, 2011, available at [http://web.up.ac.za/sitefiles/file/47/15338/Chimera\\_of\\_constitutionalism\\_vg1.pdf](http://web.up.ac.za/sitefiles/file/47/15338/Chimera_of_constitutionalism_vg1.pdf).

<sup>11</sup> Pius Langa, ‘Transformative Constitutionalism’ (2006) 17 *Stellenbosch Law Review* 351, 357; Karl Klare, ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146, 150; Theunis Roux, ‘Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction with a Difference’ (2009) 20 *Stellenbosch Law Review* 258-285, 260; Sandra Liebenberg *Socio-economic Rights: Adjudication under a Transformative Constitution* (Juta 2010).

gives effect to an expanded vision of human dignity and equality before the law by making it a substantive goal of government and not a product of market forces.<sup>12</sup>

In a more direct conflict with ‘Western’ constitutionalism and its secular content, is ‘Islamic constitutionalism’.<sup>13</sup> Scholars of Islamic constitutional law have debated whether the two concepts are irredeemably incompatible or whether there are overlaps between them, a debate of particular importance in Africa as at least 17 African countries are predominantly Muslim, as well as half of the Nigerian states. Although Raja Bahlul argues that there is no equivalent Arabic word for the Western concept of constitutionalism,<sup>14</sup> many scholars refer to ‘Islamic constitutionalism’ with a distinct set of norms. Without doing justice to the variety of trends of Islamic thought, governance structures and practices over time and place, some of which favoured limited government,<sup>15</sup> the key difference lies in the place of the *Shari’a* in a constitutional dispensation.<sup>16</sup> The interpretation of the *Shari’a*, as ‘the comprehensive religious normative system of Islam, which is derived from interpretations of the Qur’an and Summa, or traditions, of the Prophet’,<sup>17</sup> as the ultimate source of law on which constitutions draw, determines the nature of the state. Some scholars argue that notions of limited government, human rights, and democracy are embedded in the *Shari’a* and may have been practiced at different times.<sup>18</sup> Others maintain that there is no compatibility as there is in theory and practice no separation of powers, no formal and institutional limitations of powers, equal rights or the rule of law, or a strong tradition of judicial independence.<sup>19</sup> For some the religious basis and source of an Islamic constitution is the very antithesis of secular constitutionalism.<sup>20</sup> Yet, there are differences of opinion on the impact of having the *Shari’a* as ‘the’ source of constitutionalism, or merely ‘one’ of the sources.<sup>21</sup> In many constitutions the supremacy of the *Shari’a* is entrenched, ostensibly subordinating the text to a superior religious norm.<sup>22</sup> This is, however, a simplification as the protection of *Shari’a* as a source of legislation is differently expressed and interpreted, and its impact depends on a number of contextual factors.<sup>23</sup> Those who argued that Islam was adaptable to notions of limited

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<sup>12</sup>Jan Erk (‘Iron Houses in the Tropical Heat: Decentralisation Reforms in Africa and their Consequences’ (2015) 25 (5) *Regional and Federal Studies* 409-420, 413 (n 00), 419) notes that even Francis Fukuyama, who trumpeted the victory western liberal democracy (a limited government and a strong market place) in *The End of History and the Last Man Standing* (The Free Press 1992), has mellowed his stance in in the latest book, *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* (Farrar, Straus and Giroux, 2014), where he envisages a more balanced role for the state in development.

<sup>13</sup>Abdullahi Ahmed An-Na`im, ‘Religion, the State, and Constitutionalism in Islamic and Comparative Perspectives’ (2009) 57 *Drake Law Review* 829-844; Nadirsyah Hosen ‘In Search of Islamic Constitutionalism’ (2004) 21:2 *American Journal of Islamic Social Sciences* 1-25;

<sup>14</sup>Raja Bahlul, ‘Is Constitutionalism Compatible with Islam’ in P. Costa and D. Zolo (eds) *The Rule of Law: History, Theory and Criticism* (Springer 2007), 515-542, 515.

<sup>15</sup>See Aver M. Emon, ‘The Limits of Constitutionalism in the Muslim World: History and Identity in Islamic Law’, in Sujit Choudry (ed) *Constitutional Design for Divided Societies: Integration or Accommodation?* (OUP 2008) 258-286; Cibli Mallat ‘On the Specificity of Middle Eastern Constitutionalism’ (2006) 38:1 *Case Western Reserve Journal of International Law* 13-57; Saïd Amir Arjomand, ‘Islamic Constitutionalism’ (2007) 3 *Annual Review of Law and Social Sciences* 115-40.

<sup>16</sup>Arjomand, (n 15) 116.

<sup>17</sup>An-Na`im, (n 13) 830.

<sup>18</sup>An-Na`im, (n 13); Hosen (n 13); Azizah Y. al-Hibri, ‘Islamic Constitutionalism and the Concept of Democracy’ (1992) 28 *Case Western Reserve Journal of International Law* 1-27; Bahlul, (n 14).

<sup>19</sup>Mallat (n 00) 44-47; Raja Bahlul (n 00) (no doctrine of separation of powers),

<sup>20</sup>Bahlul (n 00) 529 (Islam rejects secularism).

<sup>21</sup>Arjomand (n 00) 137.

<sup>22</sup>Asam Khalil ‘From Constitutions to Constitutionalism in Arab States: Beyond Paradox to Opportunity’ (2010) 1:3 *Transnational Legal Theory* 421-451.

<sup>23</sup>Clark B. Lombardi, ‘Sharia: “A” or “The” Chief Source of Legislation’ (2013) 28:3 *American University International Law Review* 737-774.

government took heart from the Arab Spring, commencing in Tunisia in January 2011 and spreading across north Africa and the Middle East. Five years later it is only at the place of origin, which was the most “Western” of Maghreb countries, that the principles of democracy, separation of powers, and a bill of rights were constitutionally entrenched.

It is quite remarkable that in view of these deep seated differences a liberal democratic concept of the state was embraced by the African Union in its *African Charter on Democracy, Elections and Governance* of 2007 (referred to as *African Charter on Democracy*).<sup>24</sup> These principles were projected, not as Western constructs, but as “universal values and principles”,<sup>25</sup> which include: “the universal values and principles of democracy and respect for human rights”; “the principle of the rule of law premised upon the respect for, and the supremacy of, the Constitution”; “regular free and fair elections to institutionalize legitimate authority of representative government as well as democratic change of governments”; and the independence of the judiciary.<sup>26</sup> Added to these objectives is the principle of “separation of powers”.<sup>27</sup> With the prohibition of unconstitutional change of power being central to the Charter,<sup>28</sup> article 10 imposes the duty on State Parties to entrench the principle of constitutional supremacy and ensure that “the process of amendment or revision of their constitution reposes on national consensus, obtained if need be, through referendum.” The Charter also contained a developmental mandate: State parties must ‘undertake to design and implement social and economic policies and programmes that promote sustainable development and human security.’<sup>29</sup>

By April 2016, 48 of the 54 member states have signed the Charter and the ratifications have crept up to 24, half of which are Muslim countries, including the autocracy of the Sudan.<sup>30</sup> Only Libya, Eritrea, and Egypt have not signed the Charter and Morocco is not a member of the AU.<sup>31</sup>

Following the AU’s conceptualisation of constitutionalism, a working definition of constitutionalism underlying this Seminar should, I propose, contains the classical tradition of constitutionalism (but frowns upon the Francophone watered down version) and include the developmental dimension. It thus embraces the trail-blazing nature of South Africa’s Constitution, making a transformative goal a key element of constitutionalism.

### **3. Decentralisation - towards a working definition(s)**

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<sup>24</sup> The Charter was signed by 39 of the 54 AU member states in 2007 and came into force on 15 February 2012 with the ratification by the 15<sup>th</sup> member state. See Patrick J. Glen, ‘Institutionalizing Democracy in Africa: A Comment on the African Charter on Democracy, Elections and Governance’ (2012) 5 *African Journal of Legal Studies* 149–175, 157.

<sup>25</sup> Preamble of Charter.

<sup>26</sup> Article 2 of Charter.

<sup>27</sup> Article 3 of Charter.

<sup>28</sup> Glen (n 00), 169.

<sup>29</sup> Article 9 of Charter. See also article 2 where the promotion of ‘sustainable development and human security’ are also one of the objects of the Charter.

<sup>30</sup> AU, ‘List of countries that has acceded and ratified it’, April 2016, available at <http://www.au.int/en/sites/default/files/treaties/7790-sl-african-charter-on-democracy-elections-and-governance.pdf>, accessed 20 August 2016.

<sup>31</sup> Morocco left the predecessor of the AU, the Organisation of African Unity, because of the latter’s recognition of Western Sahara. Recently, Morocco has made overtures to rejoin the AU (<http://www.aljazeera.com/news/2016/07/morocco-asks-rejoin-african-union-32-years-160718060858072.html>, accessed 20 August 2016).

The word ‘decentralisation’ usually refers to the *process* of dispersing power to subnational governments, and the term ‘non-centralism’ is often used as an equivalent.<sup>32</sup> In the literature decentralisation is given both a narrow and broad meaning. When Daniel Elazar refers to decentralisation he describes the process of a discretionary transfer of powers by the centre to local governments on a non-permanent basis.<sup>33</sup> This view is reflected in the African Union’s *African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development* of 2014 (*Charter on Decentralisation*).<sup>34</sup> Decentralisation is defined as ‘the *transfer of power, responsibilities, capacities and resources from national to all subnational levels of government* with the aim of strengthening the ability of the latter to both foster people’s participation and delivery of quality services’.<sup>35</sup> Although the term is used in an inclusive manner, referring to ‘all sub-national levels of government’ which in the context of the Charter refers to both regional and local governments,<sup>36</sup> the devolution of powers is in terms of national legislation, and is not constitutionally entrenched.

Decentralisation, when used in a federal context, refers also to the process of extending the autonomy of the constituent units, as opposed to centralising powers.<sup>37</sup> For the purposes of this conference we are using this broad definition of decentralisation which includes both federal units and local governments. Plainly stated, it entails the dispersal of powers to subnational governments, whether in terms of a constitution or legislation, provided that such governments can make final decisions on a set of predetermined matters. Put differently, it refers to the subnational autonomous exercise of power with respect to a set of policy fields. This definition is flexible enough to make space for traditional authorities. Although their position does not arise from a constitution or legislation, they make final governance decisions in respect of communal land and customary law. In terms of this definition, at the top end of the continuum of decentralisation are federations, encased in constitutions, followed by local government which may (but usually does not) find constitutional recognition. At the bottom are traditional leaders who occupy an ambiguous and contested role in local governance.

### 3.1 Federations and Federalism

The rudimentary description of federalism is that of a system of government which has both self-rule and shared-rule elements. In some decisions, subnational units make their own decisions on matters of concern for that community, and for others it is done in conjunction with the central government. The basic structural elements of a federation are: the establishment of at least two levels of government; the division of powers (including taxing powers) between the centre and the constituent units; the participation of such units in the federal parliament through a second chamber; a system of intergovernmental relations; all of which are captured in a supreme constitution that is enforced by an independent judiciary.<sup>38</sup> In this regard a distinction should be drawn between constituent units and autonomous units.

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<sup>32</sup> Ronald Watts *Comparing Federal Systems* (McGill Queen’s University Press 1999) 71-75.

<sup>33</sup> ‘Federalism vs. Decentralization: The Drift from Authenticity’ in John Kincaid (ed.) *Federalism* (vol II Sage 2011) 79-88.

<sup>34</sup> Adopted by the AU in April 2014, but has not yet come into operation.

<sup>35</sup> Art 1 ‘Decentralisation’, emphasis added.

<sup>36</sup> See references to ‘sub-national levels’ in arts 5.4, 6.2, 7.5, 11.a, 16.4.a, 18.1.a.ii,

<sup>37</sup> See for example Tullia G. Falletti, ‘Decentralization in Time: A Process-tracking Approach to Federal Dynamics of Change’ in Arthur Benz and Jörg Brschek (eds) *Federal Dynamics: Continuity, Change and the Varieties of Federalism* (Oxford University Press 2103) 140-166.

<sup>38</sup> Ronald Watts *Comparing Federal Systems* 7.

The principal difference lies in the asymmetrical devolution of power; because of the unevenness of diversity, autonomous units have a specific range of powers and institutions not shared with the rest of the country, while in most federations constituent units cover the entire country and have a universal set of powers.<sup>39</sup> Furthermore, the shared rule component in federalism is often missing, as an autonomous unit ‘often wants to be left alone’.<sup>40</sup> Autonomy is motivated by the desire of a particular, mostly ethnic/cultural, group for self-rule which is not shared by other groups. But there is much in common with federalism; they serve similar objectives, entail a division of power, and require judicial protection in terms of entrenched provisions on a constitution. Examples of autonomous units in Africa are the status of Zanzibar within Tanzania<sup>41</sup> and the elevated position of South Sudan under the 2005 Comprehensive Peace Agreement and Constitution.

The objectives of a federalism are in the main three-fold: The first is peace-making and state building in fragile states. The aim is to keep the state intact or settle conflict by accommodating minority (often ethnic) and marginalized groups in an inclusive system of government.<sup>42</sup> A second objective is to limit the abuse of centralised government, usually concentrated in the hands of an authoritarian presidency, by devolving some powers away from the centre to subnational governments. A third objective is to enhance development: bringing government closer to the people to ensure that development projects reflect regional and local preferences, and resources are spread more equitably across the country. This will also ensure better service delivery and encourage greater public participation in development.

Whether a federation achieves the objectives of federalism does not depend only on the legal provisions of a constitution, a necessary but not sufficient condition. Rather, Ronald Watts argues, it is determined by the federal nature or otherwise of a country, its political practices and processes. He suggests that the following “significant characteristics of federal processes”:<sup>43</sup>

- A strong disposition to democratic procedures since they presume the voluntary consent of citizens in the constituent units;
- Non-centralization as a principle expressed through multiple centres of political decision making;
- Open political bargaining as a major feature of the way in which decisions are arrived at; and

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<sup>39</sup> See Markku Suksi, *Sub-State Governance through Territorial Autonomy: A Comparative Study in Constitutional Law of Powers, Procedures and Institutions* (Springer 2011), 81-106; Yash Ghai, ‘Introduction: Nature and origins of autonomy’ in Yash Ghai and Sophia Woodman (eds) *Practising Self-Government: A Comparative Study of Autonomous Regions* (Cambridge University Press 2013) 1-31, 16-19.

<sup>40</sup> Ghai ‘Introduction: Nature and origins of autonomy’ (n 00) 16. See further Sophia Woodman and Yash Ghai, ‘Comparative Perspectives on Institutional Frameworks for Autonomy’, in Yash Ghai and Sophia Woodman (eds.) *Practising Self-Government: A Comparative Study of Autonomous Regions* (Cambridge University Press, 2013), 449-448, 473-478.

<sup>41</sup> On Zanzibar’s status as an autonomous unit, see Yash Ghai, ‘Zanzibar in Tanzania: From Sovereignty to Autonomy?’ in Yash Ghai and Sophia Woodman (eds.) *Practising Self-Government: A Comparative Study of Autonomous Regions* (Cambridge University Press, 2013) 258-280.

<sup>42</sup> See, for example, Liam D Anderson *Federal Solutions to Ethnic Problems: Accommodating Diversity* (Routledge 2013).

<sup>43</sup> Ronald Watts, ‘The Federal Idea and its Contemporary Relevance’ in Thomas J. Courchene, John R. Allen, Christian Leuprecht & Nadia Verrelli (eds) *The Federal Idea: Essays in Honour of Ronald L. Watts* (McGill Queen’s University Press 2011, 16-17. See also Ronald L. Watts ‘Comparing Federal Political Systems’ in Alain-G Gagnon, Soeren Keil and Sean Meuller (eds) *Understanding Federalism and Federation* (Ashgate 2015) 11-30, 13.

- A respect for constitutionalism and the rule of law since each order of government derives its authority from the constitution.

It is immediately apparent that these characteristics are essentially the basic components of constitutionalism. The first characteristic reflects a commitment to democracy. In well-established federations multi-party democracy is regarded as axiomatic; federalism without democracy is a contradiction in terms.<sup>44</sup> The element of establishing “multiple centres of political decision making”, each centre drawing its authority from its own constituency, reflects the notion of limiting the power of the centre as a safeguard against the tyranny of the latter. The legitimate construction of the government of constituent units is predicated on the expressed free will of the population in multi-party elections. Consequently, whoever captures power at the ballot box should be recognized as the legitimate government of the constituent unit, even if it is politically opposed to the elected government at the centre. It thus requires tolerance by the central government of oppositional political forces. In particular, the constituent units’ right to make final decisions in areas of exclusive jurisdiction must be tolerated. Likewise, the constituent units must respect the centre’s sphere of competencies. The mutual tolerance of each other, thus opens the way for “open political bargaining” on issues of common concern.<sup>45</sup> This open bargaining comes sharply to the fore when the institutions of shared rule, most notably the second house in the federal parliament, representing the constituent units or territories, restrain the power of the centre. The fourth element refers to the rule of law component of constitutionalism. First, the supremacy of the constitution, setting the parameters of the powers of all governments established in terms of the constitution, must be respected. Central to this respect is the notion of limited government; the central government’s powers are confined to the four corners of a constitution. Secondly, the constitution, as the solemn pact between the centre and the constituent units, cannot be amended by the centre acting on its own. Thirdly, in as much as the constitution must be respected, the laws authorized by the constitution, must also be obeyed; governments of both orders must act in terms of predetermined clear rules. Of particular significance are the rules governing intergovernmental fiscal relations. Fourthly, trust in the constitution and laws must be vindicated by an independent judiciary which is respected and obeyed by all governments.<sup>46</sup>

### 3.2 Local Government

A definition of local government is difficult as it encompasses a wide range of institutions, from the mega-metropolitan governments to small village councils. I have thus suggested that it is more appropriate to talk of local governments (plural), which have in common that ‘there is no order of government between them and the communities they serve.’<sup>47</sup> They are established either constitutionally (rarely) or by statute. An inherent quality of local governments is that they must be democratically elected and accountable to their constituencies. They perform a number of functions of which the following two are the most important. First, they provide basic services such as water, sanitation, electricity, roads, and basic healthcare which are done as an exercise of their right to govern matters of local

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<sup>44</sup> See Michael Burgess and Alain-G Gagnon, ‘Introduction: Federalism and Democracy’ in Michael Burgess and Alain-G Gagnon (eds) *Federal Democracies* (Routledge 2010) 1-25.

<sup>45</sup> Woodman and Ghai state, with reference to autonomous units, that ‘a spirit of consultation and negotiations in good faith is vital for autonomy systems’ ((n 00) 466).

<sup>46</sup> Woodman and Ghai (n 00) 471.

<sup>47</sup> Nico Steytler, “Introduction” in Nico Steytler (ed) *Local Government and Metropolitan Regions in Federal Systems* (Montreal, Kingston: McGill-Queen's University Press, 2009), 3-6, 4.

concern, and hence are accountable to their community. Secondly, they often also perform specific central government functions delegated to them by the central government under the latter's control, direction and review; their accountability is thus to the centre for the adequate performance of such functions.

To be clearly distinguished from decentralisation is deconcentration, the administrative decentralization of power within the central government to local administrative offices under the direct control of the central government. Although the central government may give regional officials a wide discretion, the latter is directly accountable to the centre and not the people in the region that they serve. Although deconcentration is sometimes mentioned in the literature as a form of decentralization, in terms of our definition of decentralization, this form of governance does not meet the criteria of democratically elected bodies exercising final decision-making powers.

Our definition is aligned with the *African Charter on Democracy* which requires that 'State Parties shall decentralize power to democratically elected local authorities as provided in national laws'.<sup>48</sup> This approach was reaffirmed in the AU's *Charter on Decentralisation* where the principles of decentralisation include:

Local governments or local authorities shall in accordance with national law, have the powers, to in an accountable and transparent manner, manage, manage their administration and finances through democratically elected, deliberative assemblies and executive organs.<sup>49</sup>

Although the Charter asserts on the one hand the legislative authority of local governments, it subjects such authority to the hierarchy of the national law and regulations.<sup>50</sup>

The objects of local government are much the same as those ascribed to federalism. The first is realising democracy from the bottom up. The *African Charter on Decentralisation* proclaims in its preamble that local governments 'are key cornerstones of any democratic governance system'.<sup>51</sup> The particular importance of local democracy is that it can readily be participatory in nature.<sup>52</sup> The establishment of democratic governance at a subnational level not only provides a legitimate basis for local government, but also allows for a democratic ethos to permeate the entire polity from the bottom up. The second object of local government is development. In South Africa local government is thus defined as 'developmental local government'.<sup>53</sup> Through the equitable distribution of resources to local authorities and, there, matching expenditure with local preferences, the argument is that development will be more effective. One of objects of the *African Charter on Decentralisation* is also promoting 'resource mobilisation and local economic development with the view of eradicating poverty in Africa.'<sup>54</sup> The third object is that local government can, to a limited extent, also serve as a vehicle to accommodate diversity.<sup>55</sup> This is a

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<sup>48</sup> Art 34.

<sup>49</sup> Art 5.2

<sup>50</sup> Art 9 Charter.

<sup>51</sup> Article 2.b states the reverse: the objects of the Charter include the promotion and championing of 'local government and local democracy as one of the cornerstones of decentralisation'.

<sup>52</sup> Art 4.a African Charter on Decentralisation.

<sup>53</sup> See Jaap de Visser, *Developmental Local Government: South African Case Study* (Intersentia, 2005).

<sup>54</sup> Art. 2.b. See Also the preamble: 'improving the livelihoods of all peoples on the continent'.

<sup>55</sup> Pranah Bardhan and Dilip Mookherjee, 'The Rise of Local Governments: An overview' in Pranah Bardhan and Dilip Mookherjee (eds) *Decentralization and Local Governance in Developing Countries* (MIT Press 2006) 1-52, 4.

principled object in the ethnic federation of Ethiopia,<sup>56</sup> and implicitly in Kenya's 47 county configuration.

As with federalism, effective decentralisation at local government level is also largely dependent on the presence of constitutionalism, although the constitutionalisation of local government is yet neither the norm nor required by the *African Charter on Decentralisation*.<sup>57</sup> First, local democracy thrives within a larger democratic ethos that also respects local democratic outcomes. Secondly, local autonomy is based on the principled acceptance of limited government at the centre, now running along a vertical axis. Thirdly, 'developmental local government' flowers within transformative constitutionalism of which it is a constitutive part. Finally, autonomous decision-making depends on adherence to the rule of law: respect for the allocation of local government powers, support for its institutions, and the resolution of disputes with the centre ultimately by an independent judiciary.

### 3.3 Traditional authorities

Traditional authorities are those social institutions that pre-date colonialism as endogenous forms of governance, based on both hereditary or elected leaders, appointed and governing in terms of customary law. The governance role varies across Africa but include a direct governance role in the absence of a state presence, land-use management in communal areas falling under their jurisdiction, facilitation and support of formal government structures and programmes, and the administration of customary law. The *African Charter on Elections*, with its focus on democracy, inevitably gave cautious recognition to their role: 'Given the enduring and vital role of traditional authorities, particularly in rural communities, the State Parties shall strive to find appropriate ways and means to increase their integration and effectiveness within the larger democratic society.'<sup>58</sup> In contrast, the *African Charter on Decentralisation* says not a single word about traditional leaders, and they thus are not seen as part of the decentralisation project.

Whereas federations and local government thrive in and bolsters constitutionalism, traditional authorities contradict the essence of some of the basic tenets. Hereditary leadership is per se undemocratic, the patriarchal system offends the basic principles of equality, and the unwritten customary rules sit uncomfortably in a rule of law system which requires written rules (particularly in a Francophone context). Despite these inherent contradictions, traditional leaders are increasingly seen as key players in the development of rural areas.

## 4. Implementing Decentralisation: the challenge of constitutionalism

### 4.1 The dominance of the centralism

The allure of liberal-democratic constitutionalism has been in reaction to highly autocratic states which broke few limits on executive powers, were intolerant of multi-party democracy, negated human rights, and transmogrified the rule of law into the rule through law. Development was inequitable, with the well-being of the imperial president and his group the

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<sup>56</sup> Zemelak Ayele, *Local Government in Ethiopia* (Nomos 2014).

<sup>57</sup> It could be argued that art. 13.1 implicitly requires the constitutionalisation of at least the principle of democratically elected local officials, but by requiring: 'Election of local public officials *shall be enshrined within the legal framework* of State Parties, which shall clearly define the modalities and timeframes for such elections.' The word 'enshrine' is usually used in the context of enshrining a right or obligation in a constitution.

<sup>58</sup> Article 35 of Charter.

primary focus. The 1990s' wave of democracy has ebbed and the Charter on Elections is still a far cry from its realisation. The dominant practice is still that of a dominant executive, often still clothed in imperial trappings of personalised rule. Electoral competition obtained in "illiberal democracies"<sup>59</sup> or "semi-democracies", where authoritarian practices and violation of human rights remain common place.<sup>60</sup> The single party in control was 'replaced by the dominant parties operating in exactly the same reckless and arbitrary manner as the post-independence singly party systems'.<sup>61</sup> A strong presidency still dominates both the legislature and the judiciary. Human rights are more often violated than protected. The rule of law is more the rule through law; the constitution rather than a restraint on government is an enabler.

As such, there is no clear articulation of a competing vision of present day constitutional practice which justifies the centrality of an imperial presidency. There are no longer post-independent politicians and theorists expounding the virtues of the centrist state for nation building and development.<sup>62</sup> As the theory of national unity and development is threadbare, the competing model of 'centrism' is informed by a number of factors. In countries which experienced wars of national liberation, the liberation movements cling to a notion of entitlement to govern and that the state is their legitimate spoils of war. In most cases the pervasive factor is the neo-patrimonial state. In contrast to Western countries where the state is separate but protective of the market, in the patrimonial state there is no split; the state dominates the economy.<sup>63</sup> Following on from the colonial patrimonial state, where it was not used for the benefit of the citizens but for the metropole, the new patrimonialism of the post-independence African state is not much different; the state is a vehicle for the self-advancement of the ruling elite located in the presidency and his or her affiliated group. Multiparty elections are not a contest of which party will serve the nation best, but all about 'our turn to eat'.<sup>64</sup> Elections are thus manipulated, limits on state action minimized, and the rule of law a hindrance that can be overcome with the support of a compliant or corrupt judiciary. The result is the 'self-serving state',<sup>65</sup> manifested by corruption, underdevelopment and, consequently, conflict.

This competing vision of the state not only undermines constitutionalism, also but also has profound effects on the implementation of decentralisation.

## 4.2 Federalism and its challenges

In highly divided African countries federal-type arrangements have been tried as a solution to enduring conflicts, most of which stemmed from ethnic/religious-mobilisation. Since the 1990s federal-type systems have emerged in South Africa (1994); Ethiopia (1995); Nigeria (1999, re-establishing earlier federal constitutions); the Comoros (1996, 2001); the

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<sup>59</sup> Sheldon Gellar, *Democracy in Senegal: Tocquevillian Analytics in Africa* (Palgrave Macmillan 2005) 175.

<sup>60</sup> Pierre Englebert and Denis M. Tull 'Postconflict reconstruction in Africa: Flawed Ideas about Failed States' (2008) 32:4 *International Security* 106-139, 116.

<sup>61</sup> Fombad 'Constitutional Reforms and Constitutionalism in Africa' (n 2) 1105.

<sup>62</sup> Pita Ogaba Agbese and George Klay Kieh, Jr., "Introduction: Democratizing state and state reconstruction in Africa", in Pita Ogaba Agbese and George Klay Kieh, Jr. (eds) *Reconstituting the State in Africa* (Palgrave MacMillan 2007) 3-29, 9.

<sup>63</sup> Yash Ghai (n 00) draft paper.

<sup>64</sup> Michela Wrong, *It's our Turn to Eat: The Story of a Kenyan Whistle-blower* (HarperCollins 2009).

<sup>65</sup> Fombad 'Constitutional Reforms and Constitutionalism in Africa' (n 2) 1023.

Democratic Republic of Congo (2005); the Sudan (2005), Kenya (2010); South Sudan (2011) and Somalia (2012). In most of them, where conflict was driven by ethnically mobilized groups (usually because of exclusion from state resources and inequitable development), federalism was the containment strategy of holding the country together. The South African interim Constitution of 1993 heralded the transition from white minority rule and a low intensity civil war to a constitutional democracy, but also accommodated secessionist tendencies among Zulu and Afrikaner nationalists. The Ethiopian Constitution of 1995 flowing from the military defeat of the Mengistu's totalitarian regime constructed an ethnic-based federation. The 1999 Nigerian Constitution restored both civilian rule and federalism after two decades of military rule, with the 36 states as a strategy to diffuse the inherent tension between the four main ethnic/religious groups. The 2001 Comoros Constitution followed the return to civilian rule after the 20<sup>th</sup> military coup d'état or attempt at such since independence in 1975 to bring peace between different island identities. The 2005 peace-treaty and interim constitution of the Sudan ended two decades of civil war which pitted the African/Christian South against the Arabic/Muslim north. The 2005 DRC Constitution brought to an end an internationalized civil war by, among other measures, devolved powers to largely ethnic-based provinces. The constitution-making process in Kenya, culminating in the 2010 Constitution, gained traction after the ethnic clashes that followed the contested 2007 presidential elections and inadvertently provides for 47 ethnic enclaves. After the 2011 referendum South Sudan became independent following a peaceful referendum in terms of the Sudan's interim constitution of 2005, but has since then collapsed in an ethnic-based civil war. The transitional Federal Constitution of Somalia of 2012 seeks to bring this failed state back to life, through a federal dispensation that currently builds on the clan system.

Whereas it was argued above that federalism gives full expression to constitutionalism, the reverse is equally true; the functioning of federal systems in Africa is curtailed in practice by the very absence or superficiality of the various components of constitutionalism. A number of challenges to the implementation of federalism can thus be identified:

First, the tolerance of democratic government at sub-national level faces considerable socio-political obstacles. Although multi-party elections take place, an authentic subnational voice is not always heard. Where the pre-1990 single party has morphed into the dominant party, the latter through a strong hierarchical party structure, ensures accountability upwards rather than horizontally. In Ethiopia, the dominance of the EPRFD, which has captured all seats at both federal and state level, has effectively hollowed out the federal democratic structures through the fusion of party and state. For more than two decades a centrist ANC has governed through hierarchical party rule, eight of the nine provinces.

Secondly, the notion of limited central power remains an anathema to most federal governments; the overwhelming ethos and goal remain that of an all-powerful centre. Evidence of the prevalence of this ethos is to be found in the very constitutions establishing the subnational states, effecting only 'fragile federalism'.<sup>66</sup> The key characteristics of this style of federalism are: the fracturing of subnational governments into numerous small units; a limited devolution of powers (mainly through concurrent powers which are then dominated by the centre); centralising taxing powers and rendering subnational governments dependent on transfers; the central dominance of intergovernmental relations; and extensive intervention powers. These 'fragile' federal arrangements came about as compromises struck between a

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<sup>66</sup> Nico Steytler and Jaap de Visser "'Fragile Federations': the dynamics of devolution", in Francesco Palermo and Elisabeth Alber (eds) *Federalism as decisionmaking* (Brill/Nijhoff 2015), 79-101.

central governing elite and polities at the periphery; such compromises the former never fully embraced and constantly seeks to undo.

Thirdly, in some federations the federal arrangements have to take root in the absence of the rule of law. At the most basic level, parties to a peace accord establishing a federal solution to an on-going conflict do not honour their signature to such accords. The tragic story of South Sudan can be traced back to repeated breaches of peace agreements between the North and South, and now within the South. Even where federal arrangements are captured in a constitution and legislation, a reckless disregard for the rules of the game is often encountered. In a number of federations the courts provide little protection of sub-national autonomy, and show deference to the centre rather than their own independence and impartiality. In some countries there is no or weak constitutional review by the courts. In Ethiopia, for example, a political body, the House of Federations, the second house of the federal parliament, is the interpreter of the Constitution including its federal provisions. The operationalisation of the federal arrangements in Somalia has to proceed in the absence of a constitutional court or a functioning judiciary.

Fourthly, decentralisation takes place in a national ethos of neo-patrimonialism; the state is not there for developing the country as a whole but to serve the narrow interest of a political elite. Subnational governments, hailed as the panacea for past injustices of underdevelopment, fall in the same trap when local elites capture the local state.

In summary, the federal peace dividend is unlikely to materialise in the absence of constitutionalism. The very fact that federal constitutions were a peace-making device, ending decades of some of the world's most horrendous wars and authoritarian regimes, was in itself indicative of the absence of democracy, limited government, the rule of law, and the presence of partisan development. The prize of capturing and maintaining central power seems to override federal peace-making objectives. Because constitutionalism is an uncomfortable restraint on the exercise of centralised power, federal arrangements as a pragmatic solution to conflict have not been implemented and put to the test, and past conflicts persist.

### ***4.3 Developmental local government and constitutionalism***

With the end of the Cold War, a triumphalist West premised development and economic growth on implementing the Washington Consensus which entailed a market economy, a reduced central government, privatisation, and decentralisation. The latter strategy was enthusiastically pursued by key international development agencies such as UNDP, the World Bank, and the International Monetary Fund, which both prescribed decentralisation structures and strategies and pumped billions of dollars into the developing world for this purpose.<sup>67</sup> This impetus prompted also a new home-grown interest in local governments. Spurred on, no doubt, by Thabo Mbeki's African Renaissance project, a continental-wide local government association, the United Cities and Local Governments of Africa (UCLGA) was established in 2005, with the founding meeting attended by 52 countries and a number of heads of state. UCLGA combined existing Anglophone, Francophone and Lusophone local government associations,<sup>68</sup> but its ambitious programme soon floundered on the rocks of the

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<sup>67</sup> Yonatan Fessha and Coel Kirkby, 'A Critical Survey of Subnational Autonomy in African States' (2008) 38 *Publius* 248-271; Jan Erk 'Iron Houses' (n ??), 410.

<sup>68</sup> Reuben Baatjies 'United Cities and Local Governments of Africa' (2005) 7:2 *Local Government Bulletin* 15.

old enmity between the Anglophone and Francophone views on local government: is local government a self-standing institution or an appendage of the central state.

As is the case with federations, the autonomous functioning of local governments is also tied up to the health of the national constitutionalism enterprise. Where there is only sham democracy at the centre, little can be expected at the local level. Even if there is multiparty democracy at national level, democracy is not always tolerated at the local level. In the Francophone system, which is predicated on a centralised administration which effects upward accountability rather than to local constituencies, mayors are still centrally appointed, reflecting the old prefecture system. Even in the Anglophone countries full effect is not given to democratic outcomes. In Botswana and Zimbabwe (before the 2013 Constitution) the president appoints a percentage of councillors to democratically elected councils. The presidential power of removing democratically elected mayors and councils is also a common feature. The tolerance of an opposition party exercising state power is not widely accepted. When the opposition party won control of Kampala, the capital city of Uganda, the city administration was summarily nationalized.<sup>69</sup> Where local elections are routinely held, Erk points out, the workings of local governments are, in a one dominant party system, dictated not by local concerns but by national party interests.<sup>70</sup> The prime examples is the EPRDF iron grip on all subnational governments in Ethiopia which has not produced local accountability, the very point of devolving democracy.<sup>71</sup>

Even where democracy at local level is tolerated, the notion that local authorities could in fact be *governments*, making final decisions, and thus impose a limitation on central power, is highly contested, and, in the final analysis, restricted. First, local government's place in the structure of the state is most often not entrenched in constitutions, with a few exceptions: (Namibia (1990), South Africa (1993, 1996), Uganda (1995), Nigeria (1999), Zimbabwe (2013), Tunisia (2014), and Zambia (2016)). The level of such protection of local autonomy varies considerably, from detailed provisions in the South African 1996 Constitution to a minimalist approach in Namibia. In most countries local authorities are established by statute, which is also the underlying assumption of the *African Charter on Decentralisation*. As 'creatures of statute' local governments are most often subject to central regulation and control, a position which is further exacerbated by their dependency on national transfers. Overall, local governments function in the main as agents of the central state at grass roots level.

Where the rule of law is no more than a goal, a rule driven local government will equally be a chimera. Conversely, the presence of the rule of law empowers local government.<sup>72</sup> Even where there is a prevailing ethos of governance through rules, local government may undermine this ethos by its sheer inability to comply with the imposed legal framework. The structures and processes imposed by central government, however well designed, are not, or

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<sup>69</sup> Jaap de Visser 'The Right to (be) a City: The Place of Cities in the Institutional and Constitutional Context of Federal/Decentralized Systems in Africa' in Sandeep Shastri (ed) *Federalism and the Democratization Process*, vol II of *Equality and Unity in Diversity for Development* (Shama Book 2012) 22-29.

<sup>70</sup> Erk 'Iron Houses' (fn ??), 413.

<sup>71</sup> Dejen Mezgebe, 'Decentralized Governance under Centralized Party Rule in Ethiopia: The Tigray Experience' (2015) 25:4 *Regional and Federal Studies* 473-490.

<sup>72</sup> Bardhan and Mookherjee (n 00) 9.

cannot, be implemented by a poorly skilled administration, resulting inevitably in a state of lawlessness.<sup>73</sup>

Whether local government can fulfil its developmental goal is dependent a number of factors, some determined by the centre, others lie in its own hands. Within a centralised fiscal system, the resources available to local governments depends largely on the generosity, or not, of the central government; having control over most sources of revenue, a lack of support from the central government is a common complaint in most countries. With scarce resources at hand and an upward accountability for whatever handouts are received, the very rationale for decentralisation – matching development measures with local preferences through horizontal democratic accountability to the constituency - is thwarted. Operating within a national ethos of a patrimonial state, local governments readily replicated and amplified it, making development an unlikely outcome.

#### 4.4 Traditional leaders and constitutionalism

Given the considerable obstacles described above, it is not surprising that the decentralisation initiatives have not been uniformly successful. The failure is also attributed to the imposition of foreign-designed institutions and processes which were, as a result, not context compatible.<sup>74</sup> Part of the missing context is the role of traditional leaders.

During the colonial period traditional authorities played an important governance role in British colonies through the so-called system of ‘indirect rule’, while in the French colonies they were marginalised through the system of direct administrative rule. In the post-independence period of centralized rule and its modernization project, Anglophone countries side-stepped traditional leaders because of their collaborative role under colonial rule, their perceived backwardness, and the intolerance of any competing sources of power. In the Francophone countries, the French colonial state’s strictly hierarchical rule gave little or no space to traditional authorities,<sup>75</sup> an approach which continued after independence.<sup>76</sup> Traditional authorities were perceived as competing centres of power and the new rulers sought to marginalise them in the name of de-ethnicising post-independence countries.<sup>77</sup>

Jan Erk points out the irony that the decentralisation push of the 1990s blew ‘new life into some of the traditional authorities who had remained politically dormant until the creation and strengthening of local government.’<sup>78</sup> With the focus on the local state, they could exert their authority effectively in the ‘smaller settings’ of local authorities, particularly where the latter failed to deliver services effectively.<sup>79</sup> However, due to the different Anglophone and

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<sup>73</sup> See Elliott Green, ‘Decentralisation and Development in Contemporary Uganda’ (2105) 25(4) *Regional and Federal Studies* 491-508; Jaap de Visser and Nico Steytler, ‘Confronting the State of Local Government: The 2013 Constitutional Court Decisions’ (2016) 7 *Constitutional Court Review*, 000-000.

<sup>74</sup> Erk (n 00) 418.

<sup>75</sup> Gerrit Krol, ‘Policy Decentralisation and the Endogenous Effect of State Traditions: Devolution of Water Management in Ghana and Senegal’ (2105) 25:4 *Regional and Federal Studies* 421-438.

<sup>76</sup> Gellar (n 00).

<sup>77</sup> Hippolyt A.S. Pul, ‘Groping and Aping to the Promised Land: Cultural Disconnects and the Challenges to Nationhood, Governance, and Development in Africa’, in Abdalla Bujra (ed), *Political Culture, Governance and the State in Africa* (DPMF 2011) 163–202, 173, 179.

<sup>78</sup> Jan Erk, ‘Iron Houses in the Tropical Heat’ (n 00) 413.

<sup>79</sup> *Ibid*, 414.

Francophone approaches to traditional authorities during the colonial period, the latter withered away and did not revive during the last two decades.<sup>80</sup>

Opinion on the role of traditional leaders is deeply divided. On the one hand, they are viewed as corrupt, illiberal, and an obstacle to modernisation of the state and development. On the other hand, there are increasingly pragmatic voices that recognize the value of their legitimacy and the enormous resource in their hands – the control of land in rural areas. Given that the traditional authority system remains deeply ingrained in the fabric of rural life, and, as Tinashe Chigwata argues, in the absence of a capable state in local level, they should play a governance role and be integrated into the modern state.<sup>81</sup> They are thus seen as necessary stakeholders in the implementation of development programmes.

The role and place of traditional leaders are context specific. In the absence of a central government (such as Somalia) they govern in a true expression of decentralisation, making final decisions over a wide range of matters. In countries (such as the DRC) where the reach of the central state is limited a similar practice is evident. Where constitutionalism has a foothold, the question has been how to integrate the traditional leaders into a modern democracy without negating the core elements of constitutionalism.

Within a democratic governance framework traditional leaders are assigned a consultative rather than a decision-making role in formal legislative processes. This may take the form of a House of Traditional Leaders that must be consulted on matters affecting customary law. Traditional leaders may also have deliberative but not voting rights in local councils, as is the case in South Africa. The principle is that the traditional voice must be heard but it may not dictate. Final decision-making powers are, however, accorded to traditional leaders in the areas of communal land and adjudication of customary law. Although customary law is unwritten (running against the grain of the Francophone system of codification), it may be aligned by superior courts to the basic principles of equality and fundamental rights. The strongest claim for the merger of traditional leadership into governance structures or processes is that they would assist in building the capable state in the face of weak local government institutions.<sup>82</sup>

## **5. Decentralisation and the advancement of constitutionalism**

The relationship between constitutionalism and decentralisation is not only one of dependency; a state of constitutionalism allows local government to thrive. The effective implementation of decentralisation also bolsters constitutionalism as it reinforces the core elements of this ideology. Thus, in countries where constitutionalism is not merely a goal, but in varying degrees a lived reality, subnational governments and polities may further enhance and deepen its realisation. A few examples will suffice.

In Botswana which has the longest track record of multiparty democracy in Africa, local government exposed its Achilles heel. When the President appointed in 1984 an additional 19 percent of the councillors to a local council which his party lost in an election, the ruling party regained control of the council. Although the president was legally permitted to do so, the local community protested vehemently, forcing the ruling party to cede back control to

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<sup>80</sup> Erk, 'Iron Houses in the Tropical Heat' (n 00) 414; Krol (n 00).

<sup>81</sup> Tinashe Charlton Chigwata, 'Decentralization in Africa and the Resilience of Traditional Authorities: Evaluating Zimbabwe's Track Record' (2105) 25:4 *Regional and Federal Studies* 439-453.

<sup>82</sup> Chigwata (n ??) 441.

the opposition, and thereby respect the basic rule of democracy. In South Africa the unanswered question has been whether the ANC, as liberation movement, would honour a negative result at the national polls. It's conduct at local government level suggests that it would; in August 2016 it gracefully and without demur handed over the reigns of the two most powerful metropolitan councils – Johannesburg and Pretoria – to opposition parties.

The conduct of subnational governments in South Africa and Namibia has affirmed the notion of limited government despite the hegemony of a dominant party. In a rare moment of dissent, some ANC-controlled provinces in 2015 defeated, through their participation in the National Council of Provinces (the second house of Parliament), a government-sponsored bill on traditional courts. In neighbouring Namibia which has an even more dominant political party, SWAPO, a government-sponsored bill, which would have further centralised control over municipalities, was rejected in 2016 by the Regional Council, the second house of Parliament and representing the regions. Despite the fact that the bill was approved by the National Assembly, the regions, all of which are controlled by SWAPO, made their voices heard without having their heads on the block. In both cases dissent within the dominant party from below bolstered, not only the federal value of accommodating local voices, but also the notion of checks and balances within the legislative process.

The relationship becomes more problematic when there is no, or very weak, constitutionalism. Ronald Watts has observed that in post-conflict countries where federal arrangements are used to secure a peace dividend, the absence of the necessary 'federal conditions' makes its achievement very remote: 'The lack of trust, willingness to compromise, and respect for constitutionality, has made it difficult to obtain accommodation or to operate a federal institution effectively.'<sup>83</sup> Watts then poses the following conundrum: 'whether a federal political culture can be created as a result of establishing a federations, or is a prior requisite'?'<sup>84</sup> Watts's answer is not entirely negative; he refers to both the US and Switzerland where fully-fledged federations with a supportive political culture were formed despite severe periods of conflict. The question in Africa is then: can the practice of decentralisation enhance or even establish the roots of constitutionalism? Is bootstraps constitutionalism possible? Can constituent units of federations play a formative role? Can local governments play a similar role?

The obvious manifestation of a lack of constitutionalism is the non- or partial enforcement of those constitutions which embody all the necessary elements of constitutionalism. Why this pervasive gap between constitutions and their implementation? The most persuasive theory, advanced by Yash Ghai,<sup>85</sup> is that such constitutions do not yet reflect a true social compact of key stakeholders in the respective societies. If they did, these stakeholders would have a material interest in constitutional enforcement. It is thus only with the growth of stakeholders independent of the state – private sector, labour, professions and civil society – that such a compact is possible and will be enforced. I have argued that in federal systems a key stakeholder has been added - the constituent units; if not captured by the centre, they have both the interest and capacity to enforce the federal compact, and set the floor for the rule of law.<sup>86</sup>

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<sup>83</sup> Watts (n 00) 2015, 27.

<sup>84</sup> Ibid.

<sup>85</sup> Ghai (n 00).

<sup>86</sup> Steytler (n 00).

Local governments and local polities may play an equally important role. When the Nigeria military regime sought to return to democracy in the late 1980s local democracy was key to the process. In 1996 it first ran a local government election based on a zero-party basis, the winners of which had to vacate office a year later when multi-party local elections were held.<sup>87</sup> Although it was a top-down manipulation of a bottom up approach, it nevertheless suggests where the roots of democracy should lie. This is also the approach of the *African Charter on Decentralisation*, which views local democracy as the ‘cornerstone’ of any democratic system.<sup>88</sup>

The absence of a functioning independent judicial system, the very cornerstone of the rule of law, is hugely problematic in new federations where there is a deep mistrust that parties will honour the compromises struck with regard to the dispersal of power. In the absence of such an institution tasked with enforcing the rules, is the notion of the rule of law meaningless? Does the absence of a functioning, legitimate supreme court render the Somali quest for a peaceful transition through federalism wishful thinking? The first and obvious response is that the two processes – building federal institutions and a judicial system – has to occur at the same time. Yet, it may not help the initial and most crucial steps towards a new constitutional dispensation. It is argued that a commitment to the rule of law starts earlier; the words on paper agreements must reflect the integrity of the parties and their commitment to the *foedus*, the federal compact. The need for such integrity calls out from South Sudan. Despite regional and international efforts to enforce the peace agreements, the civil war is testimony to the fact that signatures beneath agreements are, and have been, mere scribbles in the sand.

## 6. Conclusion

The conference will explore the relationship between decentralisation of constitutionalism. It should examine in a comparative and case specific manner the hypotheses that I have outlined above. First, the effective implementation of decentralisation and the achievement of its goals is much dependent on the realisation of constitutionalism at a national level. Without such an enabling environment, decentralisation is likely to falter. Secondly, because decentralisation incorporates elements of constitutionalism, its realisation bolsters and buttresses constitutionalism. Thirdly, decentralisation may also hold the potential to strengthen and even provide roots where constitutionalism is weak or non-existent. Overall, I would argue that there is a ‘mutually beneficial relationship between decentralisation and constitutionalism as one reinforces the other.

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<sup>87</sup> Habu Galadima ‘Federal Republic of Nigeria’ in Nico Steytler (ed) *Local Government and Metropolitan Regions in Federal Systems* (McGill-Queen’s University Press, 2009)234-266, 260.

<sup>88</sup> Preamble.

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