



Occasional Paper Series

Number 20

MULTILEVEL GOVERNMENT IN SOUTH AFRICA, ETHIOPIA AND KENYA

Observations from the practice of designing
and implementing multilevel government systems

Jaap de Visser

Nico Steytler

The Forum of Federations, the global network on federalism and devolved governance, supports better governance through learning among practitioners and experts. Active on six continents, it runs programs in over 20 countries including established federations, as well as countries transitioning to devolved and decentralized governance options. The Forum publishes a range of information and educational materials. It is supported by the following partner countries: Australia, Brazil, Canada, Ethiopia, Germany, India, Mexico, Nigeria, Pakistan and Switzerland.

The Forum of Federations wishes to acknowledge the generous support of the Australian Government and the Asia Foundation. The Australian Government and the Asia Foundation Partnership in the Philippines is funding studies that are intended to contribute to the current public discussion on reform of central-local relations (including federalism). The opinions expressed in these analyses do not necessarily reflect the position or opinions of either the Australian Government or the Asia Foundation.

1 INTRODUCTION	4
1.1 South Africa	4
1.2 Ethiopia	4
1.3 Kenya	4
2 USING FEDERALISM TO ACCOMMODATE ETHNIC / LANGUAGE DIVERSITY	4
2.1 Introduction	4
2.2 South Africa	4
2.3 Ethiopia	4
2.4 Kenya	4
3 SPECIAL AUTONOMY	5
3.1 Introduction	5
3.2 South Africa	5
3.3 Kenya	5
3.4 Ethiopia	5
4 CITIES AND LOCAL GOVERNMENT.....	5
4.1 Introduction	5
4.2 South Africa	5
4.3 Kenya	5
4.4 Ethiopia	5
5 DEMOCRACY AT REGIONAL AND LOCAL LEVEL.....	6
5.1 Introduction	6
5.2 South Africa	6
5.3 Ethiopia	6
5.4 Kenya	6
6 AUTONOMOUS POWERS AT REGIONAL AND LOCAL LEVEL	6
6.1 Introduction	6
6.2 South Africa	6
6.3 Ethiopia	7
6.4 Kenya	7
7 DIVISION OF REVENUE RAISING POWERS	7
7.1 Introduction	7
7.2 South Africa	7

7.3 Ethiopia	7
7.4 Kenya	7
8 DEALING WITH REGIONAL INEQUITY	7
8.1 Introduction	7
8.2 South Africa	8
8.3 Ethiopia	8
8.4 Kenya	8
9 USING SHARED RULE TO BRING DIVERSE COMMUNITIES TOGETHER	8
9.1 Introduction	8
9.2 South Africa	8
9.3 Ethiopia	9
9.4 Kenya	9
10 CENTRAL CO-ORDINATION OF SUB-NATIONAL UNITS	9
10.1 Introduction	9
10.2 South Africa	9
10.3 Ethiopia	9
10.4 Kenya	9
11 ROLE OF THE COURTS	9
11.1 Introduction	9
11.2 South Africa	10
11.3 Ethiopia	10
11.4 Kenya	10
12 CONCLUDING REMARKS	10

1 INTRODUCTION

This paper aims to inform policy makers and stakeholders in the Philippines about the critical features of, and practical experiences with, federalism and decentralization in South Africa, Kenya and Ethiopia. The Philippines is currently considering revisions to its present multilevel structure. Our description of the constitutional choices and subsequent experiences of these multilevel states provides an opportunity for reflection on how other countries sought solutions to the challenges they faced. This paper is also intended to provide some inspiration to those participating in the current discussions of constitutional revision in the Philippines.

The emphasis will be on South Africa with smaller remarks about Kenya and Ethiopia.

The aim of this paper is not to provide a detailed overview of the system of multilevel government in each of the three countries. Instead, the paper highlights a number of themes, which may be of relevance to the debates in the Philippines. It examines how the themes affected each of the three countries and how each theme was addressed.

1.1 South Africa

South Africa adopted a quasi-federal state structure in its 1993 Constitution. The 1993 Constitution was the product of long and intense negotiations between the liberation movements, led by the African National Congress (ANC) and the outgoing apartheid government. A major point of contention was whether post-apartheid South Africa was going to be a federal state or not. The quasi-federal structure was confirmed and refined in the 1996 Constitution. The Republic of South Africa comprises a national government, nine provincial governments and 257 municipalities. All three levels (termed “spheres” in the Constitution) are entrenched in the Constitution. The system is advanced and well-developed in law and policy. It has been relatively successful in sustaining a peaceful transition to democracy and managing ethnic and racial tension. However, major challenges persist in service delivery and development, much of which is tied to significant parts of the South African state experiencing fragility.

1.2 Ethiopia

Ethiopia’s 1995 Constitution established a federal state, comprising of a federal government and nine regional states. The Constitution

was adopted after a transitional period that included the secession of Eritrea in 1991 pursuant to a prolonged military conflict and a referendum among the Eritrean people. With 81 different language groups, Ethiopia is very diverse and bears the scars of decades of inter-ethnic strife and suppression. Its federal design, which is unequivocal in granting each “Nation, Nationality and People” self-determination and its own territory, is a direct response to the challenge of bringing the Ethiopia’s diversity of ethnic groups together in one nation. The Ethiopian People’s Revolutionary Democratic Front (EPRDF), a broad coalition of national and regional ethnic parties, is firmly in control of the federal government, all nine regional states and all local authorities. Ethiopia has seen a period of relative stability since the adoption of the Constitution. It is experiencing high economic growth, driven by state-led infrastructure development and investment in the agricultural economy. Ethnic violence is resurfacing, however, prompting the government to declare a state of emergency in 2016 in certain parts of the country. One of the main points of contention is the status of Addis Ababa, Ethiopia’s capital.

1.3 Kenya

Kenya adopted a system of “devolution” in its 2010 Constitution, implemented in 2013. While under discussion since long before, the choice for devolution was in part a response to the violent outburst of ethnic violence in 2007/2008. The Constitution of Kenya recognized a national government and 47 counties and distributed powers between the two levels of government. The first term of office of national and county governments ended in August 2017. The system is very new but has been relatively successful in diffusing ethnic tension and decentralizing state resources to rural Kenya. Kenya remains seized, however, with the challenge of managing a very diverse population, a deep rural/urban divide and a fragmented political system, driven by ethnic considerations.

2 USING FEDERALISM TO ACCOMMODATE ETHNIC / LANGUAGE DIVERSITY

2.1 Introduction

Perhaps the most fundamental question that emerging federations face is whether and how federalism can assist to accommodate cultural, ethnic and/or language diversity. In particular, whether or not subnational units, be they states, regions or local authorities, should be

demarcated along cultural, ethnic and/or language boundaries.

2.2 South Africa

The South African Constitution recognizes eleven official languages, many of whom correlate with ethnic groups. It is thus safe to say that South Africa comprises ethno-linguistic groups. South Africa never deliberately pursued ethnic boundaries for its provinces or local authorities. Boundaries were instead drawn on the basis of functional criteria related to issues such as topography, spatial patterns, functional economies etc. This is unsurprising as the suppression of the black majority during apartheid was premised on so-called “ethnic boundaries.” At the same time, there was pressure during the constitutional negotiations (particularly from the powerful isiZulu-speaking community) for the recognition of a Zulu territory. What ultimately emerged is what some call “watermark” ethnic federalism: South Africa’s provincial boundaries are not ethnic and none of the provinces bear ethnic names, except for KwaZulu-Natal. However, if one lays South Africa’s language map over the provincial boundaries, it becomes clear that many of South Africa’s provinces are homes to specific language groups. This has worked relatively well for South Africa. By not pinning the federal system on ethnic considerations, ethnic mobilization was dis-incentivized while there still is a subdued sense of belonging for language groups in specific provinces.

This does not mean that ethnic mobilization around boundaries does not happen. Some of the most pernicious boundary disputes at local government level had distinct ethnic dimensions, indicating that the system of determining boundaries is not immune to ethnic pressure.

2.3 Ethiopia

Whereas South Africa sought to avoid using ethnicity as an organising principle because of its apartheid history, Ethiopia explicitly based its federal system on ethnicity, also because of its history. Ethiopia’s ethnic-based liberation movements - coming out of more than a century of “internal colonization” by one ethnic group, the Amhara - finally brought down Mengistu’s totalitarian regime, one that had lasted from 1977 to 1991. Thus, the federal system, too, is explicitly ethnic-based, founded on the principle that each ethnic group should have control over the territory it hails from. This principle has been followed through in the manner in which the boundaries of regional states were drawn. They were not drawn up with reference to

functional criteria. By and large, they coincide with the boundaries of ethnic and language communities.

There is no doubt that this approach has contributed to Ethiopia's ability to accommodate its very diverse language, cultural and ethnic diversity. However, there are limits to this approach's ability to manage the complexities in Ethiopia. First, right from the onset, Ethiopia could not follow through completely on the principle of having the subnational boundaries coincide with ethnic groups. Because there are 81 different ethnic groups, only five states contain one major ethnic group; the four other states comprise multiple groups, but with further ethnic accommodation at local government. Most notable is the Southern Nations, Nationalities and Peoples State, a region that is in fact home to a large number of ethnic groups. Secondly, putting ethnicity at the centre of the federal system has made ethnicity into prime currency in politics, at the expense of efficiency and developmental criteria. Thirdly, Ethiopia is rapidly urbanising and its cities are melting pots of languages, cultures and ethnicities. Yet, they are located in a federal system that assumes they can be 'allocated' to one particular ethnic group. This has become a site of contestation in Ethiopia.

2.4 Kenya

Kenya, also home to numerous ethnic groups, became independent in 1963 with a semi-federal type constitution to accommodate ethnic groups falling outside the dominant Kikuyu and Luo groups. But the federation was short-lived, and for the next forty years it was a centrist government, dominated by one or other of the two main ethnic groups. When the 2010 Constitution was drafted, the question was how to accommodate ethnicity. The idea of establishing nine large regions where the major ethnic groups would be dominant was rejected as that could lead to ethnic clashes, as witnessed in 2007. The solution then chosen was to break up the large ethnic groups through creating a number of small counties – 47 in number. However, when boundaries were drawn, the drafters used the old colonial administrative boundaries, which were based on ethnicity. So, the 2010 constitution reintroduced ethnic entities through the backdoor. This, in turn, has resulted in some conflicts during the 2017 elections.

3 SPECIAL AUTONOMY

3.1 Introduction

It is not uncommon for federal constitutions to afford special status to specific territories. This type of special autonomy is often granted

for historic or political reasons. It ranges from far reaching autonomy resulting in near-independence to lighter asymmetrical arrangements granting extra constitutional powers to specific regions, states or provinces.

3.2 South Africa

In the 1993 Constitution, which served as a peace-making treaty, right wing Afrikaners were given a special dispensation; as an expression of the right to self-determination they could establish a “people’s state” if they could show any area where they were in the majority. This concession was given because they wielded considerable clout through the outgoing apartheid security establishment. As they failed to show any exclusively Afrikaner area in South Africa, these provisions fell away in the final 1996 Constitution. The South African Constitution thus does not grant any of the nine provinces special status. All nine provinces have equal status and enjoy equal constitutional powers. The Constitution does still include a provision on the right to “self-determination”, within the territory of South Africa, of any community sharing a common cultural and language heritage, but can only be exercised in terms of an act of Parliament. It was however never given content to because an act of Parliament was never adopted.

3.3 Kenya

None of Kenya’s 49 counties enjoy any special constitutional status; they have all the same powers and functions, irrespective of their size and wealth. The county of Nairobi, the capital city, with over three million people but a small territory, thus enjoys the same rights and powers as the county with the smallest population (less than 250 000) and a huge semi-arid territory.

3.4 Ethiopia

Ethiopia’s nine regional states also have equal status in the Constitution and there is no provision for any special autonomy for a specific regional state. However, the Ethiopian Constitution explicitly recognizes an “unconditional right to self-determination, including the right to secession.” A “Nation, Nationality or People” may petition to secede from the regional state it finds itself in or from the Ethiopian state altogether. The criteria are strict and the procedure very burdensome. Since the adoption of the Constitution in 1995, no group has even attempted to secede from the Ethiopian state.

4 CITIES AND LOCAL GOVERNMENT

4.1 Introduction

When federalism was first used as a state structure for emerging nations, it did not pay much attention to local government. Local government was not mentioned in the constitutions of early federations, such as the United States and Australia. It was seen as a responsibility of the states or provinces to determine their own system of local government in subnational constitutions and/or subnational legislation. In other words, local government existed as a result of state or provincial legislation and was governed exclusively by state or provincial legislation. In more recent federal constitutions, i.e. those that were adopted in the second half of the 20th century or later, it became more common to include provisions related to local government in the constitution. This is as a result of the growing importance of local government and cities in particular. Examples are the constitutions of Germany, India, Nigeria, South Africa and Nepal. These constitutions pay specific attention to local government. The level of constitutional protection of course depends on what the constitution provides exactly. This, in turn, is dependent on factors such as the political context within which the constitution was agreed upon, historical factors and the push and pull of central-local politics. What many emerging federations have in common, though, is that urbanization and the consequent rise of strong cities puts pressure on the federal system to properly address the role of local government.

4.2 South Africa

South Africa's Constitution provides for three orders of government and explicitly recognizes and protects local government. The Constitution provides that local government is one of the three "spheres of government" that make up the South African state and municipalities are allocated powers by the Constitution itself. This has a specific background in South African political history and the positions of the main parties to the constitutional negotiations. The liberation movements, led by the ANC, wanted a powerful central government. They disliked federalism, which was associated with racial and ethnic segregation. At the same time, the ANC had a strong affinity with local government which had been a major site for struggle against apartheid. The outgoing National Party viewed federalism and decentralization as a mechanism to curb the dominance of central government. The Inkatha Freedom Party, a strong ethnic-based movement in KwaZulu, wanted federalism and a recognition of regional identity. Local government emerged as a form of decentralization assured of support by all major negotiating

parties. The end result was a Constitution that provides for a quasi-federal state, with the powers of provinces diluted by strong local governments. While provinces are tasked with supervising local governments, they do not control what local governments do. There are a number of features of the South African local government design that continue to define and sometimes complicate the central-provincial-local relations.

First, the intergovernmental funding local governments receive comes from national government and not from the provinces. This reduces the provincial influence over local government.

Secondly, the Constitution tasks both national and provincial governments with overseeing local governments. This has resulted in overlapping responsibilities and overregulation.

Thirdly, none of the cities have federal status. Even the biggest cities operate under the supervision of provinces. Given that provinces are relatively weak in terms of powers and financial autonomy, this places powerful cities under emasculated provinces. The cities of Johannesburg, Ekurhuleni and Tshwane (economic and political powerhouses) are supervised by the Gauteng Province. In reality, however, these three cities are more powerful than the province given their financial, economic and political importance.

4.3 Kenya

Kenya's devolution revolves around the 47 counties and the Constitution pays little, if any regard, to local government structures below the counties. Cities and urban areas are recognized as administrative units within the county. However, its largest city and capital, Nairobi is a county in its own right. Despite this, it has been argued that, in empowering counties only, the Kenyan Constitution has marginalized local democracy.

4.4 Ethiopia

The Ethiopian Constitution leaves local government to the regional states. It constitutes the federation primarily on the basis of the nine regional states and the federal government. Two cities have federal status, namely Addis Ababa and Dire Dawa. These are governed by special charters. All other local governments exist and are regulated by constitutions and legislation adopted by the nine regional states. Addis Ababa's status as a federal city has not prevented continuous claims being made on the back of Ethiopia's ethnic federal logic, in particular that the city belongs to one specific ethnic group. This has proved to be a particularly intractable political problem for Ethiopia.

5 DEMOCRACY AT REGIONAL AND LOCAL LEVEL

5.1 Introduction

One of the most important indicators of subnational autonomy is the question as to whether the citizens of a particular territory, be it regional or local, are permitted to elect their own regional or local leaders. If political leadership is (partly) imposed by the central government, this often has a centralizing effect.

Another critical question relates to how regional or local leaders are elected. This relates to electoral system used for electing public representatives. It also relates to the question as whether the executive is directly elected or indirectly elected, i.e. the choice between elements of either a parliamentary system or a presidential system. The choices made with respect to these matters have a significant impact on how the management of the intergovernmental system.

5.2 South Africa

The South African Constitution establishes provincial and local democracy. Provincial legislatures are elected by the voters in the province and municipal councils are elected by the voters in the municipality. There is thus no imposition of national political leaders into provincial or municipal legislatures.

Following a parliamentary system, provincial legislatures elect a provincial premier and municipal councils elect a mayor. So the provincial and municipal executives are indirectly elected. A premier or mayor remains in power for as long as he or she enjoys the support of the legislature. The politics of the majority in the legislature or the council is thus always aligned with the politics of the executive. Public representatives at national and provincial level are elected on the basis of proportional representation, in other words via party lists and not to represent specific constituencies. The only exception is local government where half of the seats are elected by ward representatives (who are mostly party aligned). Political parties are therefore very powerful across the three spheres of government. In fact, the ANC controls eight out of the nine provinces making it a powerful integrating force in central-provincial relations. It also controls the vast majority of local governments. The party hegemony across the three spheres of government and, importantly, between legislatures and executives, had a stabilising and integrating effect on the multilevel government system, particularly in the early years. For example, as the new provinces and local governments began to use their spending powers and the risk of illegitimate and frivolous expenditure arose, the national government could lay down the gauntlet and insist on

fiscal prudence. Similarly, intergovernmental disputes could be kept at a minimum as most disputes between spheres of government could be solved politically. However, the ANC party hegemony is waning and the strength of the intergovernmental system is being tested more than ever before. First, the ANC is internally divided and has therefore lost much of its momentum to unify actors across the three spheres of government. Secondly, the ANC suffered a major defeat in the 2016 local government elections and now has to tolerate that four of the eight metropolitan municipalities are controlled by the Democratic Alliance, an opposition party. The ANC is also no longer guaranteed to maintain control over so many provinces when the 2019 elections come.

An important lesson to take away from the South African experience is that it was wise to carefully build a system of intergovernmental relations even though all three spheres of government were by and large controlled by one party. Now that there is more political diversity across the three spheres, that system of intergovernmental relations can be put to use to ensure coherence and avoid disputes as far as possible.

5.3 Ethiopia

The Ethiopian Constitution (as do subnational constitutions) ensures that each subnational level of government, i.e. regional and local governments, is elected by voters in the corresponding jurisdiction. Ethiopia follows a parliamentary system with national, regional and municipal executives elected by the respective legislatures. Ethiopia uses a constituency-based electoral system (one representative elected per constituency). The Ethiopian People's Revolutionary Democratic Front (EPRDF), a broad coalition of national and regional parties, is firmly in control of the federal government, all nine regional states and all local authorities. There is little doubt that the EPRDF has been able to use the "first-past-the-post" electoral system to secure electoral victories of 100 per cent in all legislatures.

As will be highlighted later, alignment and coherence across the three levels of government is pursued mainly through EPRDF channels with little or no resort to intergovernmental relations. At first sight, this seems to have served Ethiopia well. Backed by a political party with immense power across all levels of government and a "democratic centralism" ethos, the federal government has been able to vigorously pursue a state-led development strategy and achieve robust economic growth. However, the growing tension between major ethnic groups and a ferocious dispute over the status of Addis Ababa are testing the EPRDF's ability to subdue sectarian violence. One of the gestures made

by the federal government to those seeking a less rigid political system has been to revisit the electoral system and make it less hostile to smaller parties. (See Section 10.3)

5.4 Kenya

The Kenyan Constitution also ensures that county governments (consisting of a county assembly and a county governor) are elected by the voters in that county. Members of the county assembly are elected from county wards. The county governor is directly elected and thus not dependent on the support of the county assembly. This has added complexity to the politics of the emerging counties as the governor and the county assembly often pursue different politics. The many disputes between governors and legislatures in the same county have been a source of instability in the new system. Although Kenya follows a first past the post system, because the parties are very concentrated (ethnic-based), the national legislature is more or less representative of minority parties, although it is not always the case at county level. The 2010 Constitution has also introduced the rule that in the national and county legislatures, there should not be more than two thirds from one gender (a third should be women).

6 AUTONOMOUS POWERS AT REGIONAL AND LOCAL LEVEL

6.1 Introduction

The manner in which the Constitution distributes powers between orders of government in a federal or decentralized state is critical. Many of the modern constitutions of multilevel states use mixtures of mechanisms such as concurrent powers held by multiple levels of government, exclusive powers held by only one level of government, residual powers, distinguishing broad regulation and policy making from execution etc. Very often, the courts are positioned as umpires to resolve disputes over who does what in a multilevel state (See section 11.1).

Two questions matter in particular, namely 1) which functional areas are allocated to which level of government and 2) what powers (i.e. legislative, executive or administrative) can that subnational government exercise with respect to such a functional area.

6.2 South Africa

The South African Constitution uses lists of concurrent and exclusive powers to divide authority between national and provincial

governments. There is a short list of exclusive provincial powers, and a much longer list of concurrent powers shared by the national and provincial governments. All unlisted policy areas fall exclusively under the national government's jurisdiction. The national government thus controls virtually all security and judicial powers. Key powers such as controlling mining, land, higher education and defence are also exclusively national. Provincial governments share with national governments most of the big social spending powers, such as social development, primary and secondary education, housing and health. In principle both national and provincial governments have the same authority with respect to concurrent matters. If there is conflict between a national and a provincial law, the Constitutional Court (See Section 11.2) must determine which law prevails. Finally, provincial governments have control over a list of exclusively provincial functions. However, this list is short and contains little that matters. Local governments have also been allocated constitutionally protected powers, for example with respect to land use regulation and municipal services such as water, sanitation, electricity and roads.

First, the picture that emerges is one of "hourglass" federalism where the national and local government levels are strong but the provincial system in the middle enjoys little protection. This is accentuated by the allocation of fiscal powers (See Section 7.2).

Secondly, South Africa's provinces have not pushed the envelope when it comes to their constitutional powers. While they could exercise concurrent powers and do so to differ from the national government, the reality is that provinces rarely pass any laws on concurrent matters. The background is political and financial and will be discussed throughout the other themes of this paper.

Thirdly, local governments and cities in particular have successfully defended themselves against national and provincial infractions on their powers. For them, the constitutional protection of their powers has been meaningful. For many smaller local governments, however, the allocation of constitutional powers means little as they struggle to perform even the most basic of functions.

Fourthly, soon after the introduction of the Constitution, it emerged that the lists of exclusive and concurrent powers actually provide little clarity as to what actually ought to happen where. The complexities in health, education, housing, environment and land use proved infinitely more complex than the single words in the constitutional lists that try to apportion them to spheres. As a result it was often not clear

from the Constitution where one sphere's power ends and the other sphere's power begins. Further legislation to clarify cut-off points, the occasional Constitutional Court judgment to solve a powers dispute but most importantly, intergovernmental relations, is thus relied upon to deal with the "fuzzy edges" of the constitutional division of powers.

6.3 Ethiopia

In the Ethiopian Constitution the division of powers is done in exactly the opposite way to that in South Africa. There is a lengthy list of exclusive federal powers, which include the usual competences of a federal government. The states are then given the exclusive powers with regard to all matters not listed in the exclusive federal list. Thus, the scope of the states' powers is then dependent on how broad the federal competences are interpreted. Some commentators say that the scope of exclusive state powers is in fact quite limited. A further limitation of states' power is also the broad power of the federal government "to formulate and implement the country's policies, strategies and plans in respect of overall economic, social and development matters" (art. 51.2 Constitution). In the end, the residual powers of states are rather empty.

6.4 Kenya

The Kenyan Constitution, in contrast to Ethiopia, provides two lists of powers: one for the national government and the other for the counties, but in a very confusing manner. The national list gives the national government a long list of exclusive competences, including the usual of international relations, military, policing, financial institutions. The list also contains powers in which the legislative ability of the national government is restricted to making national policy (which means providing framework legislation that leaves the counties to fill in the details and operations). The powers in the county list are not exclusive to the counties. To the extent that they overlap with the national government's power, they are concurrent and there is a provision for dealing when there is a conflict between national and county laws. The Constitution also provides that for greater certainty, the national government may make laws on any matter, thus making all county competences concurrent.

The lesson to take from Kenya is that the lack of clarity in the division of powers has led (and will lead) to conflict between the two levels, conflicts that the courts must then sort out.

7 DIVISION OF REVENUE RAISING POWERS

7.1 Introduction

Discussions about the power to raise revenue go to the heart of what federalism and decentralization is about and aims to achieve. Whether or not subnational governments have the power to raise revenue, i.e. collect taxes and/or charge for services, is an important indicator of the degree of autonomy they enjoy. A region, state or city that is entirely dependent on funds allocated by the central government will inevitably have less discretion than a region, state or city sustained by the taxes that it collects, or by the services that it charges for. The division of revenue raising powers therefore says much about the degree of decentralization, sometimes more than the division of functional powers.

Linked to this is the fact that regional or local revenue generation enhances accountability. Regional or local politicians will feel accountable to local taxpayers rather than to the national government. In a situation of dependency on the national government, however, there is upward accountability to those who control the purse strings, at the expense of local accountability. At the same time, taxing citizens or making them pay for services is a complex exercise that makes politicians unpopular. Therefore, subnational governments sometimes prefer receiving revenue from the central coffers rather than to make the effort of collecting taxes and charging for services.

7.2 South Africa

In South Africa, revenue generation powers are located at national and municipal level with provinces having little or no revenue raising authority. The Constitution reserves all the major taxation powers (income tax, value-added tax, corporate tax) for the national government. Local governments have the constitutional authority to levy property tax and charge for fees provided. Provinces have no constitutional taxing powers and very limited ability to charge fees. This division underscores the “hourglass model” of South African federalism and is no coincidence. While the ANC accepted the introduction of constitutionally protected provinces, it did not want provinces to become too powerful and rather accepted the fiscal autonomy of local governments. This division has been fundamental to shaping South Africa’s multilevel government system. It has contributed to the strong national-provincial integration of laws, policies and budget priorities. It has also removed the incentive on the part of provinces to use their constitutional powers to differ from the national government. The provincial authority to differ, for example

by adopting provincial legislation with province-specific rules on how to subsidize low cost housing, may be there. However, the prospect of having to plead with the national government to fund the different approach, is usually enough to make the provincial government back away and fall in line with the national approach. Local governments, particularly the big cities, have developed more of an autonomous status on the back of their constitutionally guaranteed revenue raising powers. The fact that they may tax property and charge for municipal services makes them less reliant on national government transfers. Transfers constitute only 26 per cent of municipal budgets while they constitute 97 per cent of provincial budgets.

7.3 Ethiopia

In the Ethiopian Constitution of 1995 the federal government and the states are able to jointly levy and collect taxes, including income and corporate taxes. This provision was amended to delegate the power of levying and collecting such joint taxes to the federal government. The result has been that states collect little of their own revenue and are financially dependent on transfers from the central government. Local governments, in turn, have, in terms of state constitutions, only delegated revenue-raising powers, which are negligible so that they are almost entirely dependent on state transfers.

7.4 Kenya

In Kenya, most taxes are reserved for the national government with counties only controlling property taxation and entertainment taxes. The property taxation system is underdeveloped and counties are reluctant to impose taxes, choosing to rely on their equitable share of revenue raised nationally. The Constitution provides that counties are entitled to at least 15 per cent of the national revenue. In fact they receive slightly over 20 per cent of the national revenue. Counties also raise revenue by charging for services they are constitutionally empowered to deliver. However, in most cases the national government still delivers those services and thus collects the fees. All in all, counties therefore rely on the national government for most of their funding.

8 DEALING WITH REGIONAL INEQUITY

8.1 Introduction

Autonomy for regions or states can compound regional inequity, particularly if subnational governments raise much or all of their own revenue. Urbanized regions or states with vibrant economies are then likely to do better than rural regions or states with little or no

economic activity. Differences in the quality of public services may increase, making the federal compact less sustainable. Federalism therefore almost always involves a redistributive role for the federal or central government.

8.2 South Africa

The deep spatial inequality, facilitated by racial and ethnic segregation and exploitation, made ensuring equity across the nine provinces into a critical theme in the design of the South African multilevel state. There are three constitutional features can be regarded as the most crucial levellers in the context of regional inequity.

First, the Constitution includes a Bill of Rights that guarantees fundamental rights for every individual, regardless of his or her location. This Bill of Rights includes socio-economic rights such as the right to water, sanitation, housing, education and food. These rights are enforceable in court. There have been many court judgments in which national, provincial or municipal governments have been compelled to deliver on these rights. These rights also impact on policy and legislation. There are national minimum standards for many public services, formulated in national laws, policies and practices. The Bill of Rights has influenced the formulation of these standards.

Secondly, the Constitution makes the national government responsible for redistribution. This reduces the scope for differences between provinces. Provinces do not raise much revenue and the most buoyant taxes (income tax, company tax, value-added tax etc.) are collected by the national government. Because the national government controls the division of nationally generated revenue, provinces play a minor role in redistributing resources from wealthier to poorer areas.

Thirdly, each province and each local government is constitutionally entitled to an “equitable share” of national revenue. South Africa uses an advanced, formula-based system of dividing nationally generated revenue. Every year, Parliament adopts a Division of Revenue Act that divides the revenue generated nationally between the three spheres of government and between the nine provinces and 257 local governments. The division is based on a set of constitutional criteria that place a high premium on trying to level the playing field between provinces and between municipalities. The actual equitable share formula for provinces uses factors such as education and health needs, population, poverty and economic output. The formula for local government considers the cost of providing free services to poor people and delivering basic services.

8.3 Ethiopia

There are large differences in the level of development among the various states. Although the Constitution does not deal with the matter directly, the federal government is seized with the matter. As the federal government collects most of the revenue, that government also performs the function of the equitable redistribution revenue among the states. Given that the states raise only about 20 per cent of their income, they are largely dependent on transfers. Although the vertical division of finances is determined by Ethiopia's second house of Parliament, the House of Federation, the split between the states is done by the federal government. The formula used is driven by three main factors: population size, fiscal capacity, and expenditure needs.

8.4 Kenya

One of the reasons for devolution in Kenya was to ensure that there is a more equitable distribution of resources across the country. This is done in two ways. First, as is the case in South Africa, each county's equitable share of the revenue raised nationally is determined by a formula (adopted by the second house of Parliament, the Senate) which is informed, among other factors, by "economic disparities within and among counties and the need to remedy them," and "the need for affirmative action in respect of disadvantaged areas and groups" (art 203 Kenya Constitution). Second, the Constitution establishes an "Equalisation Fund", which receives every year 0.5 per cent of the revenue raised nationally, to provide basic services to marginalized areas to bring them on the same level as the rest of the country.

9 USING SHARED RULE TO BRING DIVERSE COMMUNITIES TOGETHER

9.1 Introduction

No matter how strict the division of powers between levels of government, they will have to collaborate to deliver public services and ensure development. Any system of multilevel government requires its component parts to collaborate around joint projects, consult on matters of mutual interest, align programmes and share information.

9.2 South Africa

South Africa's multilevel government system relies heavily on intergovernmental collaboration. The parties to the constitutional negotiations (the ANC in particular) were worried that deep, competitive federalism would tear the country apart and result in fragmentation and inequality. This is one of the reasons by the

Constitution itself puts a premium on cooperation, rather than competition. First, the Constitution provides for a number of national institutions, where two or three levels of government come together in a manifestation of shared rule.

- The National Council of Provinces (NCOP) is the most prominent shared rule institution. It is the second chamber of Parliament, comprising delegates from all nine provinces. In addition, the Constitution guarantees local government non-voting seats. All new legislation is discussed in the NCOP. If the law affects provinces, the NCOP can stop a bill from being passed into law. If it doesn't the NCOP can cause considerable delays in the passing of a bill.
- Another shared rule institution is the Fiscal and Financial Commission (FFC), a national commission tasked with advising government on intergovernmental fiscal matters. It comprises representatives of all three spheres of government. The annual cycle to determine how much money the national government will transfer to provinces and municipalities always starts with the FFC's advice.
- The constitutional recognition of organized local government is also an important feature of intergovernmental relations. It is designed to give local government a seat at the table of national and provincial dialogues.

In addition to these national shared rule institutions, the Constitution dedicates an entire chapter to "Cooperative Governance," i.e. the duty on organs of state in different spheres of to work together by keeping each other informed, consulting on matters of common interest, resolving disputes etc. South Africa's law and practice of governance across the three spheres is replete with both statutory and informal forums and processes, focused on intergovernmental dialogue. A key example is the gathering called the "MinMEC," a regular meeting of a national minister ("Min") with his or her provincial counterparts (members of provincial executive councils - "MEC"). These meetings are used to discuss draft legislation, intergovernmental projects, new governance initiatives etc. They exist in all sectors where national and provincial governments share authority. At provincial level, the premier regularly convenes a "Premier's Coordinating Forum" for provincial and local politicians to discuss matters of common interest. At the apex of this system stands the President's Coordinating Council, a regular meeting of the president with key national, provincial and municipal officials. The architecture of these cooperative governance institutions

is laid down in a dedicated law (the Intergovernmental Relations Framework Act). In addition, there are numerous processes through which organs of state in different spheres of government attempt to align their budgets, spatial plans and their strategic plans.

First, the NCOP never truly became a house of provinces. Because eight of the nine provinces are controlled by the same party, its delegates bring a party political perspective, rather than a provincial perspective to the NCOP. As a result, the NCOP emulates Parliament but with fewer members and less resources.

Secondly, the architecture of Intergovernmental Relations (IGR) forums insufficiently recognized the importance of cities. In theory, cities such as Johannesburg were expected to engage the IGR system in provincial forums, alongside small municipalities. This was never going to work as cities need direct, bilateral engagement with national governments. As a result, alternative structures and forums centred around national-city engagement have emerged.

Thirdly, while the regular convening of politicians across spheres of government helps to sustain cooperation, there is the often-heard complaint that they are “talkshops.” IGR forums must go beyond symbolism and conference-style presentations into more programmatic engagement.

9.3 Ethiopia

Ethiopia’s Constitution, with its emphasis on ethnic federalism, does not explicitly call for or recognize intergovernmental relations between or among levels of government. However, its House of Federations is a “self-rule” structure as it brings together representatives of all recognized ethnic groups (and thus the nine regional states only indirectly). It has played a modest role in facilitating intergovernmental dialogue and resolving conflicts between and among levels of government. Ethiopia has not adopted legislation to structure intergovernmental relations. There also has been little or no incentive to do so as the ruling coalition controls all nine regional states and all local governments. Therefore, the political party channels could be relied upon for intergovernmental planning and collaboration.

9.4 Kenya

The Kenyan Parliament has also a second chamber, the Senate, composed of directly elected senators in each of the 47 counties. There are also “special interest” senators representing women, youth and persons with disability. (The Senate may not be composed of more

than two thirds of one gender.) The task of the Senate is to represent the counties in the national Parliament in policy and law-making with regard to matters affecting counties, including determining, as noted above, the formula for sharing the equitable share of revenue raised nationally between the counties. In practice the relationship between the senators and the county governors has not always been smooth as both compete for power within the county.

The Kenyan Constitution also contains, in a manner very similar to South Africa, a number of provisions capturing the principles of cooperative government, including the duty to consult and avoid settling intergovernmental disputes through litigation. In terms of the Intergovernmental Relations Act of 2012, provision is made for National and County Government Co-ordinating Summit whose members include the president and the 47 country governors. There is also a Council of Governors the mandate of which is to enhance the sharing of knowledge, consultation and cooperation between counties.

10 CENTRAL CO-ORDINATION OF SUB-NATIONAL UNITS

10.1 Introduction

The management of a system of multilevel government often requires a focal point at central government level. National departments, responsible for the coordination of legislation, policies and programmes affecting subnational governments are very common in younger federations and decentralized states. At times, the “centre of government” (i.e. the prime minister or president) plays this role but often there is a dedicated department or ministry tasked with this.

10.2 South Africa

Ever since the inception of South Africa’s system of multilevel government, there has been a national department responsible for the central coordination of provincial and local governments. Initially, this task was housed under the Department of Constitutional Development. It was then renamed the Department for Provincial and Local Government and it is now known as the Department of Cooperative Governance, headed by a national Minister. In every province, an equivalent exists, headed by a provincial minister.

From 1994 to 2005, the national department played a crucial role in designing the new system of multilevel government, particularly with respect to the legal framework for local government. It spearheaded the adoption of legislation pertaining to local government boundaries, institutions, elections, systems, property taxation and also a broad framework law on intergovernmental relations. After that, its attention

shifted to overseeing the system of intergovernmental relations and conducting monitoring, evaluation and oversight. It has struggled to perform these tasks effectively. Some of the reasons are set out below. The first observation is that the Department's oversight focuses almost exclusively on local government. Local governments are subjected to comprehensive, statutory monitoring routines but far less attention is being paid to monitoring provinces.

The second observation relates to the problem of delineating the roles of national sector departments (i.e. departments responsible for water, sanitation, housing etc.) and the role of the Department of Cooperative Governance vis-à-vis local government. Given the fact that the work of almost all national departments intersect with local government one way or another, they often compete with the national Department of Cooperative Governance to oversee local government. This problem has been the most pronounced with respect to the overlapping responsibilities of the National Treasury and the Department of Cooperative Governance. The National Treasury spearheaded municipal finance legislation and oversees its implementation while the Department of Cooperative Governance oversees governance and intergovernmental relations. It goes without saying that these matters continuously overlap. Given the importance of the purse strings, carefully controlled by the National Treasury, it has upstaged the Department of Cooperative Governance in many respects.

10.3 Ethiopia

Ethiopia has what is often referred to as a dual federal system and as a rule the federal (central) government is not supposed to involve in sub-state matters. However, it has a wide range of legislative and policy-making powers on social and economic matters which allow it to directly or indirectly influence state and sub-state matters. Unlike in South Africa, no single ministry or a federal institution is in charge of dealing with states and local government matters. The Ministry of Finance and Economic Development, which is in charge of channelling federal grants to the states, ensures that state policies and plans are aligned to federal policies and plans. Again, under the dual federal system, the federal government is not allowed to regulate local governments which are, under the federal Constitution, solely state functions. However, its policy making power on social matters allows it to coordinate, though indirectly, social service provisions at local level. In 2001 the federal government thus established a Ministry of Capacity Building which, among others, was charged with coordinating the "district level decentralization programme (DLDP)" aimed at empowering local governments. The Ministry was dissolved after having implemented the DLDP. There is a Ministry of Federal

Affairs which interacts with the states and ethnic-based sub-state units (zones and liyu-woredas) and deals with issues of ethnic management. The Ministry of Urban Development and Construction coordinates the activities of cities in the country.

10.4 Kenya

As noted in the sections above, the national government has overarching policy-making powers that it is required to exercise in consultation with the county governments. At the national level, the Ministry of Devolution and Planning is mandated with coordination of all matters related to devolved governance and intergovernmental relations. In the transition period, which lasted from 2010 until 2015 (a total of five years), a statutory body, the Transition Authority (TA), was established to supervise the transition to the 2010 devolved government structures; the Transition Authority reported to another interim body, the Commission for the Implementation of the Constitution. After the lapse of the TA's mandate in 2015, a technical body named the Intergovernmental Technical Relations Committee (IGRTC), established under the legislation dealing with Intergovernmental relations, was operationalized. Its broad role is to manage relations between the two levels of government and support the operations of all intergovernmental relations structures in the overall system. However, overall national government policies regarding devolution are overseen by the Ministry of Devolution, in coordination and partnership with the respective sectoral ministries and sectoral intergovernmental structures and systems.

The lack of a political and governance culture of consultation and consensus-building (traceable to the previous centralized decision-making system), lack of capacity to understand the theoretical and practical aspects of multilevel governance, and lack of willingness to embrace cooperative governance, seem to be the greatest challenges in the coordination of devolution affairs in the country.

11 ROLE OF THE COURTS

11.1 Introduction

Courts can play a crucial role in protecting the integrity of the multilevel system of government. Often, they are positioned as a kind of umpire to solve conflicts between levels of government, particularly as regards their powers. The precise role depends on the constitution.

11.2 South Africa

In South Africa, intergovernmental disputes can be brought to

court. Ultimately, the Constitutional Court has the final say in intergovernmental disputes. However, the Constitution discourages organs of state from going to court before they have tried alternative dispute resolution. In the first two decades of democracy, relatively few cases of intergovernmental disputes have been settled by the courts. This is mostly because of the hegemony of the ANC across the three spheres of government and because the South African system of multilevel government emphasizes cooperation instead of competition. As the ANC's hegemony is declining (with four metropolitan cities governed by the opposition), the courts are being used more to settle disputes. Cities, in particular, have turned to the Courts to see protection against national and provincial governments encroaching on their powers.

11.3 Ethiopia

In Ethiopia, the courts play no role to solve intergovernmental conflicts. This is because the Constitution designates the House of Federation, Ethiopia's second chamber as the institution that must settle such conflicts. It is a non-professional institution and decisions are made on political grounds.

11.4 Kenya

In Kenya, politics is diverse and fragmented so the courts are used extensively to settle intergovernmental disputes. In fact, disputes between organs of state within a county also regularly make their way to court. This is putting strain on the judiciary: judges at times have criticized politicians for inundating the courts with institutional and political battles. All in all, the courts have played a crucial role in enforcing the rules of Kenya's young multilevel government system.

12 CONCLUDING REMARKS

From the brief overview of three "federal" countries, the following observations can be made:

- In all three countries ethnicity is an issue, but each country approached the matter differently. It would seem that the choice is between making ethnicity an organizing principle or merely accommodating it. In the first case, the danger exists that by entrenching ethnicity conflicts may be exacerbated rather than solving them.
- Although a special autonomous status could be given to a particular group in a defined area (depending on the prevailing balance of forces), the usual approach is to give all constituent

units the same powers and functions.

- Because cities and local government play such an important role in the economic and social wellbeing of a nation, it is important that in a federal system their role and function should be recognized and clearly spelled out in the constitution.
- Democratically elected regional and local legislatures are an indispensable part of any federal system. Through the electoral system such legislatures should also be inclusive of minority groups, including women.
- The best way of having an effective sharing of power between the central and subnational governments is to ensure that there is clarity on who does what by having clearly listed powers for subnational governments.
- The trend in all three countries is for subnational government to rely on transfers from the central government to support their activities (with local government in South Africa being the exception). This has reinforced lines of accountability towards the central government rather than the subnational governments accounting to their own electorates.
- There are, however, also benefits derived from the central government raising the bulk of revenue. As all three countries exhibit high levels of inequality between different states, provinces and counties, the federal government must through the transfer system ensure that there is equalization of resources so that there is a minimum level of equality in the services provided to all citizens.
- Institutions of shared rule at the national level – both legislative and executive – are present in the three countries. The second house of Parliament representing the regions, provinces and counties has not yet developed much as a single party controls both houses. Also, executive intergovernmental relations have mostly been an intra-party business. However, as different parties may govern at the national and regional levels, an effective system of intergovernmental relations is required to ensure coherence and avoid disputes as far as possible.
- As a federation is very much a rule-based system of government, the courts play an important role to ensure that all parties to the constitutional compact keep to the rules they have agreed to.

Nico Steytler (BA LLB LLM PhD, Dr h.c.) is the South African Research Chair in Multilevel Government, Law and Policy the Dullah Omar Institute of Constitutional Law, Governance and Human Rights of the University of the Western Cape, Cape Town, South Africa. His research focus is multilevel government in South Africa, Africa and further afield. He was a member of South Africa's Municipal Demarcation Board (2004-2014) and is a commissioner of the Financial and Fiscal Commission (2013-2018). He is the former-president of the International Association of Centre for Federal Studies (2010-2016).

Jaap de Visser (LLB, LLM, PhD) is Director of the Dullah Omar Institute at the University of the Western Cape (Cape Town). The Institute conducts research and advocacy on constitutional law, governance and human rights in Africa. His research, teaching and consulting focuses on multilevel government, local government, good governance and federalism in Africa and he has published extensively on these topics. He has co-authored and edited several books including Local Government Law of South Africa, Constitution-Building in Africa and Developmental Local Government: A Case Study of South Africa. He is member of the Board of the Commonwealth Local Government Forum and Treasurer of the International Association of Centers for Federal Studies.



Forum of Federations
75 Albert Street, Suite 411
Ottawa, Ontario Canada K1P 5E7

forumfed.org