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The Judiciary in Federal Systems in Africa

by

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Abstract

Eight states in Africa that have federal or federal-type government systems and most of these federations emerged in the post-Cold War period. The African federations are in various degrees characterised by a limited extent of self-rule and the concentration of power at the centre. The question this article addresses is whether, and if so, how, the federal character of the state organisation impacts on the administration of justice. In other words, is the judicial branch of government also part of the federal arrangements, and if so, how has that been manifested? Four sub-questions are posed in this regard. First, does the structure of the judicial institutions also follow the vertical division of powers between the central and subnational governments? Secondly, given the non-centrist or centrist structure of the courts, how are judges appointed? Thirdly, as language and ethnic diversity are often the key reasons for the establishment of federal arrangements, how is the language question dealt within in the administration of justice? Finally, what role have the courts played in realisation of the federal character of the state?

Key-words

Africa, federalism, judicial pluralism, language and ethnic diversity

1. Introduction

There are eight states in Africa that have federal or federal-type government systems and most of these federations emerged in the post-cold period; South Africa (1994); Ethiopia (1995); Nigeria (1999, re-establishing earlier federal constitutions); the Comoros (1996, 2001); the Democratic Republic of Congo (2005); the Sudan (2005), Kenya (2010); South Sudan (2011) and Somalia (2012). Federal system in these countries was adopted mostly as an institutional response to the challenges of inter-ethnic conflicts. The African federations are in various degrees characterised by a limited extent of self-rule and the concentration of power at the centre. The key characteristics of this style of federalism are: the fracturing of subnational governments into 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 intervention powers.[I]

The question this article addresses is whether, and if so, how, the federal character of the state organisation impacts on the administration of justice. In other words, is the judicial branch of government also part of the federal arrangements, and if so, how has that been manifested. Four sub-questions are posed in this regard:

First, does the structure of the judicial institutions also follow the vertical division of powers between the central and subnational governments? The organisation and functions of a judiciary in a federal system may take one or a combination of two approaches; non-centralised (which includes dualist model) or centralised approaches.[II] In the first case courts are established at a federal and state levels. The courts at each level of government exercise judicial functions on matters that are within the exclusive legislative competences of the relevant level of government. Hence state courts decide cases based on state laws and federal courts entertain cases having federal elements. In the dualist model state courts have a final say on state matters while federal courts have final decision-making powers on federal matters.[III] In a centralised (or unitary) approach, judicial functions are essentially a national competence. The constitution establishes a single judiciary which is funded by the federal government. Courts in such federations have only deconcentrated branches at subnational level and these are not considered to be the third branch of the latter. Cheryl

Saunders also makes similar distinctions between three categories: a dualist system, where there is no link between the federal and state judiciaries; an integrated system where there are some linkages between the two distinct levels of courts; and a single judicial authority which resides under the central government.[IV] For her, the US is an example of a dual system, Germany, Canada, Nigeria and India of an integrated system, while South Africa is of a single court authority system.[V] For the purposes of this essay, we use the broad distinction between a non-central and a centrist (single judicial authority) systems. Given these models, what model(s) prevail among the four 'federations', and what are the consequences of such model(s) in practice?

Secondly, given the non-centrist or centrist structure of the courts, how are judges appointed? In the non-centrist system, does the centre play any role in the appointment of the judiciary as the subnational level? Conversely, do subnational governments in centrist system have a say in the appointment of judges functioning in their territory?

Thirdly, as language and ethnic diversity are often the key reasons for the establishment of federal arrangements, how is the language question dealt within in the administration of justice?

Finally, what role have the courts played in realisation of the federal character of the state? Have courts in non-centrist systems been more protective of federalism or devolution than those in a unitary system? What does their jurisprudential record suggest? Any such role, however, is premised on the practice of judicial independence.

This contribution seeks to answer these questions with reference to the four-major federal/federal-type systems in Africa, i.e. Nigeria, Ethiopia, Kenya and South Africa. The essay argues, first, that Kenya and South Africa, reflecting the general ethos of their centralised federations, have established unitary judicial systems. In these countries, the judiciary is firmly a national function. On the other hand, Ethiopia and Nigeria have federalised court structures; the judicial function is split between the centre and subnational government. However, the non-centralism of the judicial system in these two federations does not produce end result a very distinctive from South Africa's and Kenya's centrist system. Secondly, the non-centrist system in Nigeria and Ethiopia does not preclude federal involvement in the appointment of the state judiciary. In both a non-centrist (Nigeria) and a unitary system (South Africa), subnational governments can play a role in the appointments of federal/national judiciary through the second house of Parliament.

Thirdly, apart from Ethiopia, the other three countries display a strong unitary character in allowing one official court language. Finally, although the federal jurisprudence of the apex courts (excluding Ethiopia, where a political body is the final interpreter of the Constitution) may in Nigeria and South Africa tend towards favouring the centre, their independence from the executive is more important for the survival of the federal systems.

The article analyses the judiciary in Ethiopia followed by Nigeria, Kenya and South Africa with reference to the four questions. It concludes with a few comparative observations.

2. The Ethiopian federal system

Ethiopia is federal country made up of nine states and two federal cities.[VI] Underpinned by the need to manage the ethnic diversity of the Ethiopian people, the boundaries of the states are delineated along ethnic lines. None of the states is however ethnically homogenous. Indeed, only five of them have a numerically dominant ethnic community[VII] while the rest have none. The Constitution envisages that intra-regional ethnic diversity would be territorially managed at the local level. Hence, five multi-ethnic states have established ethnic-based sub-regional units called special *woredas* and special (ethnic) zones.[VIII]

The Ethiopian federal system is often referred to as a dual federal system in that it divides political, administrative, and financial as well as judicial powers between the federal and state governments.[IX] This duality is however vapid since the balance in the constitutional division of power between the federal government and the states decidedly tilts in favour of the former. The Constitution contains a long list of federal exclusive competences - 22 broadly defined items. It leaves residual powers to the states over and above the short list of exclusive state competences it contains. Yet the Constitution provides the federal government with a significant leeway allowing it to assume most of the state competences thereby taming the duality of the federal system.[X] This is also reflected in the manner that the federal and state judicatures are structured and function.

2.1. Structure and jurisdiction of courts

The court structure is as a rule based on the principle of duality at federal and state levels and each exists side by side.[XI] The Constitution establishes the federal Supreme Court and authorises Parliament to establish federal high and first instance courts in some or all parts of the country, a decision that Parliament has to approve with a special majority.[XII] The Constitution also explicitly provides that each state would have a supreme court, a high court and courts of first instance.[XIII] Although proceeding from a base of duality, the structure and functions of the federal and state courts also show some degree of integration. The federal government has established federal first instance and high courts in the two federal cities since the latter do not have constitutionally defined judicial powers. It has also issued a proclamation establishing federal high courts in Afar, Somali, the Southern Nations, Nationalities and Peoples' Region (SNNPR), Benishangul-Gumuz, and Gambella states.[XIV] However, in the states where the federal government has not established federal courts, state high courts and states supreme courts are constitutionally authorised to assume the jurisdictions of the federal first instance and high courts, respectively.[XV]

The Constitution also contains a principle of duality in the jurisdictional division of federal and state courts. Federal courts are empowered to resolve disputes relating to federal matters using federal laws and international treaties whereas state courts are empowered to resolve legal disputes relating to states matters, based on state laws.[XVI] This means federal courts have exclusive jurisdiction on most criminal matters, except those that are covered by state laws. State courts have exclusive jurisdiction on most civil matters relating to family, succession, property and the like, with the exception of the ten items that are listed under Article 5 of Proclamation 25 (1996).[XVII] In the two federal cities, the federal courts exercise jurisdiction on all federal matters and on matters that are, under the Constitution, listed as state competences, including those relating to family and succession. The federal Supreme Court has the power to provide a final and authoritative interpretation on specific provisions of a federal law.[XVIII] To this extent the dual federal principle is reflected in the functional jurisdiction of the federal and state courts.

The Constitution provides that a state supreme court has 'the highest and final judicial power over State matters'.[XIX] Article 80(3) of the Constitution also provides that a state supreme court has a power of cassation on the interpretation of a state law. It is however

unclear whether a state Supreme Court has the last word on the interpretation of a specific provision in a state law since the Constitution also provides that the federal Supreme Court has 'power of cassation *over any final court decision* containing a basic error of law'. Moreover, Article 10 of Proclamation 25 (1996), the Proclamation establishing federal courts, provides that the Cassation Division of the Federal Supreme Court has power of cassation on final decisions of the [state] Supreme Court that the latter rendered as a regular division or in its appellate jurisdiction.

There are two opposing arguments on the issue above. The first argument is that the phrase '*over any final court decision'* implies that the power of cassation of the federal Supreme Court extends to reviewing decisions of a state supreme court, including those of the cassation divisions of a state supreme court.[XX] The other argument is that the aforementioned phrase, viewed in light of the dual federal principle, should be construed to mean only a final decision of federal courts or a decision of a state court that the latter passed in its capacity as a federal court. This argument further goes that Article 10 of Proclamation 25 (1996) does not explicitly authorise the federal Supreme Court to review the decision of the cassation division of state supreme courts. It simply states that the federal Supreme Court can review the decisions of a state supreme court that the latter passed 'as a regular division or in its appellate jurisdiction'. This refers, so the argument goes, to a decision that a state Supreme Court passed on federal matter in its capacity as a federal high court. The cassation division of a state supreme court thus has a final say on the interpretation of state laws.

In light of the dual federal principle, the second argument seems to be more convincing. However, practice shows that the Cassation Division of the Federal Supreme Court reviews decisions of the cassation divisions of state supreme courts. One can thus approach the Federal Supreme Court if he/she can show *prima face* case that a state supreme court, including the cassation division of the state supreme court, has made basic error in interpreting a specific provision in a state law.[XXI]

The power to resolve constitutional disputes is arguably within the exclusive jurisdiction of the House of Federation (HoF). There is little agreement regarding whether federal courts can use the Constitution to resolve legal disputes. Some argue federal courts can do so even though they cannot make a final and authoritative pronouncement on constitutional issues. Others maintain federal courts can use only ordinary federal laws, and

never the Constitution, to resolve legal disputes. In practice, the courts hardly invoke the constitution to decide cases.[XXII] Likewise, the power to interpret state constitutions is entrusted in an organ called Constitution Interpretation Commission (CIC). In the SNNP, the power to interpret the state constitution belongs to the Council of Nationalities, the second chamber of the state council and a mirror image of the HoF. While the HoF has dealt with several constitutional matters, the practice with respect to the interpretation of state constitutions is unclear.

2.2 Appointment of judges

The manner in which judges of federal and state courts are nominated and appointed shows both elements of federal duality and integration. The final say on the appointment of judges of federal courts resides in the House of People Representatives (HoPRs) while state councils have final decision-making power on the appointment of judges of state courts. To this extent the appointment of judges of federal and state courts is based on duality. However, as will be seen below, the involvement of the Federal Judicial Administration Council (FJAC) in the appointment of judges of state courts brings about an element of fusion.

The Constitution implicitly provides that there would be an FJAC which would have the power to nominate persons who it deems are suitable for appointment as federal judges. The Constitution, while implying its establishment, is silent on who its members are and how they are appointed. This is regulated by a federal law which provides that the FJAC would be composed of the presidents of the three federal courts, the vice president of the Supreme Court, three members of Parliament, a Minister of Justice, a judge representing the three federal courts, a law professor of a higher education institution and a distinguished citizen.[XXIII] Clearly the states do not have representation in the FJAC.

The FJAC hence submits a list of its nominees to the Prime Minister (PM) and the latter in turn submits the names of the nominees to HoPRs for confirmation.[XXIV] The PM seems to have the discretion not to submit to the HoPRs the names of some or all of those that the FJAC nominates. He/she cannot, however, submit his own list of nominees. The PM has the authority to nominate the president and vice presidents of the Federal Supreme Court who would then be appointed by the HoPR.[XXV]

The Constitution also provides that a State Judicial Administration Council (SJAC) would be established in each state with the power to nominate judges of state courts and submit the names of the nominees to a state council.[XXVI] The Constitution does not envisage the involvement of a regional president in the appointment of judges of state courts since the SJAC is authorised to directly submit the names of its nominees to the state council (legislature). He/she is however authorised to appoint the president and vice president of the state supreme court subject to confirmation by the state council.[XXVII] A SJAC has the obligation to seek the opinion of the FJAC regarding its nominees for judgeship of state high and supreme courts.[XXVIII] The SJAC is also required to disclose to the state council the FJAC's opinion, if any, regarding the nominees.[XXIX] The FJAC is hence involved in the appointment of judges of state courts. This brings an element of fusion in the judicial federalism even though the FJAC does not seem to have more power than giving its opinion on the nominees of the SJAC. The opinion of the FJAC on the SJAC's nominees is required seemingly because, as was indicated above, state high and supreme courts also act as federal first instance and high courts respectively. Yet, there is nothing in the Constitution that relieves the SJAC from consulting the FJAC even when the federal government establishes its own first instance and high courts in the state. This clearly tames the duality in the structuring and functioning of federal and state courts.

The state constitutions establishing special *woredas* and zones (ethnic local government units) provide that special *woredas* and zones should be consulted regarding the appointment of judges who would be presiding in state first instance and/or high courts having jurisdiction in the territorial areas of the special *woreda* or zone.[XXX] This reflects the fact that the federal system is underpinned by accommodation of ethnic diversity.

2.3 Language

Amharic (*Amharigna*), a language that is supposedly spoken by about 70 percent of the Ethiopian population, is constitutionally designated to be the working language the federal government.[XXXI] The Constitution allows the states to choose and adopt their own working languages.[XXXII] Accordingly Afar, Amhara, Oromia, Somali and Tigray each has decided to use the language of the ethnic community that is in majority in it. The other four states have opted to use Amharic as their working language. The working language of the federal government is by default the working language of federal courts while the working

language of a state also serves as the working language of the state's courts. The federal and state governments, except the Hareri region, are monolingual in a sense each has only a single working language. The same is, therefore, true to federal and state courts.

It is unclear whether a state Supreme Court and high courts are required to use Amharic for hearing and deciding cases when acting as a federal high court. Practice shows that state courts use the working language of the relevant state government when hearing both state and federal matters. The whole proceeding is translated to Amharic if and when the case is taken on appeal to the federal Supreme Court or its Cassation Division. As stated above, some of the special *woredas* and zones, especially those in the Amhara and SNNP states, have adopted local working languages. It is unclear whether a state first instance and high courts that exercises jurisdiction in the special *woredas* and zones, have to use the working language of the latter in their proceedings. However, even if that is the case, state laws are hardly ever translated into sub-state official languages.

Regardless of the language that a state court uses for administering justice, the Constitution recognises the rights of an arrested person to be informed of the reason of his/her arrest and his/her right to remain silent in the language he/she understands. It also recognises the right of an accused person, if he/she seeks, to receive the assistance of an interpreter at the state's expense.[XXXIII]

2.4 Federal jurisprudence

It is often assumed that the regular courts of a federation would give 'shape and texture' to the federal system when they are established based on federal duality. They do so by simply applying the laws of their coordinate legislatures and by interpreting the constitutions of the relevant level of government.[XXXIV] As indicated above, the Ethiopian courts are established principally based on federal duality. The Ethiopian federal and state courts have however played a minimal role in terms of developing federal jurisprudences or giving shape and texture to the Ethiopian federal system.[XXXV] There is barely any decision that the court passed impacting the federal system. There are several factors hindering the courts from playing any role in this regard. As indicated above, state courts in Ethiopia do not have the final word on the interpretation of state laws since their decisions are reviewed by the Cassation Division of the Federal Supreme Court. A study by Yonatan Fessha and Zemelak Ayele shows that the Cassation Division of the Federal Supreme

Court has reversed over 60 per cent of the cases that state supreme courts or their cassation divisions decided based on state laws.[XXXVI] By insisting on uniformity, the Federal Supreme Court has thus undermined the role that state courts could have played in terms of giving 'shape and texture' to the federal system by interpreting state laws. Moreover, as stated above, state courts do not have the authority to interpret, even to refer to, state constitutions. Their decisions are thus often found to be inconsistent with certain constitutional principles or individual rights that are guaranteed in the Bill of Rights of the federal Constitution; inconsistencies that the state courts could have avoided by simply referring to the bills of rights in state constitutions.

The federal courts also play minimal role in terms of judicially impacting the federal system since they are not empowered to apply the federal Constitution to resolve legal disputes. Moreover, despite the constitutional guarantees to this effect,[XXXVII] state and federal courts lack institutional independence and the judges lack personal independence which are critical for developing federal jurisprudence. The Ethiopian courts operate in a political context which is dominated by a single party, EPRDF. There is thus a general perception that judges both at federal and state level lack personal independence since they are allegedly appointed and dismissed based on political consideration and that the judges often face interferences by politicians.[XXXVIII]

2.5. Concluding remarks

Ethiopia has a dual federal system in which government is organised at federal and state level. The duality of the federal system is also reflected in the manner that the regular courts are structured and their jurisdictions are delimited. The duality is not however perfect since the state courts also entertain federal cases and that the FJAC is involved in the appointment of judges of state courts. Most importantly the decision of the highest state court is reviewed by the federal Supreme Court. Indeed, state courts serve the purpose of accommodating the linguistic diversity in the country. However, the fact that they have no final say on state matters and that their final decisions are reviewed by federal courts render state courts largely redundant.

3. Nigeria

Nigeria has been a federation since it attained independence in 1962, which makes it the oldest federation in Africa. The country has lurched back and forth between democracy and military rule until, in 1999, it returned again to civilian rule. The Nigerian federation is composed of 36 states, a federal capital territory (FCT), Abuja, and a federal government. The Nigerian Constitution allocates an extensive list of exclusive powers to the federal government, while the states are endowed with the residual powers as well as a list of powers shared with the federal government. The Nigerian federal system is viewed as overly centralised, a legacy of the military rule the country underwent for over four decades.[XXXIX] As will be discussed below, features of centralisation are also reflected in the manner that the judiciary is structured and functions.

3.1. The structure and jurisdiction of courts

The judiciary in Nigerian reflects the duality of the country's federal system in that there are courts that are established for the federation as well as those that are established for the states.[XL] The federal and state courts are as a rule separate and exist side by side and exercise judicial functions on matters that are assigned to the federal government and the states, respectively. At the apex of the federal judiciary is the Federal Supreme Court.[XLI] A Court of Appeal and a Federal High Court are established below the Supreme Court. The High Court, Sharia Court of Appeal and the Customary Court of Appeal are also considered parts of the federal judicature.[XLII]

The highest judicial organs at state level are a state High Court, a state Sharia Court of Appeal, and a state Customary Court of Appeal.[XLIII] These three judicial offices are of equal rank but apply different laws for resolving cases. The states and the FCT are also authorised to establish 'lower courts' such as magistrates and customary courts. However, 'the lower courts' do not have constitutional recognition or protection.[XLIV] The magistrates and the *kadis* of the lower courts are not considered a part of what the Constitution refers to as 'judicial officer'.

As a rule, federal courts are expected to exercise jurisdiction on federal matters while state courts are expected to exercise jurisdiction on matters that are assigned to the states.[XLV] The dual judicial federalism that is envisaged under the Constitution is however

much more moderated since 'there is a greater degree of interdependence between the [federal and state government] in relation to the judiciary… than in relation to the legislative and executive branches'.[XLVI] For instance, the Constitution authorises state courts to hear cases relating to federal matters[XLVII] thereby extending the judicial powers of state courts 'to justiciable matters arising under laws made by the National Assembly'. This, however, excludes those federal matters that are designated as original jurisdiction of one of the federal courts.[XLVIII] For instance, the Supreme Court has original and exclusive jurisdiction over disputes between governments. The Court of Appeal has original jurisdiction on matters relating to presidential elections. The Federal High Court has original jurisdiction over a long list of federal matters. State courts can thus hear cases relating to federal matters unless those matters are within the original and exclusive competence of one of the federal courts.

On the other hand, the Nigerian Constitution, unlike the Ethiopian Constitution, does not even provide for the establishment of a state supreme court or a state court of appeal. The Supreme Court, for instance, not only serves as the country's constitutional court, as is the practice in Ethiopia, it also has the final say on 'the interpretation and application of all laws in the country, including customary laws and Sharia'.[XLIX] Thus, in the words of Suberu, the Nigerian Constitution has created a 'unified judicial structure in which federal courts … and the sub-federal judicature (especially, the state High Court and Customary, or Sharia, Court of Appeal) are part of a single appellate hierarchy, with the Supreme Court (which exists only at the federal level) at the apex'.[L]

3.2. Appointment of judges

The Supreme Court has a maximum of 22 justices one of whom is the Chief Justice.[LI] The Court of Appeal has 50 judges including the President of the Court.[LII] At least three of the judges in the Court of Appeal are required to have knowledge of Sharia personal laws and at least other three judges are expected to be knowledgeable in customary laws.[LIII] This is because, as will be discussed below, the Court of Appeal exercises appellate jurisdiction over cases that are decided by a State Sharia Court of Appeal and a State Customary Court of Appeal. The Constitution provides that the federal legislature determines the number judges of the Federal High Court. [LIV]

The National Judicial Council (NJC)[LV] is empowered to nominate those who qualify for appointment as justices of the Supreme Court and the Court of Appeal and the judges and *Kadis* (judges deciding cases on the basis of Sharia) of the Federal High Court.[LVI] A Federal Judicial Service Commission advises the NJC in this regard.[LVII] The President can only make appointment on the basis of the recommendation of the NJC. He or she can however refuse to appoint one or all of the NJC's nominees. The Constitution enjoins the President to seek confirmation form the Senate on the appointment of all the justices of the Supreme Court and all of the heads of the federal courts i.e. the Chief Justice, the President of the Court of Appeal, and the Chief Judge of the Federal High Court.[LVIII] To this extent, the states, through their three elected senators each, can play an important role in bring state interests to bear on appointments to the highest judicial offices. However, the President is not required to seek such confirmation regarding the appointment of the rest of the justices of the Court of Appeal as well as the judges of the Federal High Court.

At state level, a governor of a state retains the power to appoint a chief judge of a state high court, a grand *kadis* of a state sharia court of appeal and a president of state customary courts of appeal.[LIX] Such appointments are again based on the recommendation of the NJC. A State Judicial Service Commission (SJSC)[LX], which is also responsible for the administration of state courts, merely advises the NCJ in the selection of 'suitable persons for appointment' in state courts. It does not make any recommendation to the state governors in this regard. The NJC makes the actual recommendations to state governors on the appointment of judges and *kadis* of a state high court, a sharia court of appeal and a customary court of appeal.[LXI] State governors also appoint other judges and *kadis* of state courts, including magistrates and *kadis* of state sharia courts and customary courts, only upon the recommendation of NJC. The Constitution expressly requires the confirmation by a State House of Assembly of the appointment of a chief judge of a state high court, a grand *kadi* of a state sharia court of appeal, and the president of a state customary court of appeal. It is however silent on whether such confirmation is needed with regard to the appointment of judges other than these three.

From the above it can be gathered that there are features of duality as well as integration in the manner that the judges and *kadises* of the federal and state courts, sharia courts and customary courts are appointed. As mentioned above, the NJC is key to the appointment of judges both for federal and state courts. Since its members are

predominately from the federal judiciary, the NJC is viewed as an essentially federal institution.[LXII] In fact, according to section 153(1)(i) of the Constitution, the NJC is one of the 'federal executive bodies'. This federal executive organ has the power to discipline and dismiss federal and state judges. It is also authorised to 'to collect, control and disburse moneys, capital and recurrent, for the judiciary'.[LXIII] The dualism in the federal system is thus watered down to the extent of the NJC's involvement in the above respect. Taking into account the role of the NJC in appointment and dismissal of judges and *kadis* of state courts, AE Obidimma and EOC Obidimma conclude that 'the 1999 Constitution … established a federal judiciary for the federation and *a quasi-federal judiciary for the states*'.[LXIV] For the same reason, Suberu also refers to the state High Courts, Sharia Courts of Appeal and Customary Courts of Appeal as 'sub-federal judicature'.[LXV]

What can perhaps be considered as truly state judiciary in Nigeria are the lower courts, which include the magistrate, the sharia court, and customary courts. However, these courts do not have constitutional recognition and are subject to the integrated appeal system. Moreover, as mentioned above, these are not covered by what the Constitution refers to as 'judicial offices' and the judges and *kadis* of these courts are not also deemed 'judicial officers'.[LXVI] The NJC is not involved in the appointment of the judges and *kadis* of these courts. They are rather 'appointed, promoted and subjected to disciplinary control of' an SJC, which is as per the Constitution, a state executive organ.[LXVII]

3.3. Language

The Constitution explicitly makes English the working language of the National Assembly and a state's Houses of Assembly even though there are hundreds of languages that are spoken in Nigeria, the major ones being Hausa, Yeruba, Ibibio, Edo, Kanuri, Igbo and Fulfulde.[LXVIII] Indeed, the National Assembly may conduct its business in Hausa, Ibo and Yoruba, but only if arrangements are made to this effect.[LXIX] A House of Assembly may also use, in addition to English, one or more of the languages spoken in the state, to conduct its business if the House so resolves.[LXX]

The Constitution is, however, silent on the working language of the courts. The Supreme Court however declared in several decisions that the language of superior courts of the country is English and that any document written in any other language, and which needs to be submitted to these courts, has to be translated to into English.[LXXI] As stated

above, the Constitution recognises Sharia and customary laws. In most cases, the Quran, Hadith and other sources of Sharia are not translated into local languages and are found only in Arabic. However, the *kadis* use the language of a particular community to administer justice using Sharia laws.[LXXII] Judges of customary courts also use local languages of a specific area to decide cases.[LXXIII]

3.4. Federal jurisprudence

Rotimi Suberu summarises the impacts of the courts, especially the Nigerian Supreme Court, in terms of impacting the federal system of the country as more 'centralist than federalist' with minimal 'transformational impact on Nigeria's centralized federal system'.[LXXIV] Yet, according to Suberu, there are two aspects of the Supreme Court's decision which have some differing impacts on the Nigerian federal system: decisions on disputes between the federal government and the states on division of revenue; and those relating to the place and status of local government.

The Court's decisions on revenue related disputes between the federal government and states were mostly centralist which, Suberu maintains, time and again confirmed the federal government's 'fiscal hegemony'.[LXXV] Its decision on the issue of on-shore and off-shore oil dichotomy in *AG Federation v AG Abia State & Ors*[LXXVI] and *AG Ogun State & Ors v AG Federation* was one impacting on the division of revenue between the federal and state governments.[LXXVII] For the purpose of determining the 13 per cent derivation from oil revenue that goes to oil-producing states, the federal government divided oil revenue into those that are collected from on-shore oil and off-shore oil drilling. According to the federal government no individual state, including those adjacent to the sea are entitled to 13 per cent of the oil revenue collected from off-shore oil drilling. Some littoral states opposed this decision and sued the federal government. The Supreme Court decided in favour of the federal government. Later the National Assembly passed a law entitling littoral states for 13 percent of off-shore oil revenue if and when the oil is extracted from an area which is "two-hundred-meter water depth Isobaths' and adjacent to a littoral state. When this law was challenged in *AG Ogun State & Ors v AG Federations* by non-oil producing states, the Supreme Court once again decided in favour of the federal government upholding the constitutionality of the Act passed by the National Assembly. In *AG Ogun State & Ors v AG Federation*, the Supreme Court decided that the federal

government was entitled deduct certain revenue from federally collected revenue before paying those in to the Federation Account. In *AG Abia State & Ors v AG Federation*, the Supreme Court found to be constitutional President Obasanajo's decision to federalize 7.5 percent of the revenue in the Federation Account, which was previously 'designated as special funds' to be used for the purpose of financial stabilisation and the like.

On the other hand, the Supreme Court's decision on the place and status of local government in the federal matrix has been decidedly in favour of the states.[LXXVIII] In several cases, the Supreme Court has protected the autonomy of the states by preventing the federal government from having a direct relationship with local government and by insisting that everything relating to local government has to pass through the states. For instance, in *AG Ogun & Ors v AG Federation (2002)*[LXXIX], the Supreme Court decided that the federal government cannot directly transfer to local government revenue that is designated as the share of the latter and that it has to be channeled through the states. The Supreme Court also ruled in *AG Abia & Ors v. AG Federation (2002)*[LXXX] that the states retain an exclusive power to regulate local elections, including determining the tenure of local councils.

3.5. Concluding remarks

Although the Nigerian judiciary appear to be dualist, both in law and practices it is unified in terms of its institutional structure and material jurisdiction. While the states through the Senate confirmation hearings have some say in federal appointments it is restricted to the highest judicial offices only. The federal institution, the NJC, on the other hand, plays a major role in the appointments to the state high courts. A further indication of the integrated nature of the judicial system is the use of English as the court language in superior courts (bar, of course the Sharia and customary courts). Given the integrated nature of the court system, it is not surprising that that the jurisprudence of the Supreme Court is also more centralist than federalist. Where it has defended the autonomy of the states it was against federal encroachment of states' control over local government.

4. Kenya

Kenya's 2010 Constitution introduced a devolved system of government with a national government at the centre and 47 counties as the second order of government. The Constitution does not provide for a third level of government, although it envisages that the counties may create sub-county administrative units in urban areas.[LXXXI] Counties are thus envisaged to take up the functions of both a meso-level government and a local government. While the Constitution provides a list of exclusive national functions, it is not clear that the list of county functions is of a similar nature, as extensive provision is made for the concurrency of powers.[LXXXII]

4.1. The structure and jurisdiction of courts

In Kenya there is 'judicial unitarism' in that the devolution of judicial function was never considered during the drafting of the 2010 Constitution[LXXXIII] According to Conrad Bosire, '[n]ot a single view was expressed to federalize or devolve judicial power during the entire constitutional review process in Kenya'.[LXXXIV] The result was thus that judicial matters are an exclusive national function.[LXXXV]

The Kenyan judiciary consists of superior and subordinate courts in which both courts form a single judiciary. The superior courts are the Supreme Court, the Court of Appeal, and the High Court. [LXXXVI] Specialized courts that may be established through legislation to resolve labour disputes and those relating to land and the environment, are also considered parts of the superior court. [LXXXVII] The subordinate courts include magistrates, *kadhis'* (Islamic courts) and courts martial.[LXXXVIII] The Chief Justice and his or her deputy serve as the head and deputy head of the entire judiciary and the Chief Registrar is the chief administrator.[LXXXIX] There is also a single Judicial Service Commission.[XC]

The Constitution nevertheless encourages the use of alternative dispute settlement mechanisms including the use of traditional courts so long as the decisions of such tribunals does not result in violation of human rights, the Constitution and other laws.[XCI]

At county level, practice shows that the counties have established county courts using the 'incidental' clause under Section 185(2) of the Constitution.[XCII] These courts may be

labeled county courts, but they are part of the unitary judicial system; the judiciary seconds magistrate to try petty offences such as littering, parking violations, garbage dumping and the like.[XCIII]

The Constitution defines the functional jurisdiction of the superior courts. The Constitution is silent on the jurisdictions of the special superior courts and the subordinate courts, authorising Parliament to define the jurisdictions of such courts through ordinary legislation.[XCIV]

4.2 Appointment of judges

The president of the country is constitutionally authorised to appoint the judges of the superior and subordinate courts, including the chief justice and the deputy chief justice, of the country.[XCV] He or she does so based on the recommendation of the Judicial Service Commission (JSC).[XCVI] The president needs the consent of the National Assembly (NA), the popular house of the Kenyan Parliament, with respect to the appointment of a chief justice and a deputy chief justice.[XCVII] A law requiring the JSC to provide the president with a list of three nominees for the latter to select and appoint the chief justice was declared unconstitutional.[XCVIII] Now the JSC nominates a single person for the office and the president has no option but to appoint the person.[XCIX] The president has the power to appoint other judges upon the recommendation of the JSC with no need to seek the approval of the NA.[C]

This process begs the question whether the counties are directly or indirectly involved in the appointment of judges. As indicated above, judicial power is within the exclusive competence of the national government; the Constitution thus does not envisage the involvement of the counties in the appointment of judges. According to Bosire the Kenyan judiciary is simply 'an independent arm of national government operationally, financially, and institutionally'.[CI] He further states that the counties play no role in the appointment of judges and that even the 'Senate, which represents and safeguards the interests of counties at the national level, is excluded from the vetting of the chief justice and the deputy chief justice.'[CII]

4.3. Language

As all African countries, Kenya has a multilingual society. Over 40 languages are spoken in the country. English (due to the country's colonial history) and Kiswahili are the most widely used languages in the country. The Constitution has thus recognised Kiswahili as the national language of the country while recognising both English and Kiswahili as official languages of the country.[CIII]

English has been used as the language of courts in Kenya since the country attained independence, but lower courts used Kiswahili in oral examination. However, 'all records of the court proceedings [were kept in English] since the records had 'to be verified by the high court'.[CIV] This practice is still maintained even if the Constitution recognises Kiswahili as the national first language.

4.4. Devolution jurisprudence

The Kenyan superior courts, especially the Supreme Court, are playing an increasingly important role in giving 'shape and texture' to the Kenyan system of devolution. The counties are also increasingly using courts to assert their rights and defend their autonomy. The role of the courts in guarding the 'constitutional space' of the counties is especially important since, given the decades old centralized system of the country, there is often an impulsive temptation from the central government to erode the constitutional space of the counties. The courts also play important role of defining the beginning and end of the constitutional space of each level of government given that the constitution is less than clear in defining the competences of the two levels of government.

Bosire argues that the courts have given shape and texture to the devolved system in three ways: by analyzing both the 'nature of the [devolution] system' and the 'significance and thrust' of the system, and by determining specific matters 'including sharing or revenue, powers and functions, and intergovernmental relations among other issues'.[CV] In terms of determining the 'nature' of the Kenyan devolved system, the issue was whether and how the system was similar or different from a federal system. In *Speaker of the Senate v Speaker of the National Assembly,* the Supreme Court has underscored that the Kenyan devolved system is not a federal system and that it is 'based on a unitary system' in which the centre gave up some of its power to counties.[CVI] With regard to the objectives of the devolved system, the Court declared that the devolved system is as important as the

Constitution itself and 'denotes self-empowerment, freedom, opportunity, self-respect, dignity and recognition'.[CVII] The courts have decided on several cases in which it protected functional competences and revenue raising powers of the counties. For instance, the Constituency Development Fund (CDF) was declared unconstitutional.[CVIII]

4.5. Concluding remarks

The devolution of judicial authority was not an issue in Kenya and the unified structure of the court was taken as a given by the drafters of the 2010 Kenyan Constitution. The resultant uniform court system is thus also evidence of the highly centralised 'federal' character of the Kenyan state, although at the fringes the counties are using their incidental powers to pay from 'local' courts, presided over to by national magistrates. In this centrist scheme the counties or their senators play no role in the appointment of the judiciary. The use of English as the only court language further emphasizes the unitary nature of the court system. Given the centrist slant of the constitution, the superior courts, in particular the Supreme Court, have however played a significant role in giving meaning and content to the devolution provisions. The Supreme Court has depicted devolution as one of the key elements of the new constitution and has not shied away from giving them full effect.

5. South Africa

The "negotiated revolution" ending white minority rule in April 1994 included a system of multilevel government.[CIX] The African National Congress, the dominant liberation movement, insisting on a strong centralized state to undo the ravages of apartheid reluctantly compromised on the establishment of provinces, but was more enthusiastic on securing a strong local government sphere of government. The 1996 Constitution, building on the 1993 Interim Constitution, established three spheres of government – the national, provincial and local governments – but with strong central control. It has thus been described as being a unitary state with federal features. Provinces have an emaciated list of exclusive competences, with the bulk of powers being concurrent with the national government, accompanied by a qualified override clause in favour of the latter. Local government has a list of powers which are exclusive to the extent that the national or

provincial governments may *regulate* those powers. The national government's powers are thus those concurrent with the provinces and all residual matters.

As the administration of justice, including the judiciary, is not listed in either the provinces' lists of exclusive or concurrent powers, it is a matter that falls within the exclusive domain of the national government. It is thus not one of the country's 'federal features'. However, there are some small elements that do reflect a federal dimension in the structure of the courts and the composition of the bench. However, very little attention is given to regional local languages as language of record. With regard to a 'federal' jurisprudence, the Courts have, on the whole, favoured the 'hourglass' approach; strengthening the national and local spheres of government at the expense of the provinces in the middle.[CX]

5.1. The structure and jurisdiction of courts

From the outset during the negotiations for the 1993 Constitution and in the Constitutional Assembly in 1995-1996 there was little debate whether some judicial powers should be devolved to provinces. In line with the overall centrist approach advanced by the African National Congress, the judiciary was not to be a provincial matter. The result was that there was strong continuity of the uniform apartheid judicial structure (and judges) into the new democratic dispensation.

Before 1994, a unified system, from the magistrates to the Supreme Court, culminating in the Appellate Division of the Supreme Court, was the norm. The Supreme Court had six divisions, one each for the four provinces, with the Cape Province, due to its geographical size, being sub-divided into three divisions: Northern Cape, Eastern Cape and Cape Provincial Divisions. In line with grand apartheid, each of the 'independent' Bantustans - Transkei, Bophuthatswana, Ciskei and Venda - had its own judiciary, with a High Court and an appellate court.

The new democratic dispensation brought some innovative measures but on the whole the courts structure remained intact. The most important innovation was the establishment of the Constitutional Court, as final arbiter on all matters constitutional, while the Appellate Division was renamed the Supreme Court of Appeal, with exclusive jurisdiction

over all matters non-constitutional.[CXI] This distinction was hard to maintain and in 2012 the Constitutional Court was also given the power to adjudicate on all matters.[CXII]

The 'provincialisation' of the courts took two decades to complete, namely the establishment of a High Court for each province. As a transitional measure, all courts functioning in 1994 continued to do so. Thus, the four Bantustan High Courts continue to dispense justice in the same territorial jurisdiction of the former Bantustans. It was fairly easy to established High Courts in the Western Cape (old Cape Provincial Division), Northern Cape, Eastern Cape, KwaZulu-Natal, and the Free State. The dismemberment of Transvaal Provincial Division was more problematic. The former Bophutatswana High Court become the North West High Court, the Venda High Court was subsumed into a new Limpopo High Court, and the last court to be established was the Mpumalanga High Court in 2017. It is only when the latter court is fully functional that the Gauteng High Court will serve only the Gauteng Province.

At local government level one finds so-called 'municipal courts'. They are courts, financially carried by a municipality, but presided over by a magistrate appointed by the Department of Justice. With a jurisdiction limited to the enforcement of municipal by-laws, it fits into the overall national judicial court structure.

The Constitutional Court, as the court of final jurisdiction on constitutional matters, has thus also the final say on the federal arrangements. The Constitution thus makes specific provision that the Constitutional Court is the only court that can "decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers and functions of any of those organs of state."[CXIII] High Courts also have jurisdiction over constitutional matters, but where a High Court invalidates a national or provincial law, or presidential conduct, as being unconstitutional, there is an "automatic" review by the Constitutional Court; unless the Court confirms the invalidity, the law or conduct stands.[CXIV]

5.2 Appointment of judicial officers

Although the judiciary falls squarely outside the functional areas of provinces, the provinces do play an important role in judicial appointments through their indirect participation in the Judicial Service Commission (JSC). Created in 1994 as a clear break

with the long-standing practice of executive appointments, the JSC sought to make the process of appointment more transparent and less controlled by the executive. It is a powerful institution. The president appoints the chief justice and his or her deputy after consultation with the JSC and the leaders of the political parties in the National Assembly. The president needs to consult the JSC with regard to the appointment of the president and deputy president of the Supreme Court of Appeal. When it comes to the nine justices of the Constitutional Court, the president appoints them from a list provided by the JSC (there must be three names more than the vacant positions). For the appointment of all other judges, the president must follow the JSC's advice.

The JSC's members comprise: representatives from the judiciary (three, including the chief justice as chairperson); the minister of justice; the legal profession (four); law schools (one); the National Assembly (six, three of whom must be opposition MPs); National Council of Province delegates (NCOP) (four); presidential nominees (four); and the judge-president and premier of a province where a matter concerns the High Court in that province (including appointments to the provincial High Court).

The NCOP is the second house of Parliament, and as its name suggests, represents the provinces. Each of the nine provinces appoints a delegation of ten members to the NCOP (six permanently and four drawn from the provincial legislature itself). The power of the NCOP resides in their co-determination of national legislation affecting provinces (although a two thirds majority in the National Assembly may overcome an NCOP veto) and ratifying international treaties. As a body representing provincial interests, the NCOP's four nominees to the JSC is only 16 per cent of a possible 25 members, but may be important in key decisions. The inclusion of the premier of a province in decisions affecting appointments to the provincial bench adds a further provincial flavour to process. In practice, though, the NCOP delegates follow party lines rather than advancing provincial interests.

5.3 Court languages

Sharply distancing itself from the apartheid practice of only recognizing two languages – Afrikaans and English – the new democratic dispensation saw eleven official languages constitutionally recognized. The percentage breakdown of the major language groups is:

IsiZulu (22.9); IsiXhosa (17.9); Afrikaans (14.4); Sepedi (9.2); English (8.6); Setswana (8.2); and Sesotho (7.7).[CXV] Furthermore, some of these languages have a geographical base, which has resulted in seven of the nine provinces having a majority language: KwaZulu-Natal (IsiZulu); Eastern Cape (IsiXhosa); Western Cape (Afrikaans); Northern Cape (Afrikaans); North West (Setwana); Free State (SeSotho) and Limpopo (Sepedi). Effect is given to language preferences in provinces; each province may choose at least two languages for use in administration. For example, in the Western Cape, where Afrikaans is the majority language, English and IsiXhosa are also working languages. For communication between language groups, English has become the *de facto lingua franca* of South Africa. It took more than 20 years for this position to prevail also in the courts.

During the apartheid era Afrikaans and English were the only languages of record, although any accused or witness may use its language of choice (through an interpreter). The protection of Afrikaans was, of course, no longer tenable, but remained on the statute book. It was only in 2017 that it lost its exalted position. Chief Justice Mogoeng announced that English will be the only language of record, the principal reason being efficiency; not all judges are proficient in all 11 languages.[CXVI] Even where the judge and the parties to a dispute are from the same language group, the trial is conducted in English, as there may be a prospect of appeal. This ruling has, of course, upset the Afrikaans legal fraternity, who lost their once privileged position. Although some judges have argued for the use of other indigenous languages as well, in the short to medium term, the courts will be uni-lingual.

5.4 'Federal' jurisprudence[CXVII]

The Constitutional Court viewed its task of interpreting the federal elements in a purposive manner, as it did the rest of the Constitution.[CXVIII] In a decision dealing with the appropriate assignment of functions to provinces in terms of the interim Constitution, the Court said, in response to an argument that provincial powers should be construed restrictively, as follows:

In the interpretation of those schedules [listing provincial powers] there is no presumption in favour of either the national legislature or the provincial legislatures. The functional areas must be purposively interpreted in a manner which will enable the national

parliament and the provincial legislatures to exercise their respective legislative powers fully and effectively.[CXIX]

Yet, a close reading of its subsequent judgments reveals that there has indeed been a consistent pattern of interpreting provincial powers restrictively. First, in certifying whether the Western Cape draft Provincial Constitution was in accordance with the provisions of the 1996 Constitution, it found that an electoral system different from that prescribed in the national Constitution, was not included in the broad scope of a permissive provision that allowed such provincial constitution to have 'legislative and executives structures and procedures' that differed from the national constitution.[CXX] Secondly, the Court interpreted a province's meagre exclusive powers restrictively. [CXXI] So too was its analysis of provinces' incidental powers.[CXXII] Thirdly, in clarifying the overlapping powers between provinces and local government, the Court consistently favoured the latter.[CXXIII] As noted above, the pro-centre and pro-local decisions resulted in the powers of provinces being squeezed thin in an hourglass configuration. However, when it came to procedural matters, the Court adopted a generous interpretation as to when the NCOP should be part of the legislative process; any national bill that affects the interest of the provinces must also get the approval of the NCOP.[CXXIV] Consequently, laws that were adopted without such approval have been invalidated.[CXXV]

It has been argued that the Constitutional Court's parsimonious attitude towards provinces was at first influenced by the need for unity in the face of secessionist sentiments. This was bolstered by the poor service delivery record of the majority of provinces. However, given the governance failures at the national level, the Court may become more sympathetic towards well-functioning provinces.

5.5. Concluding remarks

The courts and their functioning reflect South Africa's highly centralized federal system. Although the court structure was eventually aligned to the federal territorial arrangements, provinces play as such no role in the courts' administration. Regional preferential languages, as adopted by provinces, have not become languages of court record. Despite the fact that the judiciary is not a provincial competence, the provinces, through their delegates in the NCOP, have potentially a significant role to play in appointments to the bench. Reflective also of the government's ambiguous approach to

provinces, the courts have also not interpreted provincial powers generously. This may change, however, once provinces show themselves as an effective and efficient sphere of government in advancing socio-economic development.

6. Comparative observations

At first glance it would seem that the administration of justice of two non-centrist federal countries (Nigeria and Ethiopia) would be quite different from the two unitary systems of South Africa and Kenya. From the brief overview it is apparent that the differences are not large; the dualist systems show decidedly unitary features, while South Africa, at least, has some federal traits. Only Kenya has an unadulterated centrist system.

In the non-centrist countries, the court system reflects the configuration of the constituent units. Despite its dominant unitary nature, South Africa's High Court structure is aligned with provincial boundaries, a feature which becomes significant when it comes to appointing judges. In Kenya with 47 counties, only at lower court level is alignment possible. It is also at this level that in the unitary South African and Kenyan systems that local or municipal courts are emerging; although these courts are staffed by national judicial officers, they are instituted and paid by municipalities and counties when they can meet a particular local need, thus introducing a tiny element of dualism.

Despite the fact that Ethiopia and Nigeria are generally viewed as having dual federal systems, typical of fragile federal systems, the duality is overly tamed and the gravamen of judicial powers is more concentrated at the federal level. In Nigeria, courts of appeal are established only at federal level; there is thus no exclusive judicial authority at state level. In Ethiopia a similar situation prevails; the decisions of the highest state courts are reviewed by the federal courts also on state matters. Due to the political history of both countries, the judiciary is weak; their independence compromised by executive and political interference.

The dualist systems in Nigeria and Ethiopia also hold sway with the appointment of judges; each level appoints in the main their own, although there is a varying degree of integration. The appointment of judges to the Nigerian Supreme Court and the heads of the federal courts appellate justices must be confirmed by the Senate, which represents the

states polities. In Ethiopia the states, on the other hand, have no say regarding the appointment of federal judges.

In both countries, the states' power of appointment is, however, attenuated since the federal governments are involved in the appointment of judges of state courts. In Ethiopia the FJAC is consulted regarding the appointment of judges of state courts. In Nigeria the NCJ, which is seen as a 'federal institution', has the authority to recommend qualified judges for state courts and the SJSCs play merely an advisory role in this regard.

Despite the unitary nature of the South African judicial structure, provinces are indirectly represented in the JSC and play an important role in the appointment of judges. In Kenya, again as the most centralised 'federation' of the four countries, the counties have no say, even though the Senate, on this matter.

Although all of the four countries have multilingual populations, with concentrations of linguistic communities in states, provinces and counties, only Ethiopia uses local languages in its court systems. This flows, of course, from the ethnic model of federalism Ethiopia has embraced; as the federal system was designed primarily to accommodate linguistic diversity, state courts are required to use the working language of the relevant state. Even so, in four of the nine states, Amharic is used as court language (as it is done in federal courts) despite it not being the mother tongue in any of the multi-ethnic states; it is a matter of convenience. In Nigeria, Kenya and South Africa, all of which are trying to escape the burden of ethnicity, English, the colonial language, has become, constitutionally or otherwise, the only court language.

Having no power of constitutional interpretation, both state and federal courts in Ethiopia play almost no role in giving shape and texture to the federal system. Also, its lack of independence from the executive and dominant political party has frequently been questioned. The judiciary in the other three countries, although functioning in essentially an integrated system, with notable degrees of independence, can play an important role in given effect to the federal content of their respective constitutions. The Nigerian Supreme Court have passed several judgements impacting on the federal system. Although its decisions are in general centrist in impact, some defended the autonomy of the states. In Kenya, the courts, specially the Supreme Court, are playing a major role of guarding the autonomy of counties from encroachment by the national government. The South African Constitutional Court, although its judgments on provincial matters have been criticised as

being pro-centre or pro-local government, has been outstanding in upholding the Constitution against executive onslaughts. Its unwavering commitment to constitutionalism provides basic security for upholding also the federal arrangements.

In summary, the court system and judiciary of the four 'federal' countries are reflective of the degree of decentralised or centralised federalism a country's constitution and practice display. Given that all four countries have, to varying degrees, highly centralised federal systems, it is thus no surprise that the judicial branch of government is, too, evidence of this reality. Consequently, the main difference between the four countries - the presence or absence of a non-centrist court system – matters not much.

[I] Nico Steytler and Jaap de Visser (2015) '"Fragile Federations": the dynamics of devolution', in Francesco Palermo and Elisabeth Alber (eds) *Federalism as decisionmaking* (Brill/Nijhoff) 79–101.

[II] Nicholas Aroney and John Kincaid (2017) 'Introduction: Courts in federal countries' in Nicholas Aroney and John Kincaid (eds) Courts in federal countries: Federalists or unitarists? (University of Toronto Press) 8-9.

[III] *Ibid.*

[IV] In an earlier work she only draws the distinction between dualist and integrated systems, the former including Canada, and the latter South Africa (Cheryl Saunders, 'Legislative, Executive, and Judicial Institutions: A Synthesis', in Kathy Le Roy and Cheryl Saunders (eds) *Legislative, Executive and Judicial Governance in Federal Countries* (Montreal and Kingston: McGill-Queen's University Press, 2006) 344). Her later categorisation and definitions seem more apt in reflecting the cases mentioned.

[V] 'Courts in Federal Countries', International IDEA, Constitutional Brief, March 2019.

[VI] The states are Afar, Amhara, Oromia, Somali, Tigray, Harari, Gambella, Benishangul-Gumuz, and Southern Nations and Nationalities (SNNP) states. The federal cities are Addis Ababa and Dire Dawa. However only Addis Ababa is constitutionally recognised as a federal city.

[VII] These are Amhara, Tigray, Afar, Oromia and Somali states.

[VIII] See on this Zemelak Ayele and Yonatan Fessha (2012) 'The Constitutional status of local government in federal systems: The Case of Ethiopia" 58 *Africa* Today 89–109.

[IX] Assefa Fiseha (2007) Federalism and the accommodation of diversity in Ethiopia: A comparative study (Nijmegen: Wolf Legal Publishers) 354-55.

[X] Assefa Fiseha and Zemelak Ayele (2017) 'Concurrent powers in the Ethiopian federal system' in Nico Steytler (eds) *Concurrent powers in federal systems: Meaning making and managing* (Leiden: Brill/Nijhoff) 241-260.

[XI] Art 78(2) & (3) Federal Democratic Republic of Ethiopia (FDRE) Constitution 1995. See also Gedion Hessebon and Abduletif Idris (2017) 'The Supreme Court of Ethiopia: Federalism's bystander' in Nicholas Aroney and John Kincaid (eds) Courts in federal countries: Federalists or unitarists? Toronto: University of Toronto Press, 165-193.

[XII] *Ibid.*

[XIII] Art 78(3).

[XIV] Proclamation to establish federal high courts in some regions No 322 (2003).

[XV] Art 78(2) FDRE Constitution.

[XVI] Art 80 FDRE Constitution.

[XVII] These include disputes to which a federal government organ is a party, disputes between residents of two states, suits involving matters of nationality etc.

[XVIII] Art 80(1) FDRE Constitution, 1995.

[XIX] Art 80(2).

[XX] Muradu Abdo (2007) 'Review of decisions of state courts over state matters by the federal supreme court' 1(1) *Mizan Law Review* 60-74.

[XXI] Muradu Abdo (2007) argues that the practice of 'cassation over cassation' is against the principle of the principle of federalism and the judicial autonomy of the states.

[xxii] See Assefa Fiseha (2007) 'Constitutional adjudication in Ethiopia: Exploring the experience of the House of Federation (HOF)' 1(1) Mizan Law Review 1-32; Yonatan Fessha (Fessha Y) (2008) 'Whose power is it anyway? The courts and constitutional interpretation in Ethiopia' 22 (1) Journal of Ethiopian Law 128-144; *Adem Abebe* 'Unique but Ineffective: Assessing the Constitutional Adjudication System in Ethiopia', in Charles Fombad (ed) *Constitutional Adjudication in Africa* (Oxford: OUP, 2017) ch 8.
[xxiii] Amended Federal Judicial Administration Council Establishment: Proclamation No. 684/2010.
[xxiv] Art 81 (1) and (2).
[xxv] Art 81(1).
[xxvi] Art 81(4) and (5).
[xxvii] Art 81(3).
[xxviii] 81(4).
[xxix] Art 81(4).
[xxx] See for instance Art 74(3) (g) Amhara State Constitution (2001), Art 76(3) SNNPR Constitution (2001).
[xxxi] Art 5(2), FDRE Constitution 1995.
[xxxii] Art 5(3), FDRE Constitution 1995.
[xxxiii] Arts 19 and 20 FDRE Constitution 1995.
[xxxiv] Gardner A J (2003) 'State courts as agents of federalism: Power and interpretation in state constitutional courts' *William & Mary Law Review* 1725-1800.
[xxxv] For more on this see Yonatan Fessha and Zemelak Ayele (2020) 'Giving 'shape and texture' to a federal system? Ethiopia's courts and its unusual umpire' in Yontan Fessha & Karl Kossler (eds) Federalism and courts in Africa: Design and impact in comparative perspective Routledge (2020) 47-67.
[xxxvi] *Ibid.*
[xxxvii] Art 79 (2) and (3) FDRE Constitution 1995.
[xxxviii] The fact that the FJAC, which is empowered to nominate and dismiss judges, is composed of politicians, including a minister and member of parliaments, is claimed to have exposed the process of judicial appointment for political manipulation. For instance, a federal judge was dismissed for having 'questionable loyalty to the constitution' simply because in various conferences he voiced his opinion that some of the provisions of the Constitution need to be amended. It is also reported that judges are given instructions either by their superiors or members of the executive to handle certain politically sensitive cases in certain way. According to a World Bank report, 'telephone calls have allegedly been placed from higher-level judges or Commission members to First Instance judges questioning decisions and perhaps trying to influence case outcomes'. The situation is worse at state level where the 'concept of state governments and separation of executive and judicial branches' is new. Yohannes Anberbir **ለሕገ መንግሥቱ ታማኝ አይደሉም የተባሉት ዳኛ ከኃላፊነታቸው ተነሱ** (A judge dismissed for being 'disloyal' to the Constitution) The Ethiopian Reporter (10 February 2016); The World Bank (2004) Ethiopia: legal and judicial sector assessment (Washington, DC: Legal Vice Presidency: The World Bank).
[xxxix] RT Suberu (2008) 'The Supreme Court and federalism in Nigeria' 46(3) *The Journal of Modern African Studies*, 454.
[xl] S 6 Constitution 1999.
[xli] See *Ameze Guobadia* 'Constitutional Adjudication in Nigeria: Formal Structures and Substantive Impact', in Charles Fombad (ed) *Constitutional Adjudication in Africa* (Oxford: OUP, 2017) ch 6.
[xlii] Ss 230-265 Constitution 1999.
[xliii] Ss 270-280 Constitution 1999.
[xliv] Ss 196 (2) and 197(6) Constitution 1999.
[xlv] S 6(1) and (2) Constitution 1999.
[xlvi] E Osieke (2006) 'The Federal Republic of Nigeria' in Katy le Roy & Cheryl Saunders (eds) Legislative, executive and judicial governance in federal countries (Montreal and Kingston: McGill-Queen's University Press) 198, 213.
[xlvii] S 286(1)(a) Constitution 1999.
[xlviii] For instance, the Federal High Court retains exclusive jurisdictions on matters relating to 'the revenue of the federal government, Admiralty Matters arising from the Companies and Allied Matters etc. as well as all the items contained in the Exclusive Legislative List. 'Furthermore, section 251(1)(p)(q)(r) further preclude States' High Courts from adjudicating on any matter concerning the administration and control of federal agencies'. AE Obidimma and EOC Obidimma (2015) 'Restructuring the Nigerian Federation for Proper Functioning of the Nigerian Federalism' 5(9) *Public Policy and Administration Research*, 151.

[XLIX] Obidimma and Obidimma(2015) 150.
[L] Suberu *(*2008*)* 455.
[LI] S 230(2) Constitution 1999.
[LII] S 237 (2) Constitution 1999.
[LIII] S 237(2)(b) Constitution 1999.
[LIV] S 249 Constitution 1999.
[LV] Obidimma and Obidimma (2015) 150.
[LVI] Ss 231(1), 238(1) and 250(1) Constitution 1999.
[LVII] Third Schedule (E), Constitution (1999).
[LVIII] Ss 231 (1) (2), 238(1) and 250(1) Constitution 1999.
[LIX] Ss 271(1), 276 (1) and 281(1) Constitution 1999.
[LX] A SJSC is composed of Chief Judge of the State (a chairperson), state Attorney General, the Grand *Kadi* of the state Sharia Court of Appeal, the President of the state Customary Court of Appeal of the State, if any, two lawyers and two other persons. Third Schedule (C), Constitution (1999).
[LXI] Ss 271(1), 276 (1) & 281(1) Constitution 1999.
[LXII] 'The Chief Justice of Nigeria dominates the [NJC] - apart from being the chairman, he alone is responsible for appointing 14 out of the 23 members, 4 of whom are members by virtue of their office including the Chief Justice himself. The other five members who shall be members of the Nigerian Bar Association are also appointed by him but on the recommendation of the National Executive Committee of the Nigerian Bar Association. Obviously, the National Judicial Council as presently constituted is inconsistent with the federal status of the country'. Obidimma and Obidimma (2015) 150.
[LXIII] S 81(3) Constitution 1999.
[LXIV] Emphasis added. *Ibid.*
[LXV] Suberu (2008) 455.
[LXVI] For the definitions of 'judicial office' and 'judicial officer' see S 318(1).
[LXVII] S 197(c) Constitution 1999.
[LXVIII] S 55 Constitution 1999.
[LXIX] *Ibid.*
[LXX] S 97 Constitution 1999.
[LXXI] O J Bamgbose (2014) *Digest of Judgments of the Supreme Court of Nigeria* (Ibadan: Safari Book Mohammed), 437. Also *Oladapo Ojengbede vs N.O Esan & Another* (2002) 1 SCM 194.
[LXXII] A A Mazuri (2009) 'Shariacracy and federal models in the era of globalisation: Nigeria in comparative perspective' 26(3) *American Journal of Islamic Social Sciences* 63.
[LXXIII] T O Opeibi (2012) 'Investigating the language situation in Africa', in Peter Tiersma & Lawrence Solan (eds) *The Oxford handbook of language and law* (Oxford: Oxford University Press) 282.
[LXXIV] R T Suberu (2017) 'The Supreme Court of Nigeria: An embattled judiciary more centralist than federalist', in Nicholas Aroney and John Kincaid (eds) *Courts in federal countries: Federalists or unitarists?* (Toronto: University of Toronto Press), 290-91.
[LXXV] *Ibid.*
[LXXVI] [2001] 9 Supreme Court Monthly-SCM.
[LXXVII] [2002] 14 SCM.
[LXXVIII] Suberu (2015) 212-218.
[LXXIX] [2002] 14 SCM.
[LXXX] [2002] 5 SCM.
[LXXXI] Jill Cottrell Ghai, 'Governing Metropolitan and Urban Areas in Kenya', in Nico Steytler and Yash Pal Ghai (eds) *Kenyan–South African Dialogue on Devolution* (Cape Town: Juta), 278–301, 285.
[LXXXII] Fourth Schedule**.** See John Mathaka Kangu (2015) *Constitutional Law of Kenya on Devolution* (Strathmore University Press, Nairobi).
[LXXXIII] Conrad Bosire (2018) *Vague centralisation or reluctant federalism? Kenya's Judiciary and its role in fostering devolution* (unpublished manuscript).
[LXXXIV] Bosire (2018).
[LXXXV] See Chapter 10 Kenya Constitution, 2010.
[LXXXVI] S 161(1) Constitution 2010.
[LXXXVII] S 162(2) Constitution 2010.
[LXXXVIII] S 161(1) Constitution 2010.

[LXXXIX] S 161(2) Constitution 2010.
[XC] S 161(3) Constitution 2010.
[XCI] S 159(2)(c) Constitution 2010.
[XCII] The Constitution authorises to 'make any laws that are necessary for, or incidental to, the effective performance the powers and functions that the country government is given under the constitution.
[XCIII] Bosire (2018).
[XCIV] S 162 -169 Constitution 2010.
[XCV] S 166(1)(a) Constitution 2010.
[XCVI] *Ibid.*
[XCVII] *Ibid.*
[XCVIII] Ochieng A 'Judges clip President's powers in choice of Chief Justice' *Daily Nation* 27 May 2016 http://www.nation.co.ke/news/President-power-to-hire-Chief-Justice-quashed/1056-3220654-g1ukxw/index.html (accessed 2 November 2016).
[XCIX] *Ibid.*
[C] S166(1)(b) Constitution 2010. There was a disagreement on whether the president has the option not to appoint some or all of the judges nominated by the JSC. This was at issue when President Kenyatta appointed 11 of the 25 nominees of the JSC and postponed the appointment of 14 nominees under the pretext of studying the list, implying that he might decline to appoint some or all of the 14 nominees. Yash Ghai wrote that the president's act was a clear violation of the Constitution, arguing that the president has no discretion whatsoever on the appointment of the nominees of the JSC. Y P Ghai 'Uhuru has broken the law over judges list' *The Star* 30 July 2014http://www.the-star.co.ke/news/2014/06/30/uhuru-has-broken-the-law-over-judges-list_c962688 (accessed 2 November 2016).
[CI] Bosire (2018).
[CII]*Ibid.*
[CIII] S 7 Constitution 2010.
[CIV] Nathan yori Ogechi (2003), 'On language rights in Kenya' 12(3) *Nordic Journal of African Studies,* 290.
[CV] *Ibid.*
[CVI] [2013] eKLR.
[CVII] *Ibid.*
[CVIII] See *The Institute for Social Accountability (TISA) and another v The National Assembly and 3 others* (eKLR 2015) Petition 71 of 2013; *Real Deals Ltd v Kenya National Highways Authority and 2 others* (2014) eKLR; *Nairobi Metropolitan PSV SACCOs Union Ltd and 25 others v County Government of Nairobi and 3 others* (eKLR 2014) Petition 486 of 2013; *Cereal Growers Association and another v County Government of Narok and 10 others* (2013) eKLR.
[CIX] Nico Steytler (2013), 'South Africa - the reluctant hybrid federal state', in John Loughlin, Wilfried Swenden and John Kincaid (eds), *The Routledge Handbook of Regionalism and Federalism* (London and New York: Routledge) 442-454.
[CX] See Nico Steytler (2017), "The Constitutional Court in South Africa: Reinforcing an Hourglass System of Multi-Level Government" in Nicholas Aroney and John Kincaid (eds) *Courts in Federal Countries: Federalists or Unitarists?* (Toronto: University of Toronto Press) 328-366
[CXI] See *Richard J. Goldstone, '*The Birth of the South African Constitutional Court', in Charles Fombad (ed) *Constitutional Adjudication in Africa* (Oxford: OUP, 2017) ch 14.
[CXII] Constitution Seventeenth Amendment Act of 2012.
[CXIII] S 168(4) Constitution, 1996.
[CXIV] S 167(5) Constitution, 1996.
[CXV] Statistics South Africa, *Stats in Brief 2002* (Pretoria: Statistics South Africa, 2002), table 2.11.
[CXVI] Jeanette Chabalala, 'English will be only language of record in courts – Mogoeng', News24, 29 September 2017, available https://www.news24.com/SouthAfrica/News/english-will-be-only-language-of-record-in-courts-mogoeng-20170929, accessed 11 July 2018.
[CXVII] This section is drawn from Steytler (2017).
[CXVIII] *James Fowkes, '*Constitutional Review in South Africa: Features, Changes, and Controversies', in Charles Fombad (ed) *Constitutional Adjudication in Africa* (Oxford: OUP, 2017) ch 7.
[CXIX] *DVB Behuising (Pty) Limited v North West Provincial Government and Another*, 2000 (4) BCLR 347 (CC), para 17.
[CXX] *In re: Certification of the Constitution of the Western Cape,* 1997 (9) BCLR 1167 (CC)

[CXXI] *Ex parte President of the Republic of South Africa: in re: Constitutionality of the Liquor Bill* 2000 (1) BCLR 1 (CC).
[CXXII] *Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature and Others* 2011 (11) BCLR (CC) 1181.
[CXXIII] See Jaap de Visser and Nico Steytler (2016) 'Confronting the State of Local Government: The 2013 Constitutional Court Decisions '*Constitutional Court Review* 1-23.
[CXXIV] *Tongoane and Others v Minister of Agriculture and Land Affairs* 2010 (8) BCLR 741 (CC) (*Tongoane*).
[CXXV] Communal Land Rights Act of 2009 (*Tongoane* case); Municipal Systems Amendment Act of 2011 (*South African Municipal Workers' Union v Minister of Co-operative Governance & Traditional Affairs and Others* [2017] ZACC 7 (CC)).