

**CONSTITUTIONAL ENTRENCHMENT OF DECENTRALISATION IN AFRICA:  
AN OVERVIEW OF TRENDS AND TENDENCIES**

**CHARLES MANGA FOMBAD**

LIC-EN-DRT (UN OF YAOUNDE), LL.M.,Ph.D (UN OF LONDON)

PROFESSOR OF LAW

INSTITUTE FOR INTERNATIONAL AND COMPARATIVE LAW IN AFRICA

FACULTY OF LAW

UNIVERSITY OF PRETORIA

SOUTH AFRICA

## Abstract

The prominent place given to decentralization in the design of post-1990 African constitutions has been likened to a silent revolution. This is not surprising, for sharing power has been anathema to post-independence African leaders, who have striven to personalize power and concentrate it within a privileged clique in the capital city. This article assesses the nature and significance of the increasing trend in Africa towards constitutional entrenchment of decentralized forms of government. It examines the concept of decentralization and its manifestations in contemporary African constitutional design. It provides an overview of the extent of the constitutional entrenchment of decentralization in African practice, and then considers the rationale for, and possible implications of, this process. From an analysis and comparison of emerging trends, it argues that only a formally and constitutionally entrenched decentralization framework can ensure that the process is effectively implemented and is not dependent on the goodwill of the central government.

## Keywords

Constitutionalism ; constitutional entrenchment ; decentralization ; deconcentration ; devolution

## 1. INTRODUCTION

Decentralisation in its simplest sense has the objective of dispersing and sharing power at different levels of governance. It has been anathema to post-independence African leaders, who have striven to personalise power and concentrate it within a privileged clique in the capital city. This centralising tendency, which fuelled the repressive governments that over the years came to place a stranglehold over almost all the countries on the continent, is what the decentralisation policies introduced from the late 1980s and onwards were supposed to curb. More widely, decentralisation of governance was a critical part of the so-called “third wave”<sup>1</sup> of democratisation that ushered in a new era of constitutional reforms designed to enhance the prospects for constitutionalism, good governance, and respect for the rule of law.

Although the precise objectives of the decentralisation programme vary from one country to the next, in most cases the overall goal has been similar: to bring governance closer to the people and make it more democratic, accountable and responsive to their needs. The prominent role decentralisation played in the design of modern African governance systems in the last three decades has been likened to a “silent revolution.”<sup>2</sup> It is worth remembering that while most of the governance systems that African countries inherited at independence were decentralised in one form or another, these were progressively centralised for a variety

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<sup>1</sup> The expression was coined by Samuel Huntington in *The Third Wave: Democratization in the Late Twentieth Century*. Norman, OK, University of Oklahoma Press (1991). Similarly, Larry Diamond referred to it as a “second liberation” in “Developing Democracy in Africa: African and International Perspectives”. <http://democracy.stanford.edu/Seminar/Diamondafrica.htm>

<sup>2</sup> See Maksym Ivanyna and Anwar Shah, “How close is your government to its people? Worldwide indicators on localization and decentralization,” *Economics: The Open-Access, Open-Assessment E-Journal*, 8 (2014-3): 1—61. <http://dx.doi.org/10.5018/economics-ejournal.ja.2014-3> (accessed on February 2017).

of reasons<sup>3</sup> as governments became more authoritarian. As such, in the processes ongoing in Africa today, a special feature – and, arguably, a major innovation – that distinguishes the modern systems from inherited ones is their constitutional entrenchment of decentralisation, especially with respect to subnational government.<sup>4</sup>

The focus of this paper is on assessing the nature and significance of this increasing trend in Africa towards constitutional entrenchment of decentralised forms of government. Although numerous studies have examined decentralisation in Africa, some of them by way of a comparative perspective, hardly any have dealt with the current trend of constitutional entrenchment of devolved governance, one which raises important questions. For example, how widespread is this process? What form does it take? What are its implications for promoting constitutionalism? Has it significantly diminished African governments' near-obsessive tendency to centralise power?

The discussion proceeds by examining the concept of decentralisation and its manifestations in contemporary African constitutional design. The next section gives an overview of the extent of the constitutional entrenchment of decentralisation in African practice, and the one thereafter considers the rationale for, and possible implications of, this process. The final section provides some concluding remarks.

Analysing and comparing decentralisation across countries is a challenging task at the best of times. Owing to the wide variety of reasons given for implementing decentralisation policies, as well as the variety of types and degrees of decentralisation found across countries, it is inherently difficult to compare countries on the basis of a single notion of decentralisation.<sup>5</sup> Nevertheless, such a study provides a useful indication of trends, tendencies and patterns that can point to new directions for future research. More importantly, it affords an opportunity for cross-national learning and cross-fertilisation of ideas among African governments still in the throes of an uncertain transition. By dint of their common historical experiences and similarity of social, economic and political situation, it is likely that an approach one African country takes to decentralisation will be more adaptable and useful to another such country than inherited – and blindly emulated – colonial models and approaches.

In spite of its merits, though, focusing on the constitutional position alone has its limitations. Two caveats are in order. First, although the constitutional entrenchment of decentralisation is the strongest possible indication of a government's commitment to sharing powers with subnational units, there are many genuinely devolved systems that are not constitutionally

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<sup>3</sup> For example, African leaders throughout the continent championed the centralisation of governance under the pretext of promoting national unity among the diverse communities which had been artificially forced together as states during the partitioning of the continent in 1884, maintaining that centralisation facilitated shared political identity, nation-building and development. A key element of this was the widespread abolition, whether *de jure* or *de facto*, of the multiparty system in favour of the one-party system. It was argued that multi-partyism would promote division and tribalism and so waste national resources at a time when the newly independent states, under-resourced and comprised of numerous culturally and religiously heterogeneous groups, needed to focus on national unity, political stability and rapid economic development. It was also argued that the one-party system was the only one that fairly corresponded with traditional African systems of governance.

<sup>4</sup> See Dele Olowu, "The constitutionalization of local government in developing countries – Analysis of African experiences in global perspectives," 3 *Beijing Law Review* (2012), at p. 44.

<sup>5</sup> See Robert Work, "Overview of decentralisation worldwide: A stepping stone to improved governance and human development," <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan030965.pdf> Accessed in April 2017.

entrenched. This is not only obviously so with the devolved and strong local government systems in the United Kingdom, which has no written constitution, but is also the case in most local government systems in the West. In other words, to gauge the true degree of decentralisation in a country, one must go beyond the constitution to see what other statutory instruments provide for.

Secondly, a constitution may provide for extensive devolution of power, but it will come to naught if it is not fully implemented by the government. This raises the question of how effective the provisions are that entrench decentralisation, which in turn hinges to a large degree on what form of decentralisation has been chosen – an issue to which we now turn.

## **2. TYPES, FORMS AND RATIONALE OF THE DECENTRALISATION OF GOVERNANCE**

### **2.1 Conceptualising decentralisation**

The evolution and complexity of multi-level government in the last three decades in Africa in particular and globally in general has made it difficult to provide a precise definition of the concept of decentralisation and an indication of its nature and scope. Nevertheless, in the context of this discussion, “decentralisation” is used in a broad, generic sense to refer to the dispersal of governmental authority and power away from the centre to lower levels of government or levels of administration.<sup>6</sup> At the heart of decentralisation is the notion of subsidiarity, which proposes that functions should be devolved to the lowest possible level at which they can best be discharged effectively and efficiently.

As a result of the many new political developments and institutional arrangements since the 1990s, discussion of multi-level systems of governance has become very complicated. This is particularly so with respect to two sets of concepts, both of which relate to approaches to dispersing governmental power: the distinction, on the one hand, between decentralisation and centralisation, and, on the other, between a unitary and federal government. Are these separate and distinct components or aspects of decentralisation, or two manifestations of the same phenomenon? Properly distinguishing between them is important in appreciating the classifications and categorisations that are made in the next section of this discussion.

With respect to the concepts of centralisation and decentralisation, they can be regarded in a general sense as operating at opposite ends of the same continuum. At the one end is a “pure” form of centralised government that concentrates power in the centre; the further one moves away from that extreme, the more constrained the centre becomes by virtue of the existence of other “centres” or sub-units that exercise some powers. With the exception, perhaps of the Vatican City State and similar micro-states, there is no purely centralised government in the world. Decentralisation arises from the conferral of various powers to the sub-units, with the extent of such decentralisation increasing on the continuum from that of a weakly

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<sup>6</sup> See Markus Böckenförde, *A Practical guide to constitution building: Decentralised forms of government*, International IDEA, Stockholm (2011), at pp.1 and 44. The author points out that the term “level of government” refers to that part of the hierarchy of government through which state power is employed at a certain place in the vertical order of a country, such as national, regional or local level. By contrast, “level of administration” is used to describe an institutional setting that provides administrative support for the implementation of governmental policies at these levels, whether regional or local. Unlike “levels of government”, “levels of administrations” are responsible only for implementing policies, not making them.

decentralised system at the centralised end of this continuum to that of strongly decentralised one at the other end. Put differently, the decentralisation of states range from very weak at one end of the continuum or to very strong at the other end.

In turn, the centralised system is usually associated with a unitary state and a decentralised system with a federal state. It is when looking at the relationship between the unitary and federal systems in the context of decentralisation that the analytical distinctions become more complicated. In practice, the line between decentralisation, federalism, unitary systems and centralised systems is often blurred. For example, unitary states are often centralised; however, as pointed out above, just as there is no purely centralised state, so there is also no entirely unitary state. Every state is composed of at least one or more sub-units at different levels. Federalism is usually conceived as a means to create other, additional centres of power along a continuum which has, at one end a single centre of power moving from centralism or a unitary system through a continuum of dispersal of powers to sub-units that range from subordination to the centre to equi-ordination with the centre.<sup>7</sup> It is at the end of the continuum that the federal system is established, because the distribution of power is completely non-centralised and the structure of government multi-centred.

However, as Brunetta Baldi points out, the analytical distinction between federal and unitary systems has, because of developments in the last three decades, lost its ability to satisfactorily describe and explain the complex and differentiated multi-level systems of government that exist today.<sup>8</sup> The tendency often is to conflate federalism with decentralised government because the former is usually accompanied by the latter. However, the two concepts are distinct from each other. Federalism is not a necessary condition for decentralisation, nor is decentralisation a condition for federalism.<sup>9</sup> As King notes, “[T]here is no observed degree of centralization/decentralization which commonly and distinctly marks off federations from so-called unitary states.”<sup>10</sup>

Nevertheless, federalism can be considered as a specific form of decentralisation. Five main features of a classic federal system are generally well agreed-upon and can be stated as follows:

- i) there are at least two levels of government that exercise sovereignty over the same land and people;
- ii) both the central government at the national level and the regional government at the sub-unit level possess a range of mutually exclusive powers (self-rule), which include a measure of legislative and executive autonomy or fiscal independence;

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<sup>7</sup> See Brunetta Baldi, “Beyond the federal-unitary dichotomy,” [file:///C:/Users/P4380886/Downloads/Beyond the Federal Unitary Dichotomy%20\(1\).pdf](file:///C:/Users/P4380886/Downloads/Beyond%20the%20Federal%20Unitary%20Dichotomy%20(1).pdf) at p.14. (accessed in February 2017).

<sup>8</sup> See *ibid.* pp.1-3. Some of the factors that are mentioned include the institutionalisation of regionalism in certain countries; the combination of decentralisation with asymmetrical federalism in some countries; and the adoption in some countries of public policies that have made federal and unitary systems increasingly similar to each other.

<sup>9</sup> To cite a few global examples, some federal states, such as Malaysia, are highly centralised, whilst some unitary states, such as China, are highly decentralised. All that can be said is that federalism, depending on the form, may be considered as a special case of decentralisation.

<sup>10</sup> In *Federalism and Federation*, Baltimore, John Hopkins University Press (1982), at p.126.

- iii) the constitution provides that neither level can unilaterally alter its own responsibilities and authority or that of the other level of government;
- iv) national decision-making institutions include representatives from the sub-unit level, who might occupy a second chamber in the national legislature (shared rule); and
- v) the constitution provides an arbitration mechanism, whether by way of a constitutional court or a referendum process, that can be used to resolve disputes between the federal centre and the sub-units.

However, because of the varied degree of centralisation/decentralisation reflected in the distribution of powers and resources between the central government and the sub-units, federal systems have been categorised in different ways:<sup>11</sup>

- From the perspective of formal institutional structure, federal forms have been categorised as “decentralised federal systems,” “decentralised unitary states”, “quasi-federations” and “hybrid federations”.
- From the perspective of the origins and functionality of federations, Ronald Watts and Michael Burgess make the distinction between “emergent federations”, “post-conflict federal experiments”, “incomplete federations”, “flawed federal democracy” and “aspiring federal democracies”.<sup>12</sup>
- From the evolutionary perspective, a federal system could have developed by disaggregation, or what is known as the “holding-together” federation; or through a process where a unitary system federalises itself through an internal progression which recognises the emergence of sub-units to whom powers are devolved or through the integration of pre-existing polities into a new polity, which is referred to as the “coming-together” type of federation.

Although there are other forms of territorial distribution of power within this complex federal setup,<sup>13</sup> the only other point worth reiterating is that federalism remains a form of decentralisation and that federations can be very different from one another institutionally, depending on their degree of non-centralism and the centre-constraining mechanism entrenched in the constitution. This gives the sub-units in a federation an “original autonomy” (guaranteed and protected in the constitution), in contradistinction to the “secondary autonomy” granted to decentralised sub-units in a unitary state (such “secondary autonomy” is often based merely on ordinary legislation, which can be changed easily by the centre).

## 2.2 An overview of the types and forms of decentralisation

Generally, three types of decentralisation have been posited, namely, political, administrative and fiscal decentralisation. Within this typology, there are three forms of decentralisation:

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<sup>11</sup> For a full discussion of this, see Nico Steytler and Jaap de Visser, “‘Fragile federations’ and the dynamics of devolution,” in *Federalism as decision-making. Changes in structures, procedures and policies*, Leiden, Brill Nijhoff (2015), pp.79-101.

<sup>12</sup> *Ibid.* pp. 79-81.

<sup>13</sup> Examples include regional systems where regions are provided for in the constitution but have no law-making powers (as in France), or where such law-making power is not exclusive (as in Italy); and regional systems where the arrangements have many federal characteristics but not enough to transform them into federations (as is the case with Scotland within the United Kingdom).

devolution, delegation, and deconcentration;<sup>14</sup> one may add divestment or privatisation to the list.

### **2.2.1 Political decentralisation**

Political decentralisation occurs where central governments allow the sub-units to exercise various functions of political governance. The main form decentralisation takes is an arrangement in which governance functions are exercised by elected and empowered subnational units, such as local authorities and regional bodies.

The strongest form of political decentralisation is devolution. This involves the transfer of responsibility, decision-making, resources and revenue-generation to regional or local governments. Depending on the degree of devolution, the power of central government to interfere may be quite limited. The sub-units may be autonomous and fully independent of the devolving authority and have wide discretion, with legislative powers to adopt rules and norms; alternatively, they may be confined simply to implementing a set of national laws in a particular area. Subnational units may coordinate among themselves to ensure coherent national policy. Political decentralisation usually requires a constitutional, legal and regulatory framework to ensure accountability and transparency.

Although there are various models and degrees of devolution, devolved governance systems share a number of key characteristics:

- i) local units of government are autonomous, independent and perceived as separate levels of government over which central authorities exercise little or no direct control;
- ii) local governments have clear and legally recognised territorial boundaries within which to exercise authority and perform public functions;
- iii) local governments have corporate status and the power to secure resources to perform their functions;
- iv) there are specific local institutions for satisfying local needs and over which citizens have control; and
- v) there is a reciprocal, mutually beneficial and cooperative relationship between central and local government.

### **2.2.2 Administrative decentralisation**

In contrast to political decentralisation, administrative decentralisation involves the transfer of decision-making authority, resources and responsibilities for the delivery of specified public services from the central government to subnational levels of government, agencies and field offices of central government line departments. This may take one of two main forms: deconcentration or delegation.

Deconcentration of power is the least extensive form of decentralisation, and involves very limited transfer of authority and responsibility from one level of central government to another. The central government transfers authority for specified decision-making, financial

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<sup>14</sup> See generally Robertson Work, "Overview of decentralisation worldwide: A stepping stone to improved governance and human development." *Op. cit.*

and management functions by administrative means to different levels of local government. All the subordinate sub-units (provinces, districts, sub-districts) are headed by officials appointed by, and responsible to, central government. Local government functions are performed under the supervision and control of central government. There is thus no actual transfer of authority and power, all of which remain at the centre.

In the case of delegation of powers, on the other hand, the central government retains the powers but may transfer decision-making and administrative authority and/or responsibility to carry out certain tasks to sub-units, institutions or organisations that either are not directly controlled by government or are semi-independent. There is a principal/agent relationship, but the degree of supervision and control from the centre varies with the function. In some matters, the central government may allocate the administration and implementation of policy entirely to the sub-unit, whereas in others it may allow the sub-unit little discretion.

### **2.2.3 Fiscal decentralisation**

Fiscal decentralisation determines the financial resources allocated to the sub-units and hence their degree of financial autonomy. Without concrete arrangements to provide adequate financial resources, political and administrative decentralisation cannot be implemented. The effectiveness of fiscal decentralisation depends on how three important aspects of resource allocation have been addressed. These are:

- i) assigning responsibility for expenditure by determining which level pays for what;
- ii) assigning responsibility for raising revenue by determining which level raises which tax; and
- iii) defining the framework for intergovernmental transfers in order to ensure there is a means for different levels of government to share revenues and equalise any imbalances that are bound to arise.

Whether spelt out in the constitution or ordinary legislation, the arrangement for resource allocation usually provides for negotiations between the centre and the subnational units in order to take into account factors such as interregional equity and the availability of resources.

### **2.2.4 Divestment/ Privatisation**

Divestment or privatisation is not, strictly speaking, decentralisation, since the transfer of powers is not between, but rather within, the same level of government. Divestment of powers refers to the situation where planning and administrative responsibility or other public functions are transferred from government to voluntary, private or non-governmental institutions (for example, NGOs, corporations and private companies), with clear benefit to and involvement of the public. This may involve contracting out partial service provision or administrative functions, deregulation or full-scale privatisation.

In spite of these distinctions, it must be noted that there is no pure or completely deconcentrated, delegated or devolved form of governance. In all cases, it is, as we will see below, a question of the degree to which actual and effective powers have been transferred from the centre to the subnational units. This is influenced to a large extent by the motives behind the decentralisation, an issue to which we now turn.



### 2.3 The rationale for decentralisation

Although the objectives of decentralisation are many and vary from country to country in Africa, one could generally condense the main ones into four themes. These objectives have dictated not only the nature and scope of decentralisation, both in terms of whether a unitary or federal system is adopted, but also the degree of centralising or “de-centering” power along the continuum ranging from strong subordination to strong equi-ordination.

One important objective is that of peace-making and state-building in fragile states. The aim is to keep the state intact or settle potential conflicts by accommodating minorities (often ethnic) and marginalised groups in an inclusive system of government; this promotes inter-group harmony by giving each constituent group a political space of its own in which it is able to express its own values, identity and interests without fear of domination or veto by a central government controlled by an ethnic majority.

A second objective is to limit the abuse of power by centralised government, power usually concentrated in the hands of an authoritarian president and a clique of cronies, by devolving some powers away from the centre to subnational governments. A third is to enhance development by bringing government closer to the people to ensure that development projects reflect regional and local preferences and that resources are spread more equitably across the country; this is also to bring about better service delivery and encourage greater public participation in development.

A fourth objective is promoting constitutionalism and democracy. This involves the establishment of democratic governance at subnational level to provide a legitimate basis for local government as well as allow for a democratic ethos to permeate the entire polity from the bottom up. Bringing government closer to the people promotes constitutionalism by increasing the opportunities for popular participation in governance and by providing avenues for checks and balances that can minimise the abuse of powers and tyranny by the majority.

Two points are worth noting. The first is that the objectives regarding the form and degree of decentralisation vary not only between states but also with time: changed circumstances may compel one particular approach or emphasis or another. The second point is that there are also numerous compelling counter-arguments against decentralisation. For example, it may work against democracy if local interests are allowed to frustrate the will of a democratic majority. It is not a forgone conclusion that decentralised decision-making is actually less prone to elite domination, corruption and the like. Since decentralisation is often designed to create competing centres of power, in a weak, fragile state it may generate instability if rival elites set out to exploit this dispensation. With regard to social and economic development policy and delivery, fragmented authority can impair the ability to mobilise financial and human resources for addressing massive developmental challenges. With respect to diversity, the flip side of the coin is that decentralisation could entrench, institutionalise, perpetuate and exacerbate the very divisions it is designed to manage; in fact, it may provide nationalistic ethnic elites a platform from which to promote secession or ethnic cleansing.

Nevertheless, the failure or success of decentralisation will often depend on the specific design of the decentralised institutions and whether it is capable of ensuring that the intended goals are achieved. Factors that must be taken into account in designing the process include the number, diversity and character of ethnic groups in the country; colonial legacies; the distribution of wealth and resources across the territory; the skills and capacities available to

governments at local, provincial and national levels; and the effectiveness of other elements in the institutional structure, such as legislatures, electoral systems, the judiciary and bills of rights. Of paramount importance, ultimately, is the extent to which these different factors are constitutionalised. It is to this that we now turn.

### **3. A SYNOPSIS OF THE EXTENT OF THE CONSTITUTIONALISATION OF DECENTRALISATION IN AFRICA**

To what extent has Africa's "silent revolution" of decentralisation moved governments closer to the people and provided better prospects for fair, accountable and responsive governance conducted in accordance with the principles of constitutionalism and respect for the rule of law? The overview that follows is drawn from an examination of the constitutional provisions dealing with decentralisation in Africa's 54 countries. The analysis of these provisions was guided by seven indicators: the form of governance adopted; the number of levels of government; the extent of recognition and protection of subnational units (more specifically local government); the extent of political, administrative, and fiscal decentralisation; and the extent of decentralisation of traditional institutions of governance. The main findings are summarised below.

#### **3.1 Decentralisation and the federal/unitary state dichotomy**

It is important to note that African governance systems are a continuation of what was received and retained at the end of the colonial period. Before the advent of colonialism, however, the continent was dominated by tribes and clans. Through a process of conquest and cooperation, many of them became parts of large kingdoms, where in most cases they kept their autonomy and self-rule. Colonialism forced the various tribes, clans and kingdoms to be merged into the modern states of today, the foundations of which were laid at the Berlin Conference of 1884-1885 on the partition of Africa; nevertheless, the colonial powers, whether through assimilation or indirect rule, allowed some form of self-rule and autonomy to the disparate ethnic groups and tribes they had brought together.

The main models of governance that influenced, and continue to influence, developments in Africa correspond to the approaches adopted by the principal colonial powers that were active on the continent, namely, Britain, France and Portugal.<sup>15</sup> The German approach has also become influential recently.

The British model was based on a strong central control and dual supervision. There was a stronger role for centrally appointed officials and sectoral and functional ministries in the provision of services. In former British colonies, the role of field officers was strengthened to provide general supervision and control of local governments on behalf of the central colonial government.

The French model also involved very strong central command and dual supervision. However, in this model the national government and its agencies represented the apex of the system, with an unbroken chain of command descending downwards through regional and

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<sup>15</sup> See generally Elroy Africa, "Development of the Africa Local Governance Timeline: Decentralization Study Post 1980," <http://www.elroyafrica.com/Portals/0/Documents/African%20Local%20Governance%20Timeline%20-%20Overview%20of%20Decentralisation%20in%20Africa%20-%20Since%201980s.pdf.pdf> (accessed in April 2017).

departmental prefects to chief executives and mayors at the lowest rung of the system. There was a similar chain of command through line and functional ministries. The system permitted the so-called *cumul des mandats* (concurrent political mandates, or the holding of multiple offices or positions cumulatively), which were designed to provide elected leaders at the lower echelons with a voice at the higher levels of governments.

This heavily centralised model and its variations were applied to African colonies not only by France but so too by Portugal and Spain. Furthermore, as mentioned, more recently elements of the German model of decentralisation – which emphasises subsidiarity, cooperation and administrative efficiency – found their way into the South African 1996 Constitution as well as other constitutions influenced by it, such as the Kenyan and Zimbabwean Constitutions of 2010 and 2013, respectively. This model entrusts policy-making functions to the central level and service delivery responsibilities to the provinces and local government, to which it gives a great deal of autonomy in service delivery.

It is against the backdrop of the inherited colonial models and the current developments that have seen a large degree of dilution and convergence between the federal and unitary systems that the trends in African must be understood. In general terms it can be said – mindful of the difficulties of making any strict conceptual distinctions that are uncontroversial – that one can identify at least four main governmental patterns in Africa: the federal, the quasi-federal (federal-type), the unitary and the monarchical regimes.

Historically, there have been many federal experiments in Africa since the independence period of the 1960s, though few of these federations lasted for long.<sup>16</sup> Two main categories of federations came into existence at independence in the 1960s. The first consisted of intra-state federations, where federal structures were established as the country became independent (so-called “holding-together federalism”). The countries in this category were Nigeria, Kenya, Uganda and the Democratic Republic of Congo (DRC). The second category consisted of inter-state federations, where federal structures were established to bring states together (so-called “coming-together” federalism). The main countries in this category were the defunct Federal Republic of Cameroon (which brought together British Southern Cameroons and French Cameroun), the union between Ethiopia and Eritrea (which ended in 1991 when Eritrea won its war of independence), the short-lived federation between Senegal and Mali (then known as French Soudan) and the United Republic of Tanzania (made up of Tanganyika and the island of Zanzibar).

There were a variety of motives for these different federations. However, by the beginning of the 1990s, federalism had failed in most of the states which had adapted it at or shortly after independence. It suffices to point out that, of Africa’s 54 countries, only three can be said to meet most of the classic requirements for classification as federations. These are Ethiopia, Nigeria and Somalia (at least, as contemplated under the provisional Constitution of 2012). One important feature of all these constitutions is that they provide for different degrees of decentralised governance.

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<sup>16</sup> See Michel Burgess, “Federalism in Africa: An essay on the impacts of cultural diversity, development and democracy,” <http://docplayer.net/24010025-Federalism-in-africa-an-essay-on-the-impacts-of-cultural-diversity-development-and-democracy.html> (accessed in March 2017). Burgess points out that not only were there pre-colonial indigenous federations, such as the Ashanti Federation, but there were also many types of federations during the colonial period. He divides them into four categories: federations established for imperial administrative and political convenience; those with imperial “motherland” linkages; those established for commercial enterprise and economic cooperation for strengthening intra-African trade links; and those established as part of the process of state-building.

Many more countries that have introduced federal elements in their constitutions can be regarded as hybrid or quasi-federations. This category consists of countries combining many of the classic elements of a centralised unitary state with those of a federal state. The countries here are the Comoros, under its Constitution of 2001 (as amended in 2009); the DRC under its 2006 Constitution; Kenya under its 2010 Constitution; South Africa under its 1996 Constitution; South Sudan under its Transitional Constitution of 2011; and Sudan under its Interim National Constitution of 2005. As with the three federal countries above, all of them provide too for different degrees of decentralisation.

Three states in Africa are classifiable as monarchies. Two of them, Lesotho<sup>17</sup> and Morocco,<sup>18</sup> can be considered as constitutional monarchies in that the monarch plays a largely ceremonial role and has limited discretionary powers over governance issues. Nevertheless, it is worth observing that, in comparison to the King of Lesotho, the Moroccan King has more discretionary powers but the exercise of the powers of both monarchs is subject to the constitution. By contrast, the third country, Swaziland, is an absolute monarchy, and King Mswatii II has extensive discretionary powers which allow him to be actively involved in the governance of the country.<sup>19</sup> The constitutions of all three of these countries provide for decentralisation of governance in one form or another.<sup>20</sup>

An overwhelming majority of African states have adopted the unitary form of government. In a number of instances this is explicitly stated in the constitution, but more commonly it is implied by other provisions within it.<sup>21</sup> In the two oldest constitutions on the continent – the Botswana and Mauritius Constitutions of 1966 and 1968, respectively – decentralisation is not mentioned specifically and local government is referred to very incidentally.<sup>22</sup> Nonetheless, as pointed out earlier, the absence of a provision entrenching decentralisation does not necessarily mean no system of decentralisation is in place. For example, Botswana has an extensive system of decentralisation through local government, but this depends entirely on ordinary legislation – the Local Government Act of 2012 – adopted by parliament rather than the Constitution.<sup>23</sup> On the other hand, the constitutionalisation of decentralisation

<sup>17</sup> Section 1(2) of the 1993 Constitution of Lesotho (as amended in 2004) states that “Lesotho shall be a sovereign democratic kingdom”.

<sup>18</sup> Article 1 of the 2011 Moroccan Constitution states that Morocco is a constitutional, democratic, parliamentary and social monarchy.

<sup>19</sup> Although its 2005 Constitution states, in section 1(1), that “Swaziland is a unitary, sovereign, democratic Kingdom” and, later in section 2(2), that “[t]he King and iNgunyama and all the citizens of Swaziland have the right and duty at all times to uphold and defend this Constitution”, the powers conferred on the King in provisions such as sections 11, 64(1) and 65(4) place him above, rather than below, the Constitution. See more generally Charles Manga Fombad, “The Swaziland Constitution of 2005: Can Absolutism be Reconciled with Modern Constitutionalism?” 23 *SAJHR* (2007), pp. 93-115.

<sup>20</sup> See section 106 of the Lesotho Constitution, which provides for local government; articles 63-67 and 135-146 of the Moroccan Constitution, which provide for regions and other lower units; and section 218-226 of the Swaziland Constitution, which provides for local government.

<sup>21</sup> For example, article 8 of the Angolan Constitution of 2010 states that “[t]he Republic of Angola shall be a unitary state ...” For other examples, see article 1 of the Burundi Constitution of 2005, article 1(5) of the Constitution of Eritrea of 1997, and article 1(1) of the Constitution of Namibia of 1990.

<sup>22</sup> In the case of Botswana, local government authority is mentioned in provisions such as sections 9(2)(c), 12(2)(c), 13 (2)(c) and 15(5) with respect to certain limitations provided for in the bill of rights. Similarly, several provisions in the Mauritius Constitution also mention local government incidentally. For example, section 34, dealing with the disqualification for membership of the Assembly, excludes in subsection (1) (2b) a person who “is a public officer or a local government officer”.

<sup>23</sup> See K.C. Sharma, “Role of local government in Botswana for effective service delivery: Challenges, prospects and lessons,” <file:///C:/Users/P4380886/Downloads/1908-7729-1-PB.pdf> (accessed March 2017); and

in most Francophone constitutions is limited to just one or a few obliquely worded provisions.<sup>24</sup> This contrasts rather sharply with the approach adopted in most Anglophone constitutions, where the matter is dealt with in elaborate provisions. However, the critical issue is not merely constitutionalisation, but rather the scope and depth of the decentralisation thus entrenched. It is this theme which is examined in the sub-sections below.

### **3.2 The levels of decentralised governance and extent of their protection**

An important indicator of the depth of decentralisation, and therefore of its ability to bring government close to the people it is supposed to serve, is the existence of and number of tiers of subnational governments and the protection given to these lower levels in the constitution. The importance of a clear indication of the number of tiers of government, like the whole idea of constitutional entrenchment itself, is to safeguard against arbitrary disbandment of a tier at the convenience of the central government. Three main patterns can be observed.

The first are those constitutions which are silent on what tiers of government are envisaged. This is commonly the case in Francophone constitutions, but a number of Anglophone constitutions have taken a similar approach.<sup>25</sup> Many constitutions provide for two tiers of government: regional, state, county or provincial level and local government level.<sup>26</sup> The rest of the constitutions provide for more than two tiers of government. Although the number of tiers of subnational levels of government is critical in assessing the closeness of government to the people and therefore their ability to influence its decisions, the key factor is usually the extent to which there are constitutional safeguards to prevent the lower tiers from being abolished when it suits the political convenience of the central government. This will happen usually when the incumbent party loses control of some of the important metropolitan councils after local government elections.

Subnational-level government security is high where their existence is secured through reasonable constitutional restraints that have been put in place to check against arbitrary disbandment by the central government. This is often the case where the powers of the subnational units are either explicitly stated in the constitution in terms that do not allow much scope for interference by the central government, or where no amendments are permitted which would affect the devolved nature of governance.<sup>27</sup> In many constitutions, the level of subnational-unit governance protection is moderate, mainly because the powers of the lower levels of government are specified in terms that allow considerable scope for central government interference. This is true not only of federal states, such as Ethiopia and

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Michael Ashley, "Mauritius: A Review of the Local Government Structure, Functions and Legislation," [http://www.clgf.org.uk/default/assets/File/Country\\_profiles/Mauritius\\_report\\_Ashley\\_Feb\\_2007.pdf](http://www.clgf.org.uk/default/assets/File/Country_profiles/Mauritius_report_Ashley_Feb_2007.pdf) (accessed March 2017).

<sup>24</sup> See for example article 102 of the Central African Republic (CAR) Constitution of 2010; article 112 of the Constitution of Gabon of 1991 (as amended in 2011); article 98 of the 1991 Constitution of Mauritania (as amended in 2012); and article 102 of the Constitution of Senegal of 2001 (as amended in 2010).

<sup>25</sup> For example, see section 106 of the Lesotho Constitution and article 3 of the Liberia Constitution of 1986.

<sup>26</sup> See for example article 16 of the 1996 Constitution of Algeria (as amended in 2016); article 252(4) of the Cape Verde Constitution of 1980 (as amended in 1982); article 55 of the 1996 Constitution of Cameroon; article 102 of the CAR Constitution of 2004 (as amended in 2010); and article 174 of the Constitution of the Republic of Congo of 2001.

<sup>27</sup> The concept of unamendable constitutional provisions, or so-called perpetuity clauses is, as has been the case under many African constitutions, an illusion. See further Charles Manga Fombad, "Some perspectives on durability and change under modern African constitutions," 11(2) *International Journal of Constitutional Law* (2013), pp. 382-413.

Nigeria,<sup>28</sup> and quasi-federal ones, such as South Africa and Sudan, but also of many unitary states.<sup>29</sup>

However, an overwhelming majority of African states have a low level of protection of subnational-level governance. The reasons for this vary considerably. For example, it may be so because this level of governance is not explicitly or implicitly constitutionalised, as we noted in the case of Botswana and Mauritius. More often, though, it is because the constitution leaves it up to the central government to determine the number of sub-units to be created as well as what their powers, or, where it does provide for the establishment of such sub-units and defines their powers, it gives central government unlimited powers to interfere with, expand or abridge these powers as it finds it necessary. In this latter case, the level of security of subnational governance is still low, notwithstanding that the powers apparently conferred on these subnational units seem to be very wide-ranging.

Closely linked to the protection of subnational units is the extent to which they are allowed to govern themselves, a matter taken up in the next section.

### 3.3 The extent of political decentralisation

Considering the fundamental preoccupation of post-1990 constitutional design with promoting democracy, the question here is to ascertain to what extent the political decentralisation aimed at promoting home rule for participatory local governance has been constitutionalised. The main indicators of the prospects for effective political decentralisation are the provisions for legislative and executive election of officials at the subnational government level.

At the legislative level, the question is whether the legislative bodies provided for at the subnational government level are elected (directly or indirectly), are appointed, or are somewhere in between (that is, partly elected and partly appointed). The same question applies to the executive bodies; for instance, the heads of subnational government units, such as the governor of states or provinces and the mayors of municipal councils, along with their executives. Are they elected, directly or indirectly, or are they appointed?

Numerous constitutions contain provisions that provide for the election of members of the legislative and executive bodies of subnational units.<sup>30</sup> An overview of African constitutions

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<sup>28</sup> For example, article 52(1) of the Ethiopian Constitution of 1995 provides that “[a]ll powers not given expressly to the Federal Government alone, or concurrently to the Federal Government and the States are reserved to the States”. By contrast, whilst the Nigerian Constitution of 1999 clearly specifies the states that make up the federation – and even protects against “gerrymandering” in section 8, which provides a complex procedure for the establishment of new states – the status of local governments is made to depend, under section 7(1), on state legislation that will determine their “establishment, structure, composition, finance and function”.

<sup>29</sup> For example, under the South African Constitution the division of powers between the national government and local government is set in sections 44 and 156, as well as schedules 4 and 5 of the Constitution; nevertheless, the central government is dominant. This is so for several reasons. The main ones are because it can override on any matter on the concurrent list; it can legislate in matters within exclusive the provincial list in schedule 5; and it can intervene under section 44(2) in cases of necessity (national security, maintenance of economic unity, uniformity of national standards and minimum standards, or prevention of action prejudicial to other province or nation as whole). Under the Sudanese Constitution of 2005, see articles 25-26 and 177-184. For some examples under unitary constitutions, see articles 217-220 of the 2010 Angolan Constitution; article 260-264 of the 2005 Burundian Constitution; articles 201-206 of the Guinea Bissau Constitution; sections 124-126 of the Tanzanian Constitution 2014; and sections 264-279 of the 2013 Zimbabwean Constitution.

shows that there are many in which the level of the constitutionalisation of political decentralisation of subnational government is fairly low and therefore does not bode well for promoting local self-governance. The reasons for this are diverse. It is obviously the case where the exact nature and scope of political decentralisation is vaguely stated or is left to be defined by law (in other words, the central government).<sup>31</sup> This also often arises where the constitution provides for a mix of elected and appointed officials at the subnational level.<sup>32</sup> The issue of political decentralisation is commonly linked to the level of administrative decentralisation.

### 3.4 The extent of administrative decentralisation

The level of administrative decentralisation is assessed from the extent to which the constitution clearly distinguishes between the roles of the different levels of government. Equally important is whether there is an indication that lower levels of government can hire and fire staff, set the terms of their employment, and have regulatory control over them. This is where the distinction between devolution of powers, deconcentration of powers and delegation of powers becomes very important. Administrative decentralisation is high where there is effective devolution of powers, and low where there is some deconcentration of powers or a mere delegation of powers. It is low if there is a partial devolution of powers combined with some deconcentration of powers. In many respects, administrative decentralisation reflects the extent to which the powers of subnational units are defined and protected.

In general, countries with a federal or quasi-federal system, such as Nigeria, Kenya and South Africa, mostly have a high degree of administrative decentralisation.<sup>33</sup> Many others have a moderate degree of administrative decentralisation.<sup>34</sup> It is mainly in Francophone, Hispanophone and Lusophone constitutions where the level of administrative decentralisation is low, due to the large degree of discretionary and supervisory powers the constitution grants the central government over subnational units.<sup>35</sup> In fact, in many such countries decentralisation amounts to a mere deconcentration of powers, with the discretion given to the central government to delegate those powers it considers appropriate or necessary.<sup>36</sup> The same is also true, though, of certain Anglophone jurisdictions, where political and administrative decentralisation can overlap in a similarly confusing way.<sup>37</sup>

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<sup>30</sup> For example, see articles 277-182 of the Kenyan 2010 Constitution; sections 105-106, and 157-159 of the South African Constitution; and sections 268-272 and 277 -278 of the 2013 Zimbabwean Constitution.

<sup>31</sup> This is commonly the case with Francophone African constitutions, for example article 151 of the 1990 Benin Constitution.

<sup>32</sup> See for example articles 57-60 of the Cameroon Constitution of 1996 and, to some extent, articles 242(a) and 243 of the Ghana Constitution of 1992.

<sup>33</sup> See also articles 176(2)(f) and 198 of the Ugandan Constitution of 1995; sections 227-228 of the Zambian Constitution of 2014; and section 266 of the Zimbabwean Constitution of 2013.

<sup>34</sup> See for example articles 199 and 201 of the Angola Constitution of 2010; articles 263-264 of the Burundi Constitution of 2005; and article 110 of the 1990 Namibian Constitution.

<sup>35</sup> For example, see articles 55(3) of the Cameroon Constitution of 1996; articles 207-208 of the Chadian Constitution of 1996; article 88 of the Djibouti Constitution of 2010; and articles 134 -136 of the Guinean Constitution of 2010.

<sup>36</sup> See for example articles 141, 249-250 and 277-280 of the Mozambican Constitution of 2004

<sup>37</sup> See for example articles 255-266 of the 1992 Constitution of Ghana.

### 3.5 The extent of fiscal decentralisation

However extensive the degree of independence from the centre that a constitution provides for through political and administrative decentralisation of subnational units, it will not count for much unless it is matched by a reasonable degree of fiscal decentralisation. Without adequate budgetary resources to address local needs, subnational units will easily fall prey to being captured and controlled by the central government. Constitutional provisions allocating budgetary resources to subnational units offer important protection against arbitrary central government interference and are thus critical to an effective system of decentralisation. The extent – and hence potential effectiveness – of fiscal decentralisation depends on the scope of budgetary allocation specified in the constitutional provisions.

The constitutions of Kenya, South Africa, South Sudan, Uganda and Zambia provide for a high level of fiscal decentralisation.<sup>38</sup> Of these, the South African Constitution, with 19 provisions regulating financial matters, is perhaps the most elaborate in this regard. It provides for the creation of a National Revenue Fund, a Financial and Fiscal Commission, and a Central Bank. Furthermore, the provisions deal with issues such as the equitable sharing and allocation of revenue between the different levels of government; the manner of regulating national, provincial and municipal budgets; treasury control; procurement; government guarantees; and remuneration of persons holding public office. The Constitution also has an extensive set of provisions on provincial and local financial matters. Although it is the case that in practice there is a high degree of concurrency in the division of powers, close fiscal ties between the levels of government, and some central government supervision over provinces and local governments, on balance the subnational units retain a high degree of financial autonomy and are enabled to operate independently.

Another group of countries provides a moderate level of fiscal decentralisation in their constitutions.<sup>39</sup> Some of the provisions regulating financial matters between the levels of government are quite elaborate, but the wide discretionary powers conferred on central government could easily be exploited to interfere with the ability of subnational units to meet the needs of their constituents. On the whole, though, the majority of African constitutions provide a low level of fiscal decentralisation. This may be so either because there is no provision on decentralisation,<sup>40</sup> or because, if there is one, it does not deal with fiscal decentralisation.<sup>41</sup> Low levels of fiscal decentralisation are the norm in most Francophone and Lusophone African constitutions, but the approach has also been adopted by the recent Arab Spring constitutions.<sup>42</sup>

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<sup>38</sup> See articles 200-224 of the 2010 Kenyan Constitution; sections 213-230A of the 1996 South African Constitution; sections 168, 175-179 of the 2011 Transitional Constitution of the Republic of South Sudan; articles 178A, 190-197 of the 1995 Constitution of Uganda; and sections 161-164 of the 2016 Constitution of Zambia.

<sup>39</sup> See for example article 255 of the Cape Verde Constitution of 1992; article 11 of the Comoros Constitution of 2001; articles 95-100 of the 1995 Ethiopian Constitution; articles 240(2)(c) and 252(2) of the 1992 Ghanaian Constitution; section 149-150 of the Malawi Constitution of 1994; section 162-164 of the 1999 Nigerian Constitution; and articles 185, 193-196 and 200 of the Sudanese Interim Constitution of 2005.

<sup>40</sup> An example of this is Botswana, which still operates under its 1966 independence Constitution.

<sup>41</sup> See for example article 112 of the 1991 Gabonese Constitution; articles 97-98 of the 1992 Malian Constitution; and article 102 of the 2001 Senegalese Constitution

<sup>42</sup> See for example article 118 of the 2014 Egyptian Constitution; articles 141-142 of the Moroccan Constitution of 2011; and articles 155-137 of the Tunisian 2014 Constitution.



### 3.6 The place of traditional institutions in Africa's decentralised systems

The question of where traditional institutions fit into modern decentralised governance in Africa today has not attracted much attention, yet it is a pertinent issue. Traditional systems of governance did not disappear with the partition of Africa at the Berlin Conference of 1884-1885. They were retained by the different colonial powers and easily adapted to assist them fulfil their exploitative mission in Africa. Although, generally speaking, the complicity of traditional leaders through collaboration with the colonial powers goes back to the slave trade and continued after the independence period, the leaders' exact status and role in modern governance are uncertain and controversial.<sup>43</sup>

A wide variety of traditional forms and institutions of governance co-exists visibly or "invisibly" alongside modern systems of governance. Whilst their pervasive existence throughout Africa is not in doubt – making them an important instance of the phenomenon of the "invisible" constitution at work in Africa – our focus here is on those instances where they have been made visible through constitutional entrenchment.<sup>44</sup> The approaches adopted in the different African constitutions vary from one country to another. As in the preceding discussion, one can make the distinction between high, moderate and low levels of decentralisation of traditional institutions in modern African constitutions.

A high level of such decentralisation is found in the constitutions of Ghana, Lesotho, Uganda, Zambia and Zimbabwe.<sup>45</sup> For example, the Ghanaian Constitution contains provisions which define the institution of chieftaincy, provide for the creation of Regional and a National House of Chiefs, and specify what their functions will be. Chiefs are, however, barred from taking part in active politics.<sup>46</sup> A second category of constitutions also contain provisions dealing with traditional institutions, but these are often less detailed than those in the preceding group.<sup>47</sup>

The third category, to which an overwhelming majority of African constitutions belong, is one in which there is either an obscure reference to traditional institutions<sup>48</sup> or complete silence. The main reason for the non-constitutionalisation of the role of traditional institutions within Africa's modern decentralisation systems lies in the difficulties of defining what precise role they are to play. For example, unlike all Nigeria's previous constitutions, its Constitution of 1999 is silent on the role of traditional institutions owing to disagreement on what approach to take. The South African 1996 Constitution, in its sections 211-212, recognises the role of traditional institutions and traditional leaders and mandates the legislature to enact laws regulating this. Due to disagreement about the nature of the role

<sup>43</sup> See Charles Manga Fombad, "The Evolution of Modern African Constitutions: A Retrospective Perspective", in Charles Manga Fombad (ed.), *Separation of Powers in African Constitutionalism*, Oxford, Oxford University Press (2016), pp.13-57.

<sup>44</sup> On the invisible constitution, see Laurence Tribe, *The invisible constitution*, Oxford, Oxford University Press (2008).

<sup>45</sup> See articles 242(d) and 270-277 of the Ghanaian 1992 Constitution; section 44-53, 92 and 103-104 of the Lesotho Constitution of 1993; article 246 of the Ugandan Constitution of 1995; article 164-172 of the Zambian Constitution of 2016; and section 280-287 of the 2013 Zimbabwe Constitution.

<sup>46</sup> See the provisions cited above.

<sup>47</sup> See for example articles 213 and 223-224 of the Chadian Constitution of 1996; article 207 of the DRC Constitution of 2006; article 118 of the Mozambican Constitution of 2004; article 102(5) of the Namibian Constitution of 1990; article 166-167 of the Interim Constitution of South Sudan of 2011; sections 227-235 of the Swaziland Constitution of 2005; and article 143 of the Togolese Constitution of 1992.

<sup>48</sup> See for example sections 58-59 of the Gambian Constitution of 1997 and section 146(4) of the Malawian Constitution of 1994.

these institutions should be given, the legislature has been unable to come up with a law acceptable to all stakeholders, especially the traditional leaders themselves and human rights institutions opposed to the continuation of certain traditional practices.

Nevertheless, as observed above, traditional institutions remain one of the most important features of the “invisible constitution” at work in Africa, playing a significant role particularly in those parts of the various countries where the modern system of administration has only a limited and ineffective presence. The question that arises next is whether the constitutionalisation of decentralisation – be it high, moderate or low in extent – has any implications for its effectiveness, particularly in promoting the goal of constitutionalism.

#### **4. IMPLICATIONS OF CONSTITUTIONAL ENTRENCHMENT FOR THE CONSOLIDATION OF CONSTITUTIONALISM**

The effectiveness of any system of decentralisation depends as much on its design as it does on the political will of the government and the readiness of its political and administrative officials to implement it. These are two key and interdependent variables. On the premise that a good design positively affects the government’s willingness or ability to implement, it is contended that constitutional entrenchment of a well-designed decentralisation system, whilst not guaranteeing effective implementation, enhances the prospects for this, in addition to which it creates considerable scope for deepening democracy, constitutionalism and respect for the rule of law.

As noted earlier, the constitutional entrenchment of decentralisation systems is one of the major innovations to have emerged in post-1990 African constitutional design. The dispersal of powers horizontally and vertically to different levels of government was considered a much-needed antidote to counter the obsessive inclination of African leaders to concentrate power around the president and the presidency. The main argument of this paper has been that the decentralisation of powers to sub-units can only be potentially effective if it is explicitly spelt out in the constitution. Such constitutional entrenchment, depending on its degree and scope, has a number of advantages in terms of promoting constitutionalism.

First, the decentralisation of government is not an event but a process, one often taking years to complete. Once the process has been started, its sustainability is crucial to its success. Owing to the special legal status of constitutions, constitutionally entrenching a particular system of decentralisation will help to ensure that it endures and is not vulnerable to careless, casual or arbitrary amendment by transient majorities or opportunistic leaders pursuing self-interested agendas.<sup>49</sup> In other words, when a decentralised framework is constitutionally entrenched, it has a greater prospect of institutional durability, certainty and predictability than a framework created by ordinary legislation, which can be changed by parliament at any given moment for the convenience of the government in power.

A second advantage is that constitutional entrenchment, especially where it defines the scope of the powers of the different levels of government, ensures that there is clarity in the roles to be played by each. This affords a firm ground for good intergovernmental relations and open

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<sup>49</sup> See further Charles Manga Fombad, “Some Perspectives on Durability and Change Under Modern African Constitutions,” 11(2) *International Journal of Constitutional Law* (2013), pp. 382-413.

dialogue between not only the levels of government themselves but the latter and civil society and other stakeholders, relations and dialogue that are together promotive of self-government.

Thirdly, provisions entrenching a particular system of decentralisation can be reinforced by making their implementation mandatory<sup>50</sup> rather than leaving it at the discretion of the government. This opens the way for an action for violation of the constitution where the alleged violation consists of a failure to fulfil any constitutional obligation. Constitutional entrenchment can have the effect of legally compelling the executive and legislature to fulfil their duty to implement the system of decentralisation in the exact manner contemplated by the constitution. For example, one of the most progressive provisions in the 2010 Kenyan Constitution designed to promote equality between the sexes introduced the principle that no more than two thirds of the lawmakers should be men.<sup>51</sup> This was not implemented until four rights groups petitioned the High Court. In a landmark judgment, the Kenyan High Court, on 29 March 2017 (7 years after the Constitution came into effect), gave Parliament 60 days to enact legislation making it obligatory to have more female lawmakers or face dissolution. In passing the judgment, Judge John Mativo said that by failing to pass the required law, Parliament was guilty of a “gross violation” of the Constitution.<sup>52</sup> Certain constitutions even sanction non-compliance with their provisions, but the scope for this action is often limited.<sup>53</sup> The Zimbabwean Constitution, which provides that “all constitutional obligations must be performed diligently and without delay”,<sup>54</sup> equally affords a solid legal basis for taking action against the government for failure to implement the provisions on decentralisation. It can be argued that constitutional entrenchment of decentralisation has become the best way to effectively disperse and share power because of the increasing awareness of the legal avenues for compelling governments to implement national constitutions in Africa.<sup>55</sup>

A fourth point is that, depending on the scope, breadth and depth of the decentralisation spelt out in the constitution, it can promote responsiveness, transparency and accountability. This could reduce the excessive dependence of subnational units on the goodwill of the central government in making resources available to subnational units through financial transfers. It can also be argued that this has been strengthened in some constitutions by the possibilities of action for non-compliance with constitutional obligations to decentralise opened by the expansion of the *locus standi* rules for constitutional action.<sup>56</sup> The right of public interest

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<sup>50</sup> For an example of such an obligation, see section 2 of the South African Constitution of 1996, which states that “this constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, *and the obligations imposed by it must be fulfilled*” (emphasis added).

<sup>51</sup> In this regard, article 27(8) states: “In addition to the measures contemplated in clause 6, the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.”

<sup>52</sup> See, “Kenya court orders Parliament to pass gender quota,” <http://www.news24.com/Africa/News/kenya-court-orders-parliament-to-pass-gender-quota-20170329> accessed in March 2017.

<sup>53</sup> For example, under the 2010 Kenyan Constitution this is limited to article 158(1), which provides that the Director of Public Prosecutions may be removed from office for, inter alia, non-compliance with chapter six of the Constitution.

<sup>54</sup> Section 324 of the 2013 Zimbabwe Constitution.

<sup>55</sup> See generally, Charles Manga Fombad, *The Implementation of Modern African Constitutions. Challenges and Prospects*, Pretoria, PULP (2016).

<sup>56</sup> In this regard, article 22(2) of the Kenyan 2010 Constitution states that proceedings for violation of the Constitution could be instituted by:

- (a) a person acting on behalf of another person who cannot act in their own names;

action is a necessary response to the growing disenchantment with the ability and willingness of many African governments to implement the provisions on decentralisation.<sup>57</sup> This will strengthen the hands of individuals and civil society organisations (CSOs) to actively monitor and expose public officials and institutions that are not complying with their constitutional mandate. The move towards a self-enforcing constitution enhances each individual in the society's right for self-government and inevitably involves the transfer of some powers from the public into private hands, which is likely to promote greater efficiency and efficacy in dealing with constitutional matters.

Finally, constitutionalisation not only creates formal structures for the participation of citizens in governance, but also encourages informal structures of participation by civil society and foreign donors. In this way, foreign donors can direct their assistance to specific local projects where transparency and accountability can be monitored more easily. In short, decentralisation can help to build democracy from the bottom.

## 5. CONCLUSION

Many African countries are still plagued by intra-country conflict and under- and uneven development, where power is centralised and abused to the narrow patrimonial advantage of political elites or in a sectarian manner for the benefit of a section of the population. In many cases, the adoption of constitutions reflecting the objects of limited and accountable government has not resulted in constitutionalism. Some countries have remained or become fragile, and some have failed. While multiparty democracy is accepted in theory at the national level (and increasingly in practice as well), opposition-held governments at subnational level are often not tolerated. Constitutionalism and respect for the rule of law remains an ideal rather than a daily practice. It has been argued that a constitutionally entrenched system of decentralisation provides an opportunity to overcome some of these challenges.

However, constitutional entrenchment of decentralisation is not a magic solution that guarantees effective decentralisation or even that all the objectives of the decentralisation process will be achieved. It nevertheless enhances the prospects for effective implementation of the process and therefore the chances that its objectives will be met. In the absence of an elaborate and constitutionally entrenched process, the prospects of decentralisation will depend on the goodwill of government, but the historical record of governance so far shows that hardly any African government will voluntarily share power with the subnational units that have become an inevitable part of modern governance.

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(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

Article 22(2) goes even further, limiting formalities relating to proceedings to a minimum and providing that the court shall, "if necessary, entertain proceedings on the basis of informal documentation", and that "no fee may be charged for commencing the proceedings". A similar approach is provided for under section 85 of the 2013 Zimbabwe Constitution. The 2010 Angolan Constitution, in articles 73-75, also appears to broaden the rules of *locus standi*, but the language in which this is couched – along with articles 228 and 230, which restrict access to certain specified personalities – casts serious doubts on its effectiveness.

<sup>57</sup> For example, only certain aspects of part X of Cameroon's 1996 Constitution (dealing with decentralisation) have been implemented, in initiatives begun in 2004 and 2008. The decentralisation provided for thus exists more so on paper than in reality.

All African states are essentially artificial conglomerations of diverse ethnic, cultural, religious and linguistic groups that need to develop sustainable mechanisms in order to balance and contain the centrifugal tensions that are inherent in maintaining such diversity within a polity. The adoption of different types, forms and levels of multilevel governance through decentralisation in modern African constitutions in the last three decades has been one of the most significant developments in the effort to address not just the problems of diversity but – through the entrenchment of constitutionalism and promotion of democracy, good governance and respect for the rule of law – other debilitating problems that have retarded the continent's development, such as poverty, gender inequality, environmental degradation and access to education and health care.

From an analysis and comparison of the trend in the constitutionalisation of decentralisation in African constitutions today, two important lessons can be learnt. The first is that, depending on the scope and depth of decentralisation, it is possible to counter and reduce the ever-present risk of re-centralisation and de facto reassertion of central government control by Africa's dictators. Second, a carefully crafted decentralised framework that is self-enforcing can ensure that the constitutional obligation to disperse and share power with subnational units can be legally enforced by all stakeholders. This, it has been argued, will ensure that decentralisation does not hinge on the goodwill alone of the central government.

The study clearly shows that the most successful countries, in terms of constitutionalised and hence self-enforcing and sustainable systems of decentralisation, have been the Anglophone ones, with the best examples so far being Kenya, South Africa and Zimbabwe. It also shows, by contrast, that Francophone, Lusophone and Hispanophone Africa lag behind in this regard.

However, the study does no more than indicate trends and tendencies based only on what is stated in a constitution. There is need for a more elaborate study taking into account the legislation which has been introduced in many countries, particularly those like Botswana and Mauritius, which have no constitutionally entrenched system of decentralisation. In this respect, a more elaborate research to fully assess the effectiveness of decentralisation in Africa is needed that will take into account all the relevant legal and policy documents countries have adopted. This may require devising a number of indicators to guide such a comparative assessment. Because of the fundamental need to build and sustain democracy from the grassroots, promote constitutionalism, improve governance and facilitate sustainable people-centred development, developing an effective system of decentralisation will remain an important preoccupation for policy-makers and constitution designers.