

Constitutional Entrenchment of Decentralization in Africa: An Overview of Trends and Tendencies

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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

INTRODUCTION

Decentralization 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 strived to personalize power and concentrate it within a privileged clique in the capital city. This centralizing tendency, which fuelled the repressive governments that over the years came to place a stranglehold over almost all countries on the continent, is what the decentralization policies introduced from the late 1980s onwards were supposed to curb. More widely, decentralization of governance was a critical part of the so-called “third wave”¹ of democratization that ushered in a

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1 The expression was coined by S Huntington in *The Third Wave: Democratization in the Late Twentieth Century* (1991, University of Oklahoma Press). Similarly, L Diamond referred to

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 decentralization 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 decentralization has played in the design of modern African governance systems in the last three decades has been likened to a “silent revolution”.² It is worth remembering that, while most of the governance systems that African countries inherited at independence were decentralized in one form or another, they were progressively centralized for a variety of reasons³ as governments became more authoritarian. As such, in the processes on-going in Africa today, a special feature (and, arguably, a major innovation) that distinguishes the modern systems from inherited ones is their constitutional entrenchment of decentralization, especially with respect to sub-national government.⁴

This article focuses on assessing the nature and significance of the increasing trend in Africa towards constitutional entrenchment of decentralized forms of government. Although numerous studies have examined (some from a comparative perspective) decentralization in Africa, hardly any have dealt with the current trend towards constitutional entrenchment of devolved governance. It is a trend that raises important questions and has implications for the current transition to constitutional and democratic governance on the continent. For example, how widespread is this process? What form does it take? What are its implications for promoting constitutionalism? Has it

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it as a “second liberation” in “Developing democracy in Africa: African and international perspectives”, available at: <<https://web.stanford.edu/dept/iis/democracy/Seminar/DiamondAfrica.htm>> (last accessed 3 April 2018).

- 2 See M Ivanyina and A Shah “How close is your government to its people? Worldwide indicators on localization and decentralization” (2014) 8/3 *Economics* 1, available at: <<http://dx.doi.org/10.5018/economics-ejournal.ja.2014-3>> (last accessed 3 April 2018).
- 3 For example, African leaders throughout the continent have championed the centralization of governance under the pretext of promoting national unity among the diverse communities that were artificially forced together as states during the partitioning of the continent in 1884, maintaining that centralization facilitated shared political identity, nation-building and development. A key element of this was the widespread abolition, whether de jure or de facto, of multiparty systems in favour of a 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 comprising 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 corresponded fairly with traditional African systems of governance.
- 4 See D Olowu “The constitutionalization of local government in developing countries: Analysis of African experiences in global perspectives” (2012) 3 *Beijing Law Review* 42 at 44.

significantly diminished African governments' near obsessive tendency to centralize power?

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

Analysing and comparing decentralization across countries is a challenging task at the best of times. Owing to the wide variety of reasons given for implementing decentralization policies, as well as the variety of types and degrees of decentralization found across countries, it is inherently difficult to compare countries on the basis of a single notion of decentralization.⁵ 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-fertilization of ideas among African governments still in the throes of an uncertain transition. By dint of their common historical experiences and similar social, economic and political situations, it is likely that the approach one African country takes to decentralization will be more adaptable and useful to another such country than will inherited, and blindly emulated, colonial models and approaches.

Nevertheless, despite its merits, focusing on the constitutional position alone has its limitations. Two caveats are in order. First, although the constitutional entrenchment of decentralization is the strongest possible indication of a government's commitment to sharing powers with sub-national units, there are many genuinely devolved systems that are not constitutionally entrenched. This is 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 western local government systems. In other words, to gauge the true degree of decentralization 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 the government does not implement it fully. This raises the question of the effectiveness of the provisions that entrench decentralization, which in turn hinges to a large degree on what form of decentralization has been chosen, an issue to which this article now turns.

5 See R Work "Overview of decentralisation worldwide: A stepping stone to improved governance and human development" (paper presented at the second International Conference on Decentralisation, Federalism: The Future of Decentralizing States?, Manila, Philippines, 25–27 July 2002), available at: <<http://unpan1.un.org/intradoc/groups/public/documents/un/unpan030965.pdf>> (last accessed 3 April 2018).

AN OVERVIEW OF THE DECENTRALIZATION OF GOVERNANCE

Conceptualizing decentralization

The evolution and complexity of multi-level government in the last three decades in Africa in particular and globally in general have made it difficult to provide a precise definition of the concept of decentralization and an indication of its nature and scope. Nevertheless, in the context of this discussion, “decentralization” 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.⁶ At the heart of decentralization 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 fairly 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 decentralization and centralization and, on the other, between unitary and federal government. Are these separate and distinct components or aspects of decentralization, or two manifestations of the same phenomenon? Properly distinguishing between them is important in appreciating the classifications and categorizations that are made in the next section of this discussion.

The concepts of centralization and decentralization can be regarded in a general sense as operating at opposite ends of the same continuum. At one end is a “pure” form of centralized 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 Vatican City and similar micro-states, there is no purely centralized government in the world. Decentralization arises from the conferral of various powers on the sub-units, with the extent of such decentralization increasing on the continuum from a weakly decentralized system at the centralized end of the continuum to a strongly decentralized one at the other. Put differently, the decentralization of states ranges from very weak at one end of the continuum to very strong at the other.

6 See M Böckenförde *A Practical Guide to Constitution Building: Decentralised Forms of Government* (2011, International IDEA) at 1 and 44. Böckenförde 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 the 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 only responsible for implementing policies, not making them.

In turn, the centralized system is usually associated with a unitary state, and a decentralized system with a federal state. It is when looking at the relationship between the unitary and federal systems in the context of decentralization that the analytical distinctions become more complicated. In practice, the line between decentralization, federalism, unitary systems and centralized systems is often blurred. For example, unitary states are often centralized; however, as noted above, just as there is no purely centralized 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 that 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.⁷ It is at the end of the continuum that the federal system is established, because the distribution of power is completely non-centralized 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 satisfactorily to describe and explain the complex and differentiated multi-level systems of government that exist today.⁸ The tendency is often to conflate federalism with decentralized 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 decentralization, nor is decentralization a condition for federalism.⁹ As King notes, “[t]here is no observed degree of centralization / decentralization which commonly and distinctly marks off federations from so-called unitary states”.¹⁰

Nevertheless, federalism can be considered a specific form of decentralization. Five main features of a classic federal system are generally well agreed. First, there are at least two levels of government that exercise sovereignty over the same land and people. Secondly, both the central government at the national level and the regional government at the sub-unit level possess

7 See B Baldi “Beyond the federal-unitary dichotomy” (Institute of Governmental Studies, University of California, Berkeley working paper 99–7, September 1999), available at: <https://zupdf.com/download/beyond-the-federal-unitary-dichotomy_pdf> (last accessed 3 April 2018).

8 See id at 1–3. Some of the factors that are mentioned include: the institutionalization of regionalism in certain countries; the combination of decentralization 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.

9 To cite a few global examples, some federal states, such as Malaysia, are highly centralized, while some unitary states, such as China, are highly decentralized. All that can be said is that federalism, depending on the form, may be considered a special case of decentralization.

10 P King *Federalism and Federation* (1982, John Hopkins University Press) at 126.

a range of mutually exclusive powers (self rule), which include a measure of legislative and executive autonomy or fiscal independence. Thirdly, the constitution provides that neither level can unilaterally alter its own responsibilities and authority, or those of the other level of government. Fourthly, national decision-making institutions include representatives from the sub-unit level, who might occupy a second chamber in the national legislature (shared rule). Lastly, 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 centralization / decentralization reflected in the distribution of powers and resources between the central government and the sub-units, federal systems have been categorized in different ways.¹¹ From the perspective of formal institutional structure, federal forms have been categorized as “decentralized federal systems”, “decentralized 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”.¹² From the evolutionary perspective, a federal system could have developed by disaggregation (known as the “holding-together” federation) or through a process where a unitary system federalizes itself through an internal progression that recognizes 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,¹³ the only other point worth reiterating is that federalism remains a form of decentralization 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), distinct from the “secondary autonomy” granted to decentralized sub-units in a unitary state; such “secondary autonomy” is often based merely on ordinary legislation, which can easily be changed by the centre.

11 For a full discussion of this, see N Steytler and De Visser “‘Fragile federations’ and the dynamics of devolution” in F Palermo and E Alber (eds) *Federalism as Decision-Making: Changes in Structures, Procedures and Policies* (2015, Brill Nijhoff) 79.

12 *Id* at 79–81.

13 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).

Main forms of decentralization

Although, as noted above, decentralization is a complex multifaceted concept, it usually takes three main forms: political, administrative and fiscal.¹⁴ Increasingly, however, a fourth form (economic decentralization) is also included.¹⁵ Despite the fact that the form of decentralization adopted is usually influenced by the different policy objectives that have informed the decision to disperse powers, there is considerable overlap in the features that appear to distinguish each of these forms of decentralization. While this discussion concerns the three main forms (political, administrative and fiscal decentralization), it is not uncommon that different forms of decentralization may appear in different combinations within the same country and even within different sectors within the same country.¹⁶

Political decentralization

Political decentralization occurs where central governments allow the sub-units to exercise various functions of political governance. The main form decentralization takes is an arrangement in which governance functions are exercised by elected and empowered sub-national units, such as local authorities and regional bodies. In this respect, political decentralization is usually associated with pluralistic politics and representative government.

The strongest form of political decentralization 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. Sub-national units may coordinate among themselves to ensure coherent national policy. Political decentralization 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, including: local units

14 For example, D Treisman "Decentralization and the quality of government" (November 2000), available at: <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.307.6477&rep=rep1&type=pdf>> (last accessed 3 April 2018); in defining decentralization, Treisman identifies five different types: structural, decision, resource, electoral and institutional. Also see Work "Overview of decentralisation", above at note 5.

15 See World Bank Decentralization Thematic Team "What is decentralization?", available at: <http://www.ciesin.org/decentralization/English/General/Different_forms.html> (last accessed 3 April 2018); and HF Dubois and G Fattore "Definitions and typologies in public administration research: The case of decentralization" (2009) 32 *International Journal of Public Administration* 704.

16 For example, one can talk of decentralization as an educational planning strategy and of decentralization in the forestry sector.

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

Administrative decentralization

In contrast to political decentralization, administrative decentralization involves the transfer of decision making authority, resources and responsibility for the delivery of specified public services from central government to sub-national levels of government, agencies and field offices of central government line departments. This may take one of two main forms: deconcentration or delegation. However, it is important to note that devolution, especially where only limited powers have actually been devolved or may at some future date be devolved, can be considered as a form of administrative decentralization. The main difference between devolution on the one hand, and deconcentration and delegation on the other, relates to accountability; in the case of the former, there is usually downward accountability, in the case of the latter, there is upward accountability to the central government.

Deconcentration of power is the least extensive form of decentralization, and involves very limited transfer of authority and responsibility from one level of central government to another. Central government transfers authority for specified decision making, financial 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, 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 organizations that either are not directly controlled by government or are semi-independent. For example, government delegates some of its responsibilities when it creates bodies such as public enterprises or corporations, transport authorities, housing authorities and regional development zones, to which it confers a wide degree of discretion in decision making. There is a principal / agent relationship, but the degree of supervision and control from the centre varies with the function. In some matters, 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.

Fiscal decentralization

Fiscal decentralization determines the financial resources allocated to the sub-units and hence their degree of financial autonomy. Without concrete arrangements to ensure the provision of adequate financial resources, political and administrative decentralization cannot be implemented. The effectiveness of fiscal decentralization depends on how three important aspects of resource allocation have been addressed. These are: assigning responsibility for expenditure by determining which level pays for what; assigning responsibility for raising revenue by determining which level raises which tax; and defining the framework for intergovernmental transfers in order to ensure there is a means for different levels of government to share revenues and equalize 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 sub-national units in order to take into account factors such as interregional equity and the availability of resources.

Economic decentralization

Economic decentralization (sometimes also referred to as market decentralization) basically involves divestment or privatization and deregulation. These policies are not, strictly speaking, decentralization, 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 the government to voluntary, private or non-governmental institutions, with clear benefit to and involvement of the public. This may involve contracting out partial service provision or administrative functions, deregulation or full scale privatization.

Despite these distinctions, it is necessary to underscore the point made above about overlaps between the concepts and point out that there is no pure or completely deconcentrated, delegated or devolved form of governance. In all cases, it is, as will be seen below, a question of the degree to which actual and effective powers have been transferred from the centre to the sub-national units. This is influenced to a large extent by the motives behind the decentralization, an issue to which this article now turns.

The rationale for decentralization

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

One important objective is that of peacemaking and state-building in fragile states. The aim is to keep the state intact or settle potential conflicts by accommodating minorities (often ethnic) and marginalized 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 centralized government. In this regard, some of the wide powers that are usually concentrated in the hands of an authoritarian president and a clique of cronies at the centre are dispersed and shared with sub-national levels of government. 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 also brings about better service delivery and encourages greater public participation in development.

A fourth objective is to promote constitutionalism and democracy. This involves establishing democratic governance at sub-national level to provide a legitimate basis for local government, as well as allowing 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 minimize the abuse of power and tyranny by the majority.

Two points are worth noting. First, the objectives regarding the form and degree of decentralization vary not only between states but also with time: changed circumstances may compel one particular approach or emphasis. Secondly, there are also numerous compelling arguments against decentralization. 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 decentralized decision making is actually less prone to elite domination, corruption and the like. Since decentralization is often designed to create competing centres of power, this may generate instability in a weak, fragile state 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 mobilize financial and human resources for addressing massive developmental challenges. With respect to diversity, the flip side is that decentralization could entrench, institutionalize, 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 decentralization will often depend on the specific design of the decentralized 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 is the extent to which these different factors are constitutionalized.

A SYNOPSIS OF THE EXTENT OF THE CONSTITUTIONALIZATION OF DECENTRALIZATION IN AFRICA

To what extent has Africa's "silent revolution" of decentralization 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 following overview is drawn from an examination of the constitutional provisions dealing with decentralization in Africa's 54 countries. The analysis of these provisions was guided by five 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 decentralization; and the extent of decentralization of traditional governance institutions.

Decentralization 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 self-contained and self-regulating communities, or tribes and clans (as the anthropologist labelled them). Through a process of conquest and cooperation, many of them became parts of large kingdoms, where in most cases they retained 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 1884–85 on the partition of Africa (Berlin Conference); nevertheless, the colonial powers, whether through assimilation or indirect rule, allowed the disparate ethnic groups and tribes they had brought together some form of self rule and autonomy. 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: Britain, France and Portugal.¹⁷ The German approach has also recently become influential.

The British model was based on 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

17 See generally E Africa "Development of the Africa local governance timeline: Decentralization study post-1980" (August 2012), available at: <<http://www.elroyafrica.com/Portals/0/Documents/African%20Local%20Governance%20Timeline%20-%20Overview%20of%20Decentralisation%20in%20Africa%20-%20Since%201980s.pdf>> (last accessed 3 April 2018).

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 through regional and 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 so-called *cumul des mandats* [concurrent political mandates, or the cumulative holding of multiple offices or positions], which were designed to provide elected leaders at the lower echelons with a voice at the higher levels of government.

Not only France, but also Portugal and Spain, applied this heavily centralized model and its variations to African colonies. Furthermore, elements of the German model of decentralization (which emphasises subsidiarity, cooperation and administrative efficiency) have more recently found their way into the South African 1996 Constitution (South African Constitution), as well as other constitutions influenced by it, such as the Kenyan Constitution of 2010 (Kenyan Constitution) and Zimbabwean Constitution of 2013 (Zimbabwean Constitution), respectively. This model entrusts policy-making functions to the central level and service delivery responsibilities to the provinces and local government, which have significant autonomy in service delivery.

Trends in Africa must be understood against the backdrop of inherited colonial models and current developments, that have seen a large degree of dilution and convergence between the federal and unitary systems. 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, quasi-federal (federal type), unitary and monarchical regimes.

There have been many federal experiments in Africa since the independence period of the 1960s, though few of these federations lasted for long.¹⁸ Two main categories of federations came into existence at independence in the 1960s. The first consisted of intra-state federations, where federal

18 See M Burgess "Federalism in Africa: An essay on the impacts of cultural diversity, development and democracy" (January 2012), available at: <<http://docplayer.net/24010025-Federalism-in-africa-an-essay-on-the-impacts-of-cultural-diversity-development-and-democracy.html>> (last accessed 3 April 2018). 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.

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 that had adopted 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: Ethiopia, Nigeria and Somalia (at least, as contemplated under its provisional constitution of 2012). One important feature of all these constitutions is that they provide for different degrees of decentralized governance.

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 centralized unitary state with those of a federal state. These countries are: 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 the Transitional Constitution of 2011; and Sudan under the Interim National Constitution of 2005. As with the three federal countries noted above, all of them also provide for different degrees of decentralization.

Three states in Africa can be classed as monarchies. Two of them, Lesotho¹⁹ and Morocco,²⁰ can be considered 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, compared with 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, Swaziland is an absolute monarchy and King Mswatii II has extensive discretionary powers that allow him to be actively involved in the country’s

19 Sec 1(2) of the 1993 Constitution of Lesotho (as amended in 2004) (Lesotho Constitution) states that “Lesotho shall be a sovereign democratic kingdom”.

20 Art 1 of the 2011 Moroccan Constitution states that Morocco is a constitutional, democratic, parliamentary and social monarchy.

governance.²¹ The constitutions of all three of these countries provide for decentralization of governance in one form or another.²²

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.²³ The two oldest constitutions on the continent (the Botswana and Mauritius constitutions of 1966 and 1968, respectively) do not mention decentralization specifically and local government is referred to very incidentally.²⁴ Nonetheless, as pointed out above, the absence of a provision entrenching decentralization does not necessarily mean that no system of decentralization is in place. For example, Botswana has an extensive system of decentralization through local government, but it is entirely dependent on ordinary legislation (the Local Government Act of 2012) adopted by Parliament, rather than on the constitution.²⁵ On the other hand, the constitutionalization of decentralization in most francophone constitutions is limited to just one or a few obliquely worded provisions.²⁶ This contrasts rather sharply with the approach adopted

21 Sec 1(1) of its 2005 constitution states that “Swaziland is a unitary, sovereign, democratic Kingdom” and, later in sec 2(2), that “[t]he King and iNngwenyama and all the citizens of Swaziland have the right and duty at all times to uphold and defend this Constitution”. Nevertheless, the powers conferred on the King in provisions such as secs 11, 64(1) and 65(4) place him above, rather than below, the constitution. See more generally CM Fombad “The Swaziland Constitution of 2005: Can absolutism be reconciled with modern constitutionalism?” (2007) 23 *South African Journal on Human Rights* 93.

22 See sec 106 of the Lesotho Constitution, which provides for local government; arts 63–67 and 135–46 of the 2011 Moroccan Constitution, which provide for regions and other lower units; and secs 218–26 of the Swaziland Constitution of 2005, which provide for local government.

23 For example, art 8 of the Angolan Constitution of 2010 states: “The Republic of Angola shall be a unitary state ...” For other examples, see art 1 of the Burundi Constitution of 2005, art 1(5) of the Constitution of Eritrea of 1997 and art 1(1) of Constitution of Namibia of 1990.

24 In the case of the Botswana Constitution of 1966, local government authority is mentioned in provisions such as secs 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 of 1968 also mention local government incidentally; for example, sec 34, dealing with disqualification for membership of the Assembly, excludes in sub-sec (1)(2)(b) a person who “is a public officer or a local government officer”.

25 See KC Sharma “Role of local government in Botswana for effective service delivery: Challenges, prospects and lessons” (2010) 7 *Commonwealth Journal of Local Governance*, available at: <<http://epress.lib.uts.edu.au/journals/index.php/cjlg/article/view/1908>> (last accessed 3 April 2018); and M Ashley “Mauritius: A review of the local government structure, functions and legislation” (1 February 2017), available at: <http://www.clgf.org.uk/default/assets/File/Country_profiles/Mauritius_report_Ashley_Feb_2007.pdf> (last accessed 3 April 2018).

26 See for example: art 102 of the Central African Republic (CAR) Constitution of 2010; art 112 of the Constitution of Gabon of 1991 (as amended in 2011); art 98 of the 1991 Constitution of Mauritania (as amended in 2012); and art 102 of the Constitution of Senegal of 2001 (as amended in 2010).

in most anglophone constitutions, where the matter is dealt with in elaborate provisions. However, the critical issue is not merely constitutionalization, but rather the scope and depth of the decentralization thus entrenched. The subsections below examine this theme.

The levels of decentralized governance and the extent of their protection

An important indicator of the depth of decentralization, and therefore of its ability to bring government close to the people it is supposed to serve, is the existence and number of tiers of sub-national governments and the protection the constitution gives to these lower levels. Generally, there can be between two and five tiers in a decentralized system, depending on factors such as the geographic size of the country, the size of the population and its spread, the country's ethnic composition and its spread, the spread of resources and the country's history. The importance of a clear indication of the number of tiers of government, like the 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.

Some constitutions 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.²⁷ Many constitutions provide for two tiers of government: regional, state, county or provincial level, and local government level.²⁸ The other constitutions provide for more than two tiers of government. Although the number of tiers of sub-national 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 central government. This will usually happen when the incumbent party loses control of some of the important metropolitan councils after local government elections.

The security of sub-national level governments is high where their existence is secured through reasonable constitutional restraints that have been put in place to check against arbitrary disbandment by central government. This is often the case where the powers of the sub-national units are either explicitly stated in the constitution in terms that do not allow much scope for interference by central government, or where no amendments are permitted that

27 For example, see sec 106 of the Lesotho Constitution and art 3 of the Liberia Constitution of 1986.

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

would affect the devolved nature of governance.²⁹ In many constitutions, the level of sub-national 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 Nigeria,³⁰ and quasi-federal ones, such as South Africa and Sudan, but also of many unitary states.³¹

However, an overwhelming majority of African states have a low level of protection of sub-national level governance. The reasons for this vary considerably. For example, it may be because this level of governance is not explicitly or implicitly constitutionalized, as noted in the case of Botswana and Mauritius. More often, however, it is because the constitution leaves it to central government to determine the number of sub-units to be created as well as what their powers will be, 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 those powers as it finds necessary. In this latter case, the level of security of sub-national governance is still low, notwithstanding that the powers apparently conferred on these sub-national units seem to be very wide ranging.

Closely linked to the protection of sub-national units is the extent to which they are allowed to govern themselves.

29 Despite their appearance in many African constitutions, the concept of un-amendable constitutional provisions, or so-called perpetuity clauses, is an illusion. See further CM Fombad "Some perspectives on durability and change under modern African constitutions" (2013) 11/2 *International Journal of Constitutional Law* 382 at 382.

30 For example, art 52(1) of the Ethiopian Constitution of 1995 provides: "All 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, while the Nigerian Constitution of 1999 clearly specifies the states that comprise the federation (and even protects against "gerrymandering" in sec 8, which provides a complex procedure for the establishment of new states), sec 7(1) makes the status of local governments depend on state legislation that will determine their "establishment, structure, composition, finance and function".

31 For example, under the South African Constitution the division of powers between the national government and local government is set in secs 44 and 156, as well as schedules 4 and 5; nevertheless, the central government is dominant. This is so for several reasons, in particular because it can: override a decision on any matter on the concurrent list; legislate in matters within the provincial list in schedule 5; and intervene under sec 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 another province or the nation as whole). See arts 25–26 and 177–84 of the Sudanese Constitution of 2005. For some examples under unitary constitutions, see arts 217–20 of the 2010 Angolan Constitution; arts 260–64 of the 2005 Burundian Constitution; arts 105–18 of the Guinea Bissau Constitution of 1996; secs 124–26 of the Tanzanian Constitution 2014; and secs 264–79 of the Zimbabwean Constitution.

The extent of political decentralization

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

At the legislative level, the question is whether the legislative bodies provided for at the sub-national government level are elected (directly or indirectly), appointed, or partly elected and partly appointed. The same question applies to the executive bodies, for example the heads of sub-national government units, such as the governors of states or provinces and the mayors of municipal councils, along with their executives. Are they elected, directly or indirectly, or are they appointed? These options determine the degree of autonomy and hence self rule, which enables the lower levels of government to participate actively in the country's political processes and institutions.

Numerous constitutions contain provisions that provide for the election of members of the legislative and executive bodies of sub-national units.³² An overview of African constitutions shows that there are many in which the level of the constitutionalization of political decentralization of sub-national 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 decentralization is vaguely stated or is left to be defined by law (in other words, central government).³³ This also often arises where the constitution provides for a mix of elected and appointed officials at the sub-national level.³⁴ The issue of political decentralization is commonly linked to the level of administrative decentralization.

The extent of administrative decentralization

The level of administrative decentralization is assessed based on 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 decentralization is high

32 For example, see arts 277–82 of the Kenyan Constitution; secs 105–06 and 157–59 of the South African Constitution; and secs 268–72 and 277–78 of the Zimbabwean Constitution.

33 This is commonly the case with francophone African constitutions, for example art 151 of the 1990 Benin Constitution.

34 See for example arts 57–60 of the Cameroon Constitution of 1996 and, to some extent, arts 242(a) and 243 of the Ghana Constitution of 1992.

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 decentralization reflects the extent to which the powers of sub-national units are defined and protected.

In general, countries with a federal or quasi-federal system, such as Nigeria, Kenya and South Africa, tend to have a high degree of administrative decentralization.³⁵ Many others have a moderate degree of administrative decentralization.³⁶ It is mainly in francophone, hispanophone and lusophone constitutions that the level of administrative decentralization is low, due to the large degree of discretionary and supervisory powers the constitution grants to central government over sub-national units.³⁷ In fact, in many such countries decentralization amounts to a mere deconcentration of powers, with central government given the discretion to delegate those powers it considers appropriate or necessary.³⁸ However, the same is also true of certain anglophone jurisdictions, where political and administrative decentralization can overlap in a similarly confusing way.³⁹

The extent of fiscal decentralization

However extensive the degree of independence from the centre that a constitution provides for through political and administrative decentralization of sub-national units, it will not count for much unless it is matched by a reasonable degree of fiscal decentralization. Without adequate budgetary resources to address local needs, sub-national units will easily fall prey to being captured and controlled by central government. Constitutional provisions allocating budgetary resources to sub-national units offer important protection against arbitrary central government interference and are thus critical to an effective system of decentralization. The extent, and hence potential effectiveness, of fiscal decentralization depends on the scope of budgetary allocation specified in the constitutional provisions. In more precise terms, the prospects for a reasonably high level of fiscal decentralization are considerably enhanced when the constitution clearly specifies: the scope for self-financing or cost recovery through user charges; the possibilities for co-financing or co-production arrangements in which the users participate; a clear base for local revenues through property or sales taxes or other forms of indirect charges; a mechanism for ensuring intergovernmental transfers; and the indication of the

35 See also arts 176(2)(f) and 198 of the Ugandan Constitution of 1995; secs 227–28 of the Zambian Constitution of 2014; and sec 266 of the Zimbabwean Constitution.

36 See for example arts 199 and 201 of the Angola Constitution of 2010; arts 263–64 of the Burundi Constitution of 2005; and art 110 of the 1990 Namibian Constitution.

37 For example, see art 55(3) of the Cameroon Constitution of 1996; arts 207–08 of the Chadian Constitution of 1996; art 88 of the Djibouti Constitution of 2010; and arts 134–36 of the Guinean Constitution of 2010.

38 See for example arts 141, 249–50 and 277–80 of the Mozambican Constitution of 2004.

39 See for example arts 255–66 of the 1992 Constitution of Ghana.

nature of authorization of local borrowing and the mobilization of resources through loan guarantees.

Based on these considerations, the constitutions of Kenya, South Africa, South Sudan, Uganda and Zambia provide for a high level of fiscal decentralization.⁴⁰ Of these, the South African Constitution, with 19 provisions regulating financial matters, is perhaps one of the most elaborate in this regard. These provisions deal with all the financial issues that ensure a reasonably high level of financial decentralization, as indicated above. Besides this, they provide 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. 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. Nevertheless, on balance the sub-national units retain a high degree of financial autonomy and are enabled to operate independently.

Other countries provide a moderate level of fiscal decentralization in their constitutions.⁴¹ 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 sub-national units to meet the needs of their constituents. On the whole however, the majority of African constitutions provide a low level of fiscal decentralization. This may be so either because there is no provision on decentralization⁴² or because, if there is one, it does not deal with fiscal decentralization.⁴³ Low levels of fiscal decentralization are the norm in most francophone and lusophone African constitutions, but the approach has also been adopted by the recent Arab Spring constitutions.⁴⁴

40 See arts 200–24 of the Kenyan Constitution; secs 213–30A of the South African Constitution; secs 168 and 175–79 of the 2011 Transitional Constitution of the Republic of South Sudan; arts 178A and 190–97 of the 1995 Constitution of Uganda; and secs 161–64 of the 2016 Constitution of Zambia.

41 See for example art 255 of the Cape Verde Constitution of 1992; art 11 of the Comoros Constitution of 2001; arts 95–100 of the 1995 Ethiopian Constitution; arts 240(2)(c) and 252(2) of the 1992 Ghanaian Constitution; secs 149–50 of the Malawi Constitution of 1994; secs 162–64 of the 1999 Nigerian Constitution; and arts 185, 193–96 and 200 of Sudan's Interim Constitution of 2005.

42 An example of this is Botswana, which still operates under its 1966 independence constitution.

43 See for example art 112 of the 1991 Gabonese Constitution; arts 97–98 of the 1992 Malian Constitution; and art 102 of the 2001 Senegalese Constitution.

44 See for example art 118 of the 2014 Egyptian Constitution; arts 141–42 of the Moroccan Constitution of 2011; and arts 131–42 of the Tunisian 2014 Constitution.

The place of traditional institutions in Africa's decentralized systems

The question of where traditional institutions fit into modern decentralized 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. They were retained by the different colonial powers and easily adapted to assist them to 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.⁴⁵

A wide variety of traditional forms and institutions of governance co-exist 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, the focus here is on those instances where they have been made visible through constitutional entrenchment.⁴⁶ 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 decentralization of traditional institutions in modern African constitutions.

A high level of such decentralization is found in the constitutions of Ghana, Lesotho, Uganda, Zambia and Zimbabwe.⁴⁷ For example, the Ghanaian Constitution contains provisions that define the institution of chieftaincy, provide for the creation of Regional and National Houses of Chiefs, and specify what their functions will be; chiefs are, however, barred from taking part in active politics.⁴⁸ A second category of constitutions also contain provisions dealing with traditional institutions, but these are often less detailed than those in the preceding group.⁴⁹

The third category, to which an overwhelming majority of African constitutions belong, is one in which there is either an obscure reference to

45 See CM Fombad "The evolution of modern African constitutions: A retrospective perspective" in CM Fombad (ed) *Separation of Powers in African Constitutionalism* (2016, Oxford University Press) 13.

46 On the invisible constitution, see L Tribe *The Invisible Constitution* (2008, Oxford University Press).

47 See arts 242(d) and 270–77 of the Ghanaian 1992 Constitution; secs 44–53, 92 and 103–04 of the Lesotho Constitution of 1993; art 246 of the Ugandan Constitution of 1995; arts 164–72 of the Zambian Constitution of 2016; and secs 280–87 of the Zimbabwe Constitution.

48 See the provisions cited in note 47 above.

49 See for example arts 213 and 223–24 of the Chadian Constitution of 1996; art 207 of the DRC Constitution of 2006; art 118 of the Mozambican Constitution of 2004; art 102(5) of the Namibian Constitution of 1990; arts 166–67 of the Interim Constitution of South Sudan of 2011; secs 227–35 of the Swaziland Constitution of 2005; and art 143 of the Togolese Constitution of 1992.

traditional institutions⁵⁰ or complete silence. The main reason for the non-constitutionalization of the role of traditional institutions within Africa's modern decentralization systems lies in the difficulties of defining what precise role they are to play. For example, unlike all of Nigeria's previous constitutions, its constitution of 1999 is silent on the role of traditional institutions owing to disagreement on what approach to take. Sections 211–12 of the South African Constitution recognize the role of traditional institutions and traditional leaders, and mandate the legislature to enact laws regulating this. Due to disagreement about the nature of the role these institutions should be given, the legislature has been unable to devise 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 next question is whether the constitutionalization of decentralization, be it high, moderate or low in extent, has any implications for its effectiveness, particularly in promoting the goal of constitutionalism.

IMPLICATIONS OF CONSTITUTIONAL ENTRENCHMENT FOR THE CONSOLIDATION OF CONSTITUTIONALISM

The effectiveness of any system of decentralization 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 decentralization system, while not guaranteeing effective implementation, enhances its prospects, as well as creating considerable scope for deepening democracy, constitutionalism and respect for the rule of law.

As noted above, the constitutional entrenchment of decentralization 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 article has been that the decentralization 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.

50 See for example secs 58–59 of the Gambian Constitution of 1997 and sec 146(4) of the Malawian Constitution of 1994.

First, the decentralization of government is not an event but a process, 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 decentralization 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.⁵¹ In other words, when a decentralized 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 time 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 level. This affords firm ground for good intergovernmental relations and open dialogue between not only the levels of government themselves but also between government and civil society and other stakeholders, relations and dialogue that together promote self-government.

Thirdly, provisions entrenching a particular system of decentralization can be reinforced by making their implementation mandatory⁵² rather than leaving it to 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 decentralization in the exact manner contemplated by the constitution. For example, one of the most progressive provisions in the Kenyan Constitution, designed to promote equality between the sexes, introduced the principle that no more than two thirds of lawmakers should be men.⁵³ This was not implemented until four rights groups petitioned the High Court. In a landmark judgment on 29 March 2017 (seven years after the constitution came into effect), the Kenyan High Court 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.⁵⁴ Certain constitutions even sanction non-compliance with their provisions, but the scope for this action is often

51 See further Fombad “Some perspectives on durability”, above at note 29.

52 For an example of such an obligation, see sec 2 of the South African Constitution, 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).

53 Art 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.”

54 See “Kenya court orders Parliament to pass gender quota” (29 March 2017) *news* 24,

limited.⁵⁵ The Zimbabwean Constitution, which provides that “all constitutional obligations must be performed diligently and without delay”,⁵⁶ equally affords a solid legal basis for taking action against the government for failure to implement the provisions on decentralization. It can be argued that constitutional entrenchment of decentralization has become the most effective way to disperse and share power because of the increasing awareness of the legal avenues for compelling governments to implement national constitutions in Africa.⁵⁷

A fourth point is that, depending on the scope, breadth and depth of decentralization spelt out in a constitution, it can promote responsiveness, transparency and accountability. This could reduce the excessive dependence of sub-national units on the goodwill of central government in making resources available to sub-national 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 decentralize presented by the expansion of the locus standi rules for constitutional action.⁵⁸ The right of public interest action is a necessary response to the growing disenchantment with the ability and willingness of many African governments to implement provisions on decentralization.⁵⁹ This will strengthen the hands of individuals and civil society organizations actively to monitor and expose public officials and institutions that are not complying with their constitutional mandate. The move towards a self-enforcing constitution enhances the right of each individual in society to self-government and inevitably

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available at: <<http://www.news24.com/Africa/News/kenya-court-orders-parliament-to-pass-gender-quota-20170329>> (last accessed 3 April 2018).

- 55 For example, under the Kenyan Constitution this is limited to art 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.
- 56 Zimbabwe Constitution, sec 324.
- 57 See, generally, CM Fombad *The Implementation of Modern African Constitutions. Challenges and Prospects* (2016, PULP).
- 58 In this regard, art 22(2) of the Kenyan 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 name; (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”. Art 22(3) 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 sec 85 of the Zimbabwe Constitution. The 2010 Angolan Constitution, in arts 73–75, also appears to broaden the rules of locus standi, but in language that (along with arts 228 and 230, which restrict access to certain specified personalities) casts serious doubt on its effectiveness.
- 59 For example, only certain aspects of part X of Cameroon’s 1996 Constitution (dealing with decentralization) have been implemented, in initiatives begun in 2004 and 2008. The decentralization provided for thus exists more on paper than in reality.

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

CONCLUSION

Many African countries are still plagued by intra-country conflict and under- and uneven development, where power is centralized 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 (and increasingly in practice) at the national level, opposition-led government at sub-national level is 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 decentralization provides an opportunity to overcome some of these challenges.

However, constitutional entrenchment of decentralization is not a magic solution that guarantees effective decentralization or even that all the objectives of the decentralization 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 for decentralization will depend on the goodwill of government, but history shows that hardly any African government will voluntarily share power with the sub-national units that have become an inevitable part of modern governance.

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 decentralization 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.

Three important lessons can be learnt from an analysis and comparison of trends in the constitutionalization of decentralization in African constitutions today. The first is that, depending on the scope and depth of decentralization, it is possible to counter and reduce the ever present risk of re-centralization and the de facto reassertion of central government control by Africa's dictators. Secondly, a carefully crafted decentralized framework that is self-enforcing can ensure that the constitutional obligation to disperse and share power with sub-national units can be legally enforced by all stakeholders. This, it has been argued, will ensure that decentralization does not hinge on the goodwill alone of central government. Finally, decentralization and centralization of powers are not "either" / "or" alternatives. An appropriate balance of both, with emphasis clearly on the former, taking into account the country's needs, is essential to the effective and efficient functioning of government.

Whatever method or combination of methods of decentralization a country chooses, and the local contextual factors that influence this, such as geographical spread, ethnic and cultural diversity, and resource spread, success depends on the level of constitutional entrenchment. A general analysis of modern African constitutions, guided by the five indicators for gauging the extent and level of decentralization used in this study, clearly shows that the most successful countries, in terms of constitutionalized and hence self-enforcing and sustainable systems of decentralization, have been the anglophone ones, with the best examples so far being Kenya, South Africa and Zimbabwe. Analysis 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 that many countries have introduced, particularly countries like Botswana and Mauritius that have no constitutionally entrenched system of decentralization. In this respect, more elaborate research to assess fully the effectiveness of decentralization in Africa is needed, taking 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 decentralization will remain an important preoccupation for policy-makers and constitution designers.