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## 1. Introduction

Since the last decades of the past century, almost all African States have introduced federalism or other forms of distribution of power at local level<sup>1</sup>. These institutional arrangements are designated by different terms, notably ‘federations’, ‘decentralized systems of government’, and ‘devolved governments’. Like a number of broad legal and political concepts, as “constitutionalism”, “participation” or “democracy”, federalism and decentralization may assume different meanings for different people in different contexts. The proliferation of legal systems that claim to be federal or decentralized contributes to the indeterminacy of the two notions. Moreover, when applied to the African continent, they assume an additional “African flavor”, which increases the indeterminacy and makes the analysis even more complex<sup>2</sup>.

Despite the tendency to blur the perimeter of significance of the two concepts and make them converge, federalism and decentralization remain different: the former designates a system characterized by a vertical division of powers between the national government and sub-national entities entrenched in the Constitution<sup>3</sup>, whereas the latter indicates a system in which there is a transfer of responsibility from the

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<sup>1</sup> J. S. WUNSCH AND D. OLOWU (eds.), *The Failure of the Centralized State: Institutions and Self-governance in Africa*, Boulder CO, 1990. D. CONYERS, *Decentralisation and Service Delivery: Lessons from Sub-Saharan Africa*, in *IDS Bulletin*, Vol. 38 No.1, 2007, pp. 18–32. D.J. ELAZAR, *Exploring Federalism*, Tuscaloosa and London, 1991.

<sup>2</sup> B. MOLLER, *Pan-Africanism and Federalism*, in *Perspectives on Federalism*, Vol. 2 No. 3, 2010, pp. 38-76.

<sup>3</sup> A. REPOSO, *Stato federale*, in ENC. GIUR., Vol. XXX, Roma, 1993. G. BOGNETTI, *Federalismo*, in *Dig. Disc. pubbl.* IV, Torino, 1991. G. DE VERGOTTINI, *Stato federale*, in ENC. DIR., Vol. XLIII, Milano, 1990.

central government to sub-national entities, which may be simply provided for by ordinary legislation (even though a constitutional provision for decentralization is frequent in decentralized systems)<sup>4</sup>. Furthermore, decentralization can assume a political and/or administrative and/or fiscal character and it acquires diverse connotations according to the different degrees of transfer of responsibility: 1) deconcentration, which is the weakest form of decentralization where the center maintains the control over sub-national entities<sup>5</sup>; 2) delegation, which is a more extensive form of decentralization, where central governments transfer the responsibility for decision-making and the administration of public functions to semi-autonomous organizations not wholly controlled by the central government, but ultimately accountable to it<sup>6</sup>; 3) devolution, when central governments devolve functions to quasi-autonomous units of local government with corporate status<sup>7</sup>.

Nonetheless, quite often scholars argue that in the African context federalism and decentralization can be used interchangeably because they share crucial common traits: they both originate from “large-scale, top-down institutional change reform projects, often with strong international involvement and support”<sup>8</sup>; they have been presented as a mechanism to foster democracy, governance, service delivery and socio-economic development; the existence and autonomy of sub-national entities are often codified in the constitutions and their powers and functions do not vary substantially from federation to decentralized systems<sup>9</sup>. Finally, “the fact that federalism and decentralized governance belong to the same constitutional settlements, and have been put in place at the same time, have made their functioning inseparable from one another”<sup>10</sup>.

Beyond theoretical reflections on the nature of the structure of the legal system, federations and/or decentralized systems of governance have been introduced in Africa as a vehicle to manage diversity and

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<sup>4</sup> F. ROVERSI MONACO, *Decentramento amministrativo (voce)*, in ENC. GIURIDICA, Roma, 2000, 1-9. R. LUCIFREDI, *Decentramento amministrativo (voce)*, in NUOVISSIMO DIGESTO ITALIANO, Torino, 1975, pp. 247-252.

<sup>5</sup> M.S. GIANNINI, *Istituzioni di diritto amministrativo*, Milano, 1981, pp. 64-65. About the difference between decentralization and deconcentration see in particular: L. FAVOREU, P. GAÏA, R. GHEVONTIAN, ET AL., *Droit constitutionnel*, Paris, 2000, p. 475. P. PACTET, *Institutions politiques droit constitutionnel*, Paris, 1988, pp. 46 ss. F. ROVERSI MONACO, *Decentramento amministrativo (voce)*, *op. cit.*, p. 2.

<sup>6</sup> D. RONDINELLI, *What is Decentralization?*, in WORLD BANK, *Decentralization Briefing Notes, WBI Working Papers*, 1999, p. 3. S. BOULENGER, I. GAUTHIER, F. VAILLANCOURT, *Déconcentration, délégation et dévolution : avantages, inconvénients et mise en place*, Montréal, 2012, p. 6.

<sup>7</sup> D. RONDINELLI, *What is Decentralization?*, *op.cit.*, p.3. S. BOULENGER, I. GAUTHIER, F. VAILLANCOURT, *Déconcentration, délégation et dévolution : avantages, inconvénients et mise en place*, *op. cit.*, p. 7.

<sup>8</sup> J. ERK, *Federalism and Decentralization in Sub-Saharan Africa: Five Patterns of Evolution*, in *Regional & Federal Studies*, Vol. 24, No. 5, 2014, p. 537.

<sup>9</sup> For a survey of federal and decentralized constitutional design, and power and functions of sub-national entities, see: Y. FESSHA AND C. KIRKBY, *A Critical Survey of Subnational Autonomy in African States*, in *Publius*, Vol. 38, No. 2, 2008, pp. 248-271.

<sup>10</sup> J. ERK, *Federalism and Decentralization in Sub-Saharan Africa: Five Patterns of Evolution*, *op. cit.*, p. 537.

reduce conflict<sup>11</sup>, to foster democracy and better governance<sup>12</sup>, to empower communities and to bring services closer to the people<sup>13</sup>. And finally, to “domesticate the Leviathan”, or better, the post-colonial Leviathans, introducing checks and balances that minimize the opportunities for authoritarian tendencies, but also the tyrannies of the majority<sup>14</sup>. Therefore, studying federalism in Africa cannot overlook the empirical enforcement of federal and decentralized provisions, as it is exactly in the implementation of the constitutional design that the unmet promises and expectations of federalism and decentralization become evident.

The gap between the institutional blueprints (law in the book) and the facts on the grounds (law in action)<sup>15</sup> is the first, more relevant point of research on federalism and decentralization in Africa<sup>16</sup>. In many cases, a significant discrepancy between the rhetoric of autonomy and its real implementation has been noted: as a matter of fact, decentralization in Africa mostly entails a deconcentration of powers implying the mere execution at local level of decisions taken within the central governments<sup>17</sup>. In a number of cases, the stark examples of which are South Africa and Nigeria, re-centralization processes promoted by courts or central governments took place<sup>18</sup>. In other places, such as in Ethiopia and Nigeria, the lack of proper implementation has promoted a resurgence of traditional authority structures in local

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<sup>11</sup> E.E. OSAGHAE, *Federalism and the Management of Diversity in Africa*, in *Identity, Culture and Politics*, Vol. 5, No. 1-2, 2004, pp 162-178. B. REILLY, *Democratic Levers for Conflict Management*, in P. HARRIS, B. REILLY (eds.), *Democracy and Deep-Rooted Conflict: Options for Negotiators*, Stockholm. 1998, pp. 158-163. S. FANDRYCH, *Kommunalreform und Lokalpolitik in Mosambik. Demokratisierung und Konflikttransformation jenseits des zentralistischen Staates?*, Hamburg, 2001. A. MEHLER, *Dezentralisierung und Krisenprävention*, in W. THOMI, M. STEINICH, W. POLTE (eds.), *Dezentralisierung in Entwicklungsländern. Jüngere Ursachen, Ergebnisse und Perspektiven staatlicher Reformpolitik*, Baden-Baden, 2001, pp. 287-299.

<sup>12</sup> P. SMOKE, *Decentralisation in Africa: goals, dimensions, myths and challenges*, in *Public Administration and Development*, Vol. 23, No. 1, 2003, pp. 7-16. R. CROOK, *Decentralisation and Good Governance*, in *Forum Fed*, 2003, available at: [www.forumfed.org/libdocs/IntConfFed02/StG-Crook.pdf](http://www.forumfed.org/libdocs/IntConfFed02/StG-Crook.pdf)

<sup>13</sup> J. AHMAD, *Decentralization and Service Delivery*, in *World Bank Policy Research Working Paper*, No. 3603, 2005, pp. 1-29.

<sup>14</sup> N. STEYTLER, *Domesticating the Leviathan: Constitutionalism and Federalism in Africa*, in *African Journal of International & Comparative Law*, Vol. 24, No. 2, 2016, pp. 272-292.

<sup>15</sup> R. POUND, *The Ideal Element in Law*, Calcutta, 1958.

<sup>16</sup> J. ERK, *Federalism and Decentralization in Sub-Saharan Africa: Five Patterns of Evolution*, *op. cit.*, pp. 535-552. Y. FESSHA AND C. KIRKBY, *A Critical Survey of Subnational Autonomy in African States*, *op. cit.* J.I LEWIS, *When Decentralization Leads to Recentralization: Subnational State Transformation in Uganda*, in *Regional & Federal Studies*, Vol. 24, No. 5, 2014, pp. 571-588. N. STEYTLER, *Domesticating the Leviathan: Constitutionalism and Federalism in Africa*, *op. cit.* R.T. SUBERU, *Federalism and Decentralization*, in N. CHEESEMAN (eds.), *Routledge Handbook of African Politics*, London, 2013, pp. 24-36. J. TYLER DICKOVICK, *Federalism in Africa: Origins, Operation and (In)Significance*, in *Regional & Federal Studies*, Vol. 24, Iss. 5, 2014, pp. 553-570.

<sup>17</sup> L. CABRAL, *Decentralisation in Africa: Scope, Motivations and Impact on Service Delivery and Poverty*, in *Future Agriculture Working Paper*, No. O20, 2011, p. 2.

<sup>18</sup> R.T. SUBERU, *Federalism and Decentralization*, *op. cit.*, pp. 24-36. V. FEDERICO, *South African Quasi-Federalism*, in H. CORDER, V. FEDERICO, R. ORRU (eds.), *The Quest for Constitutionalism. South Africa since 1994*, Farnham, 2014, pp. 15-26.

governments, which has proved to be problematic in terms of compliance with the fundamental rights enshrined in the respective constitution<sup>19</sup>. In Malawi, Uganda and Sudan, the decentralization of powers has resulted in an exacerbation of conflicts over resource control and use, fueling those same ethnic conflicts it was deemed to appease<sup>20</sup>. Furthermore, studies demonstrate that there is not an automatic positive relation between decentralization and participation. On the contrary, it has been proved that in a number of cases decentralization has increased the complexity of political life<sup>21</sup>, whereas other cases have underlined that the devolution of responsibility at local level has fostered the local policy-makers' accountability to political parties rather than to the citizens<sup>22</sup>.

It would be oversimplifying the analysis to assert that these failures are attributable either to ethnic heterogeneity, or to “political disorder”<sup>23</sup>, to corruption or to lack of legitimacy alone. Clearly, a number of factors are at work and any analysis reducing African complexity to minimal terms will miss its goal. The overall picture of the success of federalism and decentralization in Africa is highly variegated and it tends toward a pessimistic mosaic of unattended needs and unrealized expectations. Despite this, the “federal recipe” continues to be promoted in very recent constitution-making and constitution-amending processes, which means that it still has a potential significance for the continent.

The article aims to reflect on federalism and decentralization in Africa to discuss, beyond the rhetoric of afro-optimism or afro-pessimism, why they still remain viable options for African states' reform projects. This purpose has upheld the selection of the two case-studies: Kenya and South Africa. They are different in terms of timing (the federalist system was introduced in 1994 in South Africa, while the Kenyan devolution was set in the 2010 Constitution<sup>24</sup>), as well as legal, political and socio-economic background, and these differences favor taking into consideration exactly the gap between law in the books and law in action, putting in context the ethnic heterogeneity factor, and controlling the importance of socio-economic development for the evaluation of the eventual success or non-success of the federal/decentralized project. But they are similar in “the cultural patterns [...] that underpin the regular

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<sup>19</sup> J. MARIE, E. IDELMAN, *La décentralisation en Afrique de l'Ouest: une révolution dans les gouvernances locales ?*, in *EchoGéo*, Vol. 13, 2010, <http://echogeo.revues.org/12001>

<sup>20</sup> J.I LEWIS, *When Decentralization Leads to Recentralization: Subnational State Transformation in Uganda*, in *Regional & Federal Studies*, Vol. 24, No. 5, 2014, pp. 571-588.

<sup>21</sup> T. BIERSCHENK, J-P OLIVIER DE SARDAN, *States at Work. Dynamics of African Bureaucracies*, Leiden, 2014.

<sup>22</sup> M. MBATE, *Decentralisation, Governance and Accountability: Theory and Evidence*, in *Journal of African Democracy and Development*, Vol. 1, Iss. 2, 2017, p. 3.

<sup>23</sup> P. CHABAL, J.P. DALOZ, *Africa Works. Disorder as Political Instrument*. London, 1999.

<sup>24</sup> It has been argued that in South Africa politicians played a greater role than civil society in promoting federalism, while in Kenya the proposal for decentralization the elaboration of the scheme of devolution was essentially the initiative of civil society and local academics. In both cases however there was no pressure from outside actors. See: Y. PAL GHAI, *South African and Kenyan Systems of Devolution: A Comparison*, in N. STEYTLER, Y. PAL-GHAI, *Kenyan-South African Dialogue on Devolution*, Claremont, 2015, pp. 10-11.

invocation of an African identity”<sup>25</sup>, in the mix of tradition and post-modernity in the structures of power, and in the tension, at least by part of policy-makers and of the elite, to make the two countries the model for the rest of the continent.

Having discussed the Kenyan and the South African experience, the article ends with some reflections on the meaning of federalism/decentralization in Africa. The central question in this regard is: in light of all difficulties and challenges associated with it, are there valuable rationales that still justify these kinds of institutional reform?

## 2. The Devolved System of Governance in Kenya

### a. The Constitutional Design

The 2010 Constitution introduced a decentralized system, explicitly referred to as “devolution”<sup>26</sup>.

Remarkably, decentralization is not completely new to Kenya, since under the British colonial power, the country was ruled under the principle of indirect rule<sup>27</sup>. The 1963 independence Constitution provided for a regional system called ‘Majimbo’ (meaning State/Province in Swahili), with a bicameral Parliament and seven regional assemblies<sup>28</sup>. This institutional design was initially introduced under the auspices of the colonial power<sup>29</sup>, but was soon abolished (1964) due to the loss of British support and the opposition of the administration<sup>30</sup>.

In the ‘80s of last century, under international donors’ recommendations, some steps towards decentralization were taken, through the District Focus for Rural Development<sup>31</sup>. However, only the 2010 Constitution introduced a proper decentralized system of government as an institutional

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<sup>25</sup> J. COMAROFF, J.L. COMAROFF, *Theory from the South*, London, 2012, p. 15.

<sup>26</sup> Y. GAHII, *Comparative Theory and Kenya’s Devolution*, in C.M. BOSIRE, W. GIKONYO (eds.), *Animating Devolution in Kenya: The Role of the Judiciary. Commentary and Analysis on Kenya’s Emerging Devolution Jurisprudence under the New Constitution*, Rome-Nairobi, 2015, pp. 13-37.

<sup>27</sup> P. SMOKE, *Kenya: erosion and reform from the center*, in J. WUNSCH, & D. OLOWU (eds.), *Local Governance in Africa: The Challenges of Democratic Decentralization*, Boulder, 2003, p. 211.

<sup>28</sup> M. MAXON, *The Demise and Rise of Majimbo in Independent Kenya*, in M.M. KITHINJI, M. MWANZIA KOSTER, JERONO P. ROTICH (eds.), *Kenya After 50. Reconfiguring Historical, Political, and Policy Milestones*, New York, 2016, p. 21.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ivi*, pp. 19-48.

<sup>31</sup> KENYA HUMAN RIGHTS COMMISSION (KHRC) AND SOCIAL AND PUBLIC ACCOUNTABILITY NETWORK (SPAN), *Harmonization of Decentralized Development in Kenya: Towards Alignment, Citizen Engagement and Enhanced Accountability*, Nairobi, 2010, pp. 15-16.

arrangement to accommodate pluralism, promote more equal redistribution of resources, as well as to strengthen national unity<sup>32</sup>.

The constitution-makers took South Africa's system of government into account, but it was not simply transplanted to the Kenyan context, and it was not the only experience taken into consideration<sup>33</sup>; as a matter of fact, also the Nigerian and Sudanese experiences were taken into consideration<sup>34</sup>, but undoubtedly the Kenyan Constitution borrows extensively from the South African one<sup>35</sup>

The far-reaching objectives of devolution are listed in Art. 174 and are:

- a.** to promote democratic and accountable exercise of power;
- b.** to foster national unity by recognising diversity;
- c.** to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;
- d.** to recognise the right of communities to manage their own affairs and to further their development;
- e.** to protect and promote the interests and rights of minorities and marginalised communities;
- f.** to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;
- g.** to ensure equitable sharing of national and local resources throughout Kenya;
- h.** to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and
- i.** to enhance checks and balances and the separation of powers”.

Devolution therefore explicitly aims at realizing the objectives generally attributed to decentralization, namely consolidating democracy, promoting state-building and the accommodation of different cultures, fostering more equal resource redistribution and so on.

The constitutional text sets the establishment of 47 county governments, with an elected assembly and elected governors (Art. 6 Constitution)<sup>36</sup>.

Schedule IV lists the competences of the national government and county governments: the former maintains powers in all crucial matters (foreign affairs and international trade, water resources,

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<sup>32</sup> D. OKELLO, *Devolution and Kenya's Socio-Economic Development: A Political Economy Inquiry and Emerging Case Law*, in C.M. BOSIRE, W. GIKONYO (eds.), *Animating Devolution in Kenya. The Role of the Judiciary: Commentary and Analysis on Kenya's Emerging Devolution Jurisprudence Under the New Constitution*, *op. cit.*, p. 47.

<sup>33</sup> C.M. BOSIRE, W. GIKONYO, *Introduction*, in ID. (eds.), *Animating Devolution in Kenya*, *op. cit.*, p. 3.

<sup>34</sup> M. MAXON, *The Demise and Rise of Majambo in Independent Kenya*, *op. cit.*, p. 43.

<sup>35</sup> Y. PAL GHAI, *South African and Kenyan Systems of Devolution: A Comparison*, *op. cit.*, p. 7.

<sup>36</sup> The high number of counties has been criticized as limiting the possibility that significant power can be exercised due also to their limited extension. N. STEYTLER, *Domesticating the Leviathan: Constitutionalism and Federalism in Africa*, *op. cit.*, p. 282.

immigration and citizenship, relationship between State and religion, defense, judiciary, educational and agricultural policies and so on), while the county governments have power in key sectors such as labor policies, education policy, healthcare, transportation, and so on. However, according to Art. 186(2) of the Constitution, the matters which are listed both in the national government's powers and in the county governments' powers are concurrent powers. Art. 186(3) sets that the powers which are not defined by the Constitution or the legislation are attributed to the national government, while Art. 187 provides for the transfer of the granted powers to counties if they prove that they would be more effectively performed.

These constitutional provisions point out an imbalance in favor of the national government, which is assessed also by Art. 191, which sets that in case of conflict between the national government and a county government the former prevails.

Despite these 'protective clauses' in favor of the national government it is relevant to note that Kenya's ambitious governance reform does not only entail an administrative and political devolution of power, but also a fiscal one. As a matter of fact, several constitutional provisions are dedicated to the fiscal matter.

Art. 203(3) provides that county governments receive 15% of national revenues<sup>37</sup>; Art. 204 provides the establishment of the Equalization Fund in order to provide basic services including water, roads, health facilities and electricity to marginalized areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, and this represents the main conditional grant to the county governments; Art. 209 states that the national government and the county governments have the power to impose taxes, although the amount of taxes is different according to the level of government. Finally, Art. 202 sets the possibility for county governments to borrow money from the central government.

In terms of resource management, the Constitution provides for the creation of specific funds in charge of it, namely the Commission on Revenue Allocation (Art. 215), which has consultative powers on resource redistribution, and the Revenue Funds for County Governments (Art. 207(1)), which are located in each county and administer the money raised or received by or on behalf of the county governments. Moreover, Art. 228 establishes the Controller of Budget, an independent body responsible to oversee the implementation of the budgets of the national and county governments by authorizing withdrawals from public funds.

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<sup>37</sup> It is worth pointing out that the counties have been receiving well over the stipulated 15% figure from the national government. In the 2015-2016 fiscal year, for instance, Kenya's 47 counties received 259 billion shillings in unconditional grants – more than 30 percent of the national revenue.



Finally, it is worth highlighting that the devolved system of government can be amended only through a procedure involving both Houses of Parliament, as well as the people, who shall be called to vote through a national referendum where the proposed amendment must be approved by at least 20 per cent of registered voters in each of at least half of the counties voting, as regulated by Art. 255(2)(i) of the Constitution.

### **b. The Implementation Process: Challenges and Steps Ahead**

The implementation of the system of devolution started in 2013, in line with the implementation guidelines provided by the Constitution itself<sup>38</sup>, and is still going on<sup>39</sup>.

The main implementation acts are represented by the Local Government Act of 1998 revised in 2012, the Urban Areas and Cities Act of 2011, the Inter-Governmental Relations Act of 2012, the Transition to Devolved Government Act of 2012, the Public Finance Management Act of 2012, and the National Government Coordination Act of 2013.

Most of these pieces of legislation have been disputed before the judiciary<sup>40</sup>.

One of the first cases disputed in front of the High Court of Nairobi<sup>41</sup>, is *Hon. Johnson Muthama, M.P. v. Minister for Justice and Constitutional Affairs and another* decided on 29 June 2012<sup>42</sup>. The case concerns the eligibility requirement contained in Election Act No. 24 of 2011 for being elected county governor. In particular, the petitioners complained that the requirement of holding post-secondary qualifications,

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<sup>38</sup> See: Chapter 18 and the Fifth Schedule of the Constitution providing for the enactment of necessary legislation and preliminary steps towards the establishment of country governments. Originally, the Constitution envisages five years for its implementation providing for the establishment of the Commission for the Implementation of the Constitution (schedule VI). With reference to the transfer of function from the national government to county governments the same schedule establishes a three-year lifespan.

<sup>39</sup> P. WANYANDE, *The Implementation of Kenya's System of Devolved Government*, in N. STEYTLER, Y. PAL-GHAI, *Kenyan-South African Dialogue on Devolution*, *op. cit.*, pp. 419-440.

<sup>40</sup> J.T. GATHII, *Assessing the Constitution of Kenya 2010 five years later*, in T. GINSBURG, A. HUQ (eds.), *Assessing Constitutional Performance*, Cambridge, 2016, pp. 337-364. D. OKELLO, *Devolution and Kenya's Socio-Economic Development: A Political Economy Inquiry and Emerging Case Law*, *op. cit.*, p. 52. H. KILELO, M. BERU, B. MASSIUMA, *Devolution and Public Sector Reforms in Kenya: Challenges and Opportunities*, in *International Journal of Innovative Research and Development*, Vol. 4, No. 8, 2015, p. 202.

<sup>41</sup> The Kenyan system of constitutional justice is diffuse: each court can rule on the constitutionality of an act or part of it. The Supreme Court is the apex court. It has both original and appellate jurisdiction. It has original jurisdiction to determine (a) presidential elections and (b) request for advisory opinions at the instance of the national government, State organ or county government on a matter that concerns a county government. It does have appellate jurisdiction to hear and determine appeals from the Court of Appeal in cases of interpretation of the Constitution and in cases in which it or the Court of Appeal certifies a matter to be of general public importance – though a certification by the Court of Appeal can be reviewed or set aside. Thus, the Supreme Court is the court with the final authority on constitutional interpretation, but that authority can only be exercised if a matter falls within its jurisdiction.

<sup>42</sup> *Johnson Muthama v. Minister for Justice & Constitutional Affairs & another* [2012] eKLR, Petition Nos. 198, 166 & 172 of 2011 (Consolidated)



ethical and moral attributes was in contrast with the Constitution because it implied discrimination based on sex and on social status, and violated the principle of sovereignty, because it curtailed the people's right to choose their leaders in that it imposed unreasonable restrictions. The Court gave right to the applicants' allegations and declared the Election Act of 2011 unconstitutional<sup>43</sup>.

Another legal controversy concerning devolution dealt with the Local Government (Amendment) Act of 2014 in relation to the provision of the County Development Boards in charge of consultative and collaboration functions between the national government and the county governments. According to the amendment, these bodies were to be composed by members of the National Assembly representing constituencies within respective counties, members of county assemblies, as well as members of the executive operating within respective counties, and were to be chaired by the Senator from the county. This however was considered in contrast with the principles of the separation of powers and of devolution, and on 10 July 2015, the High Court struck down the amendment<sup>44</sup>.

Other controversies have concerned the allocation of competences between the national government and the county governments<sup>45</sup>. In the case *Okiya Omtata Okoiti & 1 other v. Attorney General and 6 others* decided on 6 August 2014, the High Court of Kenya was asked to declare unconstitutional the decision of the Transition Authority to transfer health institutions to the counties<sup>46</sup>. By addressing the Court, the petitioners sought an interpretation of Section 23, Part 1 of Schedule IV to the Constitution and Section 2, Part 2 of Schedule IV as regards the meaning of the words "national referral health facilities" and "county health facilities". At the basis of the dispute there was, indeed, a different interpretation of the wording of the Constitution: according to the petitioners, it referred to the entire health service delivery, while the respondents argued that it referred only to the Kenyatta National Hospital and Moi Teaching and Referral Hospital. The Court rejected this latter argument and stressed that the Constitution had created a new governance structure between the two levels of government, without however determining the levels of the single health institutions.

These few samples of jurisprudence point out that, unlike in other countries where the courts have decided in favor of a recentralization of power, the Judiciary in Kenya has generally ruled favorably for

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<sup>43</sup> *Hon. Johnson Muthama, M.P v. Minister for Justice and Constitutional Affairs and another* [2012] eKLR, Petition No. 198 of 2011 consolidated with Petition No. 166 of 2011 and 172 of 2011.

<sup>44</sup> In the words of the Court: "In our view, the composition and mandate of the CDBs upsets and is in violation of the framework created by the Constitution with respect to devolution and the separation of powers between the various institutions created under the Constitution which leaves the approval of county development plans and budget to county assemblies" (Para. 102).

<sup>45</sup> Quite remarkably the transfer of function from national government to county governments has been done without the required functional analysis, which would have been fundamental to determine the ability to perform. See: P. WANYANDE, *The Implementation of Kenya's System of Devolved Government*, *op. cit.*, p. 434.

<sup>46</sup> *Okiya Omtatah Okoiti & another v. Attorney General & 6 others* [2014] eKLR, Petition No. 593 of 2013.

the county governments<sup>47</sup>. This can be explained by the fact that the devolution process is still ongoing, and the Court is aware that ruling in favor of recentralization would probably jeopardize the entire decentralization process.

Another relevant aspect of the implementation process of devolution is the fact that governors are willing to challenge the centre and to defend county interests<sup>48</sup>.

This, however, does not mean that the implementation of the devolved governance system is undisputed: first of all, the jurisprudence concerns cases in which the legislation was in contrast with the principle of devolution, still attributing functions to the national government; secondly, devolution has been at the centre of constitutional amendment proposals, namely the Constitution of Kenya Amendment Bill (No. 2) 2016, which proposed to reduce the number of county governments from 47 to 46 by reorganizing Nairobi County under the national government, and Amendment Bill (No. 1) 2016, which sought to empower the Senate to increase the timelines for transfer of functions assigned to the county governments. So far, these proposals have not proceeded, however they are paradigmatic of some discontent about the devolution process.

Besides these reasons of discontent which concern mainly the institutional design, there are also other grounds of concern, namely the fear that it will not promote a more equal redistribution of resources and/or better service delivery.

As a matter of fact, according to the County Development Index, 20 counties out of 47 are marginalized, 18 are moderately marginalized and only 9 are well-off<sup>49</sup>. In general, the socio-economic conditions of the country are negative as assessed by the figure according to which over 45% of Kenyans live below the poverty line<sup>50</sup>.

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<sup>47</sup> C.M. BOSIRE, *The Emerging Approach of Kenyan Courts to Interpretation of National and County Powers and Functions*, *op. cit.*, p. 105. N. STEYTLER, *Concurrency of Powers: The Zebra in the Room*, in *Concurrent Powers in Federal Systems. Meaning, Making, Managing*, Leiden, 2017, p. 345. M. KANGU, *Constitutional Law of Kenya on Devolution*, Nairobi, 2015, p. 108.

<sup>48</sup> N. CHEESEMAN, G. LYNCH, J. WILLIS, *Decentralisation in Kenya: The Governance of Governors*, in *Journal of Modern African Studies*, Vol. 54, Iss. 1, 2016, pp. 1-35.

<sup>49</sup> D. OKELLO, *Devolution and Kenya's Socio-Economic Development: A Political Economy Inquiry and Emerging Case Law*, *op. cit.*, pp. 38-39.

<sup>50</sup> H. KIM, T. O'BRIEN, *Tackling Inequality Part and Parcel of Kenya's Fight Against Poverty*, in *Georgetown Journal of International Affairs*, 2015. *A summary of Kenya's budget 2017/18 from a pro-poor perspective*, 2007, <http://devinit.org/post/a-summary-of-kenyas-budget-201718-from-a-pro-poor-perspective/>

Moreover, the National Office for Statistics calculates that the Gini coefficient is high (0.445) with differences between counties that support the hypothesis that decentralization does not necessarily imply uniformity in terms of performances, but rather promotes inequalities among local entities<sup>51</sup>.

As far as access to services is concerned, in some counties some improvements have occurred, especially with regard to access to healthcare<sup>52</sup>, while in others this has not been the case<sup>53</sup>.

With specific regard to service delivery, it is worth highlighting that the administrative and management tasks of delivering are delegated to local public administration structures and quite remarkably, a survey published by Transparency International in 2014 pointed out that 53% of citizens were not satisfied with service delivery<sup>54</sup>.

With regard to the fiscal aspects of devolution, a third of the county budget was spent on running office: in particular, only 10 counties spent 30% of their budget on development projects, as prescribed by the Public Finance Management Act 2012, while the majority of expenditures regarded salaries<sup>55</sup>. Despite the problems concerning counties' spending and allocation of funding, it is relevant to note also that some authors have argued that devolution has promoted an increase of taxation and this has caused popular discontent<sup>56</sup>.

Another challenge of the implementation process concerns the low level of participation at local level<sup>57</sup>. Also, corruption remains high and according to some observers, the devolved system of government has not been able to eliminate patronage<sup>58</sup>.

Despite the difficulties, it is clear that the implementation process of devolved government will take a long time and, naturally, spawns controversies.

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<sup>51</sup> C. SMULOVITZ, *Who Pays for Rights in the Argentine Provinces? The Case of Domestic Violence Laws*, Paper presented at the ICON Conference in Copenhagen 2017. R. CROOK, *Decentralisation and Poverty Reduction in Africa: The Politics of Local-Central Relations*, in *Public Administration and Development*, Vol. 23, No. 1, 2003, p. 83.

<sup>52</sup> M.L. NEGASH, *Opportunities, Good Practices and Challenges of Implementing Devolution under the New Constitutional Order in Nairobi County, Kenya*, Thesis Submitted to the Center for African and Oriental Studies in Partial Fulfilment of the Requirement for Master of Arts Degree in African Studies (Citizenship and State in Africa), 2016, pp. 57-58

<sup>53</sup> S. KILONZO, E. KAMAARA, K. MAGAK, *Improving Access to Maternal Health Care through Devolution in Western Kenya*, in *IDS Bulletin*, Vol. 48, No. 2, 2017, pp. 91-108.

<sup>54</sup> KENYAN PUBLIC SERVICE COMMISSION, *Evaluation report for the year 2015/2016 on Public Service Compliance with the Values and Principles in Article 10 and 232 of the Constitution*, Nairobi, 2016.

<sup>55</sup> WORLD BANK, *Decision time: Spending More or Spending Smart? Kenya Public Expenditure Review*, 2014, p. vi.

<sup>56</sup> S. OYOMO, *Kenya's Devolution. Tacking Stock One Year On*, Nairobi, 2014, p. 5.

<sup>57</sup> In January 2016, the Ministry of Devolution and Planning in conjunction with the autonomous Council of Governors published guidelines for improving public participation in governance.

<sup>58</sup> M. D'ARCY, A. CORNELL, *Devolution and Corruption in Kenya: Everyone's Turn to Eat?* in *African Affairs*, No. 115/459, 2016, pp. 246-273.

### 3. South African Centralized Quasi-Federalism

Like the large majority of African States<sup>59</sup>, South Africa has never been a homogeneous State, neither from a socio-political and cultural perspective, nor from an economic one, and especially not if we consider the structure of the State.

Before the democratic transition, the organisation of the South African State combined two different principles: the typical division of the country along geographical lines, creating territorially homogeneous entities – provinces and municipalities – which enjoyed some degree of power (both legislative and executive) depending on the level of decentralisation, and an ethno-racial principle, creating different communities of individuals (perceived to be homogeneous) with their own forms of government and differentiated rights and duties<sup>60</sup>. The two principles overlapped, but not perfectly, and produced a very confusing and intertwined power structure on a twin-track decentralisation logic, in which the central power of national government remained the dominant element in almost every process of policy-making<sup>61</sup>.

The creation of the new South African State in the early 1990s was characterised by a double, partially conflicting movement: on the one hand, the process of reunification of what had previously been separated by the apartheid State (the territory of the State, its population, the government structure, the vast majority of public policies – education, health, employment, security forces, etc.); on the other hand, the process of decentralisation, which implied a complete reformulation of the geography of the country both in terms of physical geography and power<sup>62</sup>. Indeed, in the long South African constitution-making process, few, if any topics were as hotly debated as the federal structure of the State and the creation of provinces with constitutionally guaranteed powers<sup>63</sup>. Despite the advice of the international community and of experts who engaged globally in reflections and debates on the advantages of some form of

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<sup>59</sup> And this is true also for pre-colonial States in all African regions, as demonstrated by solid research. A.M. GENTILI, *Il leone ed il cacciatore*, Roma, 1995. G. CALCHI NOVATI, P. VALSECCHI, *Africa: La storia ritrovata*, Roma, 2005. M. MEREDITH, *The State of Africa. A History of the Continent*, London 2005.

<sup>60</sup> B. EGERO, *South Africa's Bantustans: From Dumping Ground to Battle Front*, Uppsala 1991. R. PORTEILLA, *Le processus de recomposition de l'état sud-africain et l'empreinte des bantoustans*, in *Hérodote*, n.82-83, 1996, pp.79-111.

<sup>61</sup> M. WITTENBERG, *Decentralisation in South Africa*, in *ERSA Policy Paper*, No. 21, Johannesburg, 2003.

<sup>62</sup> P. GERVAIS-LAMBONY, *L'Afrique du Sud et les Etats voisins*, Paris, 1997.

<sup>63</sup> H. EBRAHIM, *The Soul of a Nation. Constitution-making in South Africa*, Oxford, 1998. R. SPITZ, M. CHASKALSON, *The Politics of Transition. The Hidden History of South Africa's Negotiated Settlement*, Johannesburg, 2000.

federalism for the new post-apartheid South African State<sup>64</sup>, the democratic constitutions (transitional and final) opted for a non-federal State, with some forms of decentralisation<sup>65</sup>.

The final 1996 Constitution (s 40) establishes three separate, but interdependent and interrelated, spheres of government: a national government, nine provincial governments and 284 local governments, all within the general frame of a co-operative government, which obliges all spheres of government and all organs of State within each sphere to collaborate instead of competing for powers and functions<sup>66</sup>. In addition, any dispute between the central government and the provinces is subject to the original jurisdiction of the South African Constitutional Court (s 167(4)), which brings the system closer to qualifying as a proper federal State.

The provincial sphere of government consists of legislative and executive competences, but provinces are not endowed with judicial authority<sup>67</sup>. The legislative authority of the provinces is vested in the provincial legislature, which consists of between 30 and 80 members depending on the size of the provincial population. As with the national Parliament<sup>68</sup>, provincial legislatures are elected through a proportional electoral system, based on closed party lists<sup>69</sup>. Following a ruling at the national level<sup>70</sup>, Members of Provincial Legislatures (MPLs) are forced to follow a rigid party discipline by the ‘anti-defection’ clause, which does not allow MPLs to vote differently from their party and/or to change

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<sup>64</sup> The argument in favor of the enactment of a significantly decentralized structure of the State was grounded on the basic assumptions of the supposed political benefits of a multi-centered political dispensation in ethnically divided societies. *Inter alia*: D. HOROWITS, *A Democratic South Africa? Constitutional Engineering in a Divided Society*, Oxford, 1991. B. DE VILLIERS, *Federalism in South Africa*, in *South African Journal on Human Rights*, Vol. 9, No. 3, 1993. K. KOTZÈ ET AL., *Federalism, the Solution?* Pretoria, 1992.

<sup>65</sup> L. PEGORARO, A. RINELLA, *Repubblica del Sudafrica: il Constitution act del 1993 tra federalismo e regionalismo*, in *Quaderni Costituzionali*, anno XV, No. 1, 1995; V. FEDERICO, *South African quasi-federalism*, *op. cit.*, pp. 19 ff.

<sup>66</sup> I. CURRIE ET AL., *The New Constitutional and Administrative Law*, Lansdowne, 2001. The model South African constitution-makers were looking at was the Indian one, perceived more suitable to accommodate the needs of a very diverse population than, for example, the German one. See: SOUTH AFRICAN LAW COMMISSION, *Report on Constitutional Models*, Pretoria, 1991.

<sup>67</sup> As is typical of decentralized but not federal State structures, the administration of justice remains the prerogative of the national power and is vested in the Courts, which may have a provincial organization (as is the case with South Africa), but do not depend on the provincial sphere of government either for their internal organization (judges’ recruitment, establishment of courts’ seats) nor for the granting of their independence, and not even for their financial resources. Following the same principle, regional governments do not have regional/provincial police and security forces. CURRIE et al. *op. cit.*

<sup>68</sup> R. SOUTHALL, *The Contradictions of Party Dominance in South Africa*, in H. CORDER, V. FEDERICO, R. ORRÙ, *The Quest for Constitutionalism. South Africa since 1994*, *op. cit.* 2014, pp. 155-168.

<sup>69</sup> Interestingly, the first draft of the Constitution of the Western Cape was rejected by the Constitutional Court because it provided for multiple-member geographical constituencies, as opposed to the party-list proportional representation prescribed by the national Constitution. The Court judged this provision to be inconsistent with the national Constitution as an electoral system cannot be considered to be a ‘legislative nor an executive structure’ (which provincial constitutions are entitled to regulate). Also, the province did not have the power to alter the electoral system (*Certification of the Constitution of the Western Cape*).

<sup>70</sup> F. DAU, *Costituzionalismo e rappresentanza. Il caso del Sudafrica*, Milano, 2011.

political affiliation during their mandate (the sanction for this is the loss of their legislative seat)<sup>71</sup>. Thus, MPLs are accountable in the first instance to their party rather than directly to the electorate. The legislative authority of provincial legislatures consists in passing legislation for its province in any matter of exclusive or concurrent competences (in respect to the general framework of existing national legislation), and in adopting, and eventually amending, the provincial constitution.

Despite the exclusive competences of provincial legislatures, the national Parliament can still enact legislation concerning provincial functional areas (Constitution, s 44(2))<sup>72</sup>. If narrowly interpreted, it is simply a guarantee. However, if broadly interpreted – as is the case with South Africa – it considerably enlarges the legislative prerogatives of the national Parliament, to the detriment of provincial exclusive competences. In fact, in *Ex parte President of the RSA: In re Constitutionality of the Liquor Bill*, the Constitutional Court (CC) underlined that ‘Our constitutional structure does not contemplate that provinces will compete with each other. It is one in which there is to be a single economy and in which all levels of government are to co-operate with one another’ (para. 75). And ‘where provinces are accorded exclusive powers these should be interpreted as applying primarily to matters which may appropriately be regulated intra-provincially’ (para. 51). That is to say, exclusive competences need to be interpreted in the context of those matters which can be effectively regulated in one province alone<sup>73</sup>.

Functional areas of concurrent national and provincial legislative competence, listed in Part A of Schedule 4 of the Constitution, cover very important aspects concerning the socio-economic development of the country and its citizens. Agriculture, education, environment, health services, housing, language policy, public transport, tourism, trade, urban and rural development and welfare services, for example, are crucial areas for people's lives<sup>74</sup>. *De iure*, provinces might have become the true driving force of the

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<sup>71</sup> Obviously, this makes internal dissenting voices hard to be heard, and it has weakened the role of the opposition as a watchdog at both national and subnational levels. R. SOUTHWALL, *Opposition and Democracy in South Africa*, London, 2001. And yet, “federal politics has vastly increased the complexity for the African National Congress (ANC, the dominant party since the transition) of running its own inner organizational life,” with conflicts between ANC people in government and both their provincial and national party leadership (D. LODGE, *Politics in South Africa*, Oxford, James Currey, 2002, p. 38). Clearly, this has created new arenas for political debate, which is extremely important for the quality of democracy. This was one of the reasons for advocating a decentralized structure of the State during the transition (R.P. INMAN, D.L. RUBINFELD, *Federalism and Democratic Transitions: Lessons from South Africa*, in *The American Economic Review*, Vol. 95, No. 2, 2005, pp. 39-43).

<sup>72</sup> In a comparative perspective, this provision is not unusual, as it is considered a type of guarantee for national unity even in highly decentralised states. V. TAMBURRINI, *Potere sostitutivo in Germania, Spagna, Austria e Belgio*, in *Amministrare*, n.3. 2004, pp.457-472., ID., *I poteri sostitutivi statali*, Milano, 2012. C. MAINARDIS, *Poteri sostitutivi statali e autonomia amministrativa regionale*, Milano, 2007.

<sup>73</sup> I. CURRIE, *op. cit.*, p. 121.

<sup>74</sup> According to the most recent data, in 2017 regional and municipal administrations spent more than half of the national budget, as to deliver on their mandated functions. SOUTH AFRICAN NATIONAL TREASURY, *2017 Budget Review*, Pretoria, 2017.

country's socio-economic development and of the democratic consolidation process. *De facto*, their functions and powers have been constantly challenged and narrowed by the national government, courts and policy-makers.

Notwithstanding provincial prerogatives, in fact, what has happened until now is that national framework legislation tends to be very detailed, regulating almost every aspect of the most sensitive issues, leaving little if any space for the provinces to perform their law-making duties effectively. As highlighted by D. Lodge, provincial governments “do not have much discretion in determining policy; the laws they pass in most domains have to conform with the principles underlying policies determined by central government. [...] Their capacities are also limited by their lack of any significant source of independent finance”<sup>75</sup>. This phenomenon has three different, and serious, consequences: first of all it narrows the specific role of the provincial legislatures, which is to provide provincial laws that better accommodate provincial and local needs, and which should better fit the socio-economic and cultural environment. Secondly, it reduces institutional accountability and transparency, as it becomes more and more difficult to understand which legislative entity is responsible for what type of legislation. Thirdly, this phenomenon fosters institutional competition (to the detriment of the principle of co-operative government for which it has been established), and intensifies institutional conflicts for the attribution of powers<sup>76</sup>.

Provincial executive authority is vested in the Premier, who is elected by the members of the provincial legislature of which she/he is also a member<sup>77</sup>.

### **a. Provincial Constitutions**

The possibility of granting provinces the capacity to adopt provincial constitutions was a much debated issue during the constitutional negotiations<sup>78</sup>, with two provinces (Western Cape and KwaZulu Natal) and some minority parties strongly advocating in favour of it. Section 142 of the 1996 Constitution attributes to provinces the authority for passing provincial constitutions, within the framework of the Constitution, which must be certified by the Constitutional Court. Still, provinces enjoy quite a broad level of self-determination, as their constitutions, according to Section 143(1) “may provide for :(a)

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<sup>75</sup> D. LODGE, *op. cit.*, p. 32.

<sup>76</sup> F. VENTER, *Local Government between Subsidiarity and Shortfalls in Service Delivery*, in H. CORDER, V. FEDERICO, R. ORRÙ, *The Quest for Constitutionalism. South Africa since 1994*, *op. cit.*, 2014, pp. 53-65.

<sup>77</sup> The prominence of provincial Premiers in policy-making at both provincial and national level is investigated by D. Lodge, and this explains the overshadowing of the members of provincial executive councils. D. LODGE, *op. cit.*

<sup>78</sup> S. GLOPPEN, *South African Battle over the Constitution*, Farnham, 1997.



provincial legislative or executive structures and proceedings that differ from those provided for in the Constitution; or (b) the institution, role, authority and status of a traditional monarch, where applicable”. And yet, as a matter of fact, the Western Cape is the only province that has succeeded in adopting its own constitution, whereas KwaZulu Natal, the other province which “embarked on a constitution drafting exercise, was unsuccessful since the constitutional text was not certified by the Constitutional Court”<sup>79</sup>. After more than two decades since the enactment of the final Constitution, all other provinces still operate under the provisions of the national Constitution. If we consider the issue from a functional perspective, the inability or unwillingness to adopt a provincial constitution does not undermine other provincial powers and functions. As stated by the Constitutional Court, the national Constitution “provides a complete blueprint for the regulation of government within provinces which provides adequately for the establishment and functioning of provincial legislatures and executives”<sup>80</sup>. This asserts that provinces have been designed to function effectively even without provincial constitutions. Indeed, scholars have noted that “provincial constitutions will never amount to more than window dressing”<sup>81</sup>, meaning that they have very little importance as a source of substantive law.

However, from a political angle, “it is noteworthy that the only two provinces which embarked on the provincial constitutional development road are the two provinces where political parties other than the ANC played a significant role since 1994”<sup>82</sup>.

### **b. The Limits of Quasi-Federalism**

Against the backdrop of unimplemented constitutional prerogatives, of relevant legislative and executive competences but narrowly interpreted by both the Constitutional court and the Parliament in Cape Town, we shall discuss whether this peculiar system of government has proved effective in reconciling South African unity and diversity.

Since 1994, the ANC has won all elections for provincial legislatures except in the Western Cape (where the New National Party won the 1994 round of elections and the Democratic Alliance was victorious in 2009 and in 2014) and KwaZulu Natal (where the IFP won the 1994 elections and have since then

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<sup>79</sup> D.J. BRAND, *Asymmetry in the Federal Systems, Constitutional Arrangements in South Africa*, in *European Diversity and Autonomy Papers*, EDAP, No. 1, 2008, p. 15.

<sup>80</sup> CONSTITUTIONAL COURT, *In re Certification of the Constitution of the Western Cape*, 1997, para 15.

<sup>81</sup> S. WOOLMAN, *Provincial Constitutions*, in M. BISHOP (ed.), *Constitutional Law of South Africa*, Cape Town, 2008, p. 21.

<sup>82</sup> D.J. BRAND, *op. cit.*, p. 16. Other scholars, nonetheless, note that “given the provinces' limited constitutional scope for autonomous policy-making, even when they are governed by the ANC's opponents there is only occasional evidence of serious differences over policy issues between central and regional government”. D. LODGE, *op. cit.*, p. 37.

remained the second strongest political party). A discussion of these electoral results and their implications is beyond the scope of this article; nonetheless, it is clear that such homogeneity between national and provincial spheres of government leaves little space for independent and differentiated provincial policy-making initiatives. Moreover, national and provincial elections are held contemporaneously, and party lists are delivered nationally, which means that ‘there is no mechanism for provincial electorates to hold their provincial governments directly accountable for the choices they make’<sup>83</sup>. The lack of accountability of provincial governments to their provincial electorates has neither positively contributed to enhancing provincial performance, nor to their political independence.

From a service-delivery angle, ‘the Big 5 areas of government performance – education, health, welfare, housing and agriculture – are either within the exclusive or concurrent powers of the provinces’<sup>84</sup>. Thus, the provinces are responsible for ameliorating the quality of life of their population. Nonetheless, three main obstacles have prevented provincial governments from being effective: Firstly, the already mentioned central dominance granted by the Constitution and the political system to the national government, which has maintained a very close degree of control over the legislative and executive policies of the provinces<sup>85</sup>. Secondly, the skills and capacity shortages which are evident at the provincial level. They resulted in poor governance, inability to deliver basic services and major inequalities between provinces<sup>86</sup>. Thirdly, ‘an additional, and perhaps more significant, limitation on the competency of the provinces is their ability to tax’<sup>87</sup>. Provinces are precluded from imposing ‘income tax, value-added tax, general sales tax, rates on property or custom duties’ (s 228), which are the most important revenue sources. They are, however, ‘entitled to an equitable share [...] to provide basic services and perform the functions allocated to them’ (Constitution, s 227). Each year, the Division of Revenue Act establishes the division of nationally raised revenue across the three spheres of government. The Intergovernmental Fiscal Relations Act of 1997 prescribes the process for determining the equitable share and allocation of revenue raised nationally. A redistributive formula is used to divide the equitable share among provinces, i.e. to balance the simple principle of proportionality with the population. The equitable share, however, takes into consideration functions allocated to provinces by national legislation only, thus ‘the provinces

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<sup>83</sup> R. VAN NIEKERK, *Revisiting History: The Creation of Provinces and the Politics of Social Policy in a Democratic South Africa*, in *Social Policy and Administration*, Vol. 46, No. 6, 2012, p. 633.

<sup>84</sup> B. DE VILLIERS, *The Future of Provinces in South Africa*, KAS Policy Paper No. 2, 2008, p. 15.

<sup>85</sup> N. STEYTLER, *Republic of South Africa*, in J. KINCAID, G.A. TARR (eds.), *Constitutional Origins, Structure and Change in Federal Countries*, Montreal, 2005.

<sup>86</sup> B. DE VILLIERS, *Review of Provinces and Local Government in South Africa: Constitutional Foundations and Practices*, Johannesburg, 2008.

<sup>87</sup> J. MARSHFIELD, *Authorising Subnational Constitutions in Transitional Federal States: South Africa, Democracy and KwaZulu Natal Constitution*, in *Vanderbilt Journal of Transnational Law*, Vol. 51, 2008, p. 594.

are not entitled to additional funding for expenses created by provincial law, and they do not have the authority to raise independent revenue<sup>88</sup>. This process results in a severe contraction of effective provincial autonomy.

The provinces' inability to fulfil their fundamental functions has been so severe in some of them that in December 2011 the national government took direct control (invoking s 100(1) of the Constitution<sup>89</sup>) of Limpopo, Free State and Gauteng provincial governments to address 'underspending, overspending, and challenges with supply chain management'<sup>90</sup>. More recently, in April 2018, the Cabinet has placed the North West health department under the administration of the national government invoking once again art. 100(1) of the Constitution. This means that the Treasury and the national Department of Health shall step in on behalf of the government in North West's health department to ensure services are delivered<sup>91</sup>. National supervision and surrogacy of functions is not unique to South Africa and it may also be not very infrequent worldwide. It is the symptom, however, of serious institutional malaise.

Sure enough, the debate surrounding the very existence of the provinces and their future is a long-standing one<sup>92</sup>, which has regularly gained momentum, and then been set aside. In 2007, the Department of Provincial and Local Government itself initiated a policy review process with the 'task of assessing whether existing forms of governance remain appropriate to meeting the changing demands that have become routine in developed and developing countries alike'<sup>93</sup>. This revival of interest, which has catalysed political and academic attention for some time, has not led to significant institutional reform in the subsequent decade. The vast inequalities in education, health, and basic infrastructure, such as access to safe water, sanitation and housing, which was inherited from the apartheid regime, still maintain a strong provincial element, as extensively demonstrated by scientific literature in very different fields<sup>94</sup>.

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<sup>88</sup> *Ivi*, pp. 594-595.

<sup>89</sup> "When a province cannot or does not fulfill an executive obligation in terms of legislation or the Constitution, the national executive may intervene by taking any appropriate steps to ensure fulfillment of obligation, including [...] b) assuming responsibility for the relevant obligation in that province to the extent necessary [...]"

<sup>90</sup> GOVERNMENT OF SOUTH AFRICA, *National Government intervenes in Free State, Gauteng, and Limpopo Provinces*, Pretoria, 5 Dec 2011. <http://www.gcis.gov.za/content/newsroom/media-releases/cabinet-statements/statement-cabinet-meeting-5-december-2011>.

<sup>91</sup> For the details: <https://mg.co.za/article/2018-04-26-cabinet-places-north-west-health-dept-under-administration>

<sup>92</sup> Indeed, it never ceased since the transition. See: B. DE VILLIERS, *Review of Provinces and Local Governments in South Africa: Constitutional Foundations and Practices*, *op. cit.*

<sup>93</sup> DPLG, *Policy Process on the System of Provincial and Local Government*, Pretoria, 2007, p. 3.

<sup>94</sup> B. OZLER, *Not Separate, Not Equal: Poverty and Inequality in Post-apartheid South Africa*, in *Economic Development and Cultural Change*, Vol. 55, No. 3, 2007, pp. 487-529. M. LEIBBRANDT et AL., *Trends in South African Income Distribution and Poverty since the Fall of Apartheid*, in *OECD Social, Employment and Migration Working Papers*, No. 101, 2010. N. SPAULL, *Poverty and Privilege: Primary school inequality in South Africa*, in *International Journal of Educational Development*, Vol. 33 No.5, 2013, pp. 436-447.

In education, Sayed and Soudien, for example, illustrate how ‘policies of educational decentralisation may exacerbate rather than reduce inequities in society; they may exclude more than include’<sup>95</sup>. Moreover, ‘weak capacity in provincial education departments hinders the translation of policy from the national level down to the school level; and without any adjustment in the provincial equitable share [of national revenues], poorer provinces will continue to struggle to fund the many schools falling into no fee poverty quintiles’<sup>96</sup>. If we consider access to basic services, and in particular access to water, major provincial inequalities continue to persist<sup>97</sup>. Furthermore, ‘figures reported on healthcare in the Eastern Cape indicated an infant mortality rate of 60 compared to the South African average of 45’; this is the consequence of the existence of significant health needs but poor administrative capacities. ‘Combined with the poor governance systems characteristic of provinces with a bantustan legacy, the health system in the Eastern Cape failed to deliver adequate health services to the citizens of the province’<sup>98</sup>.

The decentralised structure of the State seems therefore to be ineffective in delivering positive governance as it has proved ineffective in providing innovative solutions for the multiple country governance challenges. Moreover, corruption, clientelism and mismanagement have proliferated at provincial level<sup>99</sup>.

Why maintain the quasi-federalism, then, and what for? First of all, the combination of public commitment to decentralisation and constitutional provisions supporting the provinces makes overt recentralisation difficult<sup>100</sup>. Secondly, and more relevantly, decentralisation has played a crucial role in the South African democratisation process. Accommodating requests from minorities for political guarantees through a form of decentralization or federalism was part of the negotiated democratic transition<sup>101</sup>. Therefore, in the general assumption that constitutional engineering offered a safe riverbed for the negotiations, as it provided the adequate institutional embankments (in this case the different decentralisation patterns) that made it possible for different people to reach agreement when agreement

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<sup>95</sup> Y. SAYED, C. SOUDIEN, *Decentralisation and the construction of inclusion education policy in South Africa*, in *Compare*, Vol. 35, No. 2, 2005, p. 115.

<sup>96</sup> *Ibid.*, p. 685.

<sup>97</sup> V. FEDERICO, «Ogni persona ha diritto all’acqua». *Acqua e diritti fondamentali in Sudafrica*, in *Diritto Pubblico Comparato ed Europeo*, Vol. 2, 2012, pp. 566-585.

<sup>98</sup> R. VAN NIEKERK, *Revisiting History: The Creation of Provinces and the Politics of Social Policy in a Democratic South Africa*, in *Social Policy and Administration*, Vol. 46, No. 6, 2012, p. 631.

<sup>99</sup> S. PILLAY, *Corruption-the challenge to good governance: A South African perspective*, in *International Journal of Public Sector Management*, Vol. 17, No. 7, pp. 586-605; G. BLUNDO at AL., *Everyday Corruption and the State*, Cape Town, 2013.

<sup>100</sup> J.T. DICKOVICK, *Municipalisation as Central Government Strategy: Central-Regional-Local Politics in Peru, Brazil, and South Africa*, in *Publius: The Journal of Federalism*, Vol. 37, No. 1, 2007, p. 7.

<sup>101</sup> “Given their presumptive success in the provinces [of Western Cape and KwaZulu Natal] and expected defeat at the national level, the National Party and the Inkatha Freedom Party championed federalism and conditioned their support for democratisation to [...] guarantees for provinces” (J.T. DICKOVICK, *Municipalisation as Central Government Strategy: Central-Regional-Local Politics in Peru, Brazil, and South Africa*, *op. cit.*, p. 6).



was necessary<sup>102</sup>, federal arrangements were in fact a type of ‘peacemaking device’<sup>103</sup>. This is not an insignificant dowry that federalism and decentralization have brought to the new South Africa.

The constitution-makers, through the complex, two-stage constitution-making process, drew up a fairly sophisticated hybrid system, creating a complex mixture of opposite centrifugal and centripetal forces. Inevitably, the system in action has highly simplified the structure, with centripetal forces prevailing as of today. Yet, constitutions are a tool in the hands of the people, and they remain susceptible to new interpretations and innovative implementations. In future, truly federal policies might prevail, providing new wind to South African federal sails.

#### 4. Final remarks

Decentralized or federal systems of government are far from being silver bullets. To fulfil the promises and expectations they are associated with (democratization, governance, conflict resolution, development and the enhancement of socio-economic conditions, minorities' accommodation, etc...) a number of conditions have to be met. These conditions often require ‘more State’, rather than ‘less State’. In the African situation where the State is still facing a lot of challenges, being one of the most vilified institutions<sup>104</sup>, this represents a major problem and contributes to explaining the failure of decentralization in realizing the expectations.

Scholars argue that it is somehow still early to fully assess the virtues and vices of the South African system (even though criticism prevails over positive evaluation). It is out of question to do the same exercise for Kenya, where the constitutional reform is so young that it has not even been completely implemented yet. Apart from a number of differences due to the very diverse socio-economic context, the legal system, the party system, etc., and also apart from a number of similarities due to the heterogeneity of the population, the existence of major inequalities in access to resources, the appreciation for the traditional African legal system, a new drive towards constitutionalism, etc., the comparison between the two cases lead to two paramount considerations<sup>105</sup>.

First: the importance of courts in determining the concrete enactment of federal (or decentralized) constitutional provisions. Much has been written on the growing relevance courts are assuming in African

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<sup>102</sup> C. SUNSTEIN, *Designing Democracy: What Constitutions Do*, New York, 2001, p. 243.

<sup>103</sup> N. STEYTLER, J. METTLER, *Federal Arrangements as a Peacemaking Device during South Africa's Transition to Democracy*, in *Publius: The Journal of Federalism*, Vol. 31, 2001, pp. 93-106.

<sup>104</sup> T. MKANDAWIRE, *Thinking About Developmental States in Africa*, in *Cambridge Journal of Economics*, Vol. 25, No. 3, 2001, pp. 289-313.

<sup>105</sup> On the matter of a comparison between Kenya and South Africa with regard to decentralization see: N. STEYTLER, Y. PAL-GHAI, *Kenyan-South African Dialogue on Devolution*, Claremont, 2015.

contemporary legal systems<sup>106</sup> (where constitutions are no more “without constitutionalism”<sup>107</sup>), and the South African and Kenyan experiences are pertinent examples of the phenomenon. In South Africa, a coherent Constitutional Court's case-law providing narrow interpretation of provincial competences has strongly undermined the capacity of provincial institutions to establish their legitimacy in the exercise of their constitutionally recognized legislative and executive prerogatives. Similarly, but in the reverse direction, Kenyan courts have, so far, been defending counties' powers and functions, supporting, therefore, the decentralization process, and providing legitimacy that goes much beyond the tribunals' courtrooms and the decision-making arenas.

Second: the importance of federalism or decentralization to reduce conflict in democratic transitions<sup>108</sup>. This is not a minor merit in the African context, still torn apart by conflict. To avoid misunderstanding, it is noteworthy to highlight that cross-national studies on the relationship between decentralization/federalism and violence have demonstrated that such reforms can increase – rather than decrease – ethnic conflict and secession by encouraging the rise of regional parties<sup>109</sup>, and indeed, this is not what this study means to convey. Building on the South African and Kenyan experience, we argue, instead, that federalism and/or decentralization can be pivotal assets for accommodating minorities' requests during democratic and constitutional transitions. They proved to be strategic in encompassing minorities' requests (whether they be linguistic, racial, ethnic, political, geographical, or religious minorities) that could otherwise endanger the whole process, into the acceptable frame of negotiating constitutional provisions<sup>110</sup>. In other words, in Kenya and South Africa, anti-systemic drives and non-

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<sup>106</sup> Inter alia: R. L. ELLETT, *Pathways to Judicial Power in Transitional States. Perspectives from African Courts*, Abingdon, 2013; J. WIDNER, *Courts and Democracy in Postconflict Transitions: a Social Scientist's Perspective on the African Case*, in *American Journal of International Law*, Vol. 95 No. 1, 2001, pp. 64-75. On the South African case: R. ABEL, *Politics by Other Means*, Abingdon, 1995; G. VAN DES SCHYFF, *Judicial Review of Legislation*, London, 2010. On the “judicialization of politics: R. HIRSCHL, *The New Constitutionalism and The Judicialization of Pure Politics Worldwide*, in *Fordham L. Rev.*, Vol. 75 No. 2, 2006, pp. 721-753.

<sup>107</sup> H.W.O. OKOTH-OGENDO, *Constitutions Without Constitutionalism. Reflections on an African Political Paradox*, New York, 1988.

<sup>108</sup> The literature on the argument is immense and the specific reasons why decentralization is assumed to reduce conflict are manifold. See for example D.L. HOROWITZ, *Democratic South Africa?: Constitutional Engineering in a Divided Society*, Berkeley, 1991. A. LIPHJART, *Democracy in Plural Societies: A Comparative Exploration*, New Haven, 1977. C. KAUFMANN, *Possible and Impossible Solutions to Civil Wars*, in *International Security*, Vol. 20, No. 4, 2012, pp. 136-175. U. AMORETTI, N. BERMEO (eds.), *Federalism and Territorial Cleavages*, Baltimore, 2004.

<sup>109</sup> Even the literature that contests the argument of the ability of decentralization of reducing conflict is huge. See for example W. KIMLICKA, *Multicultural Citizenship*, Oxford, 1995. J.D. ELAZAR, *Exploring Federalism*, Tuscaloosa and London, 1987. L. SNYDER, *From Voting to Violence: Democratization and Nationalist Conflict*, London, 2000. For an in-depth analysis of these arguments and counterarguments see D. BRANCATI, *Peace by Design*, Oxford, 2008.

<sup>110</sup> N. STEYTLER, Y. PAL GHAI, *Devolution: What can Kenya learn from South Africa?*, in N. STEYTLER, Y. PAL-GHAI, *Kenyan-South African Dialogue on Devolution*, *op. cit.*, p. 442.



negotiable requests (such as, for example in South Africa the creation of a white *volkstaat*) have been led back into the sphere of negotiable issues through a federal or decentralized institutional design.

Federalism and decentralization are clearly neither the “one-fits-all” solution for African societies, nor the elixir for long life for new African States. They have played a prominent role in African politics since the eve of decolonization, without achieving impressive results. Kenyan, and especially South African, experiences demonstrate that the large majority of positive impacts on the quality of democracy, governance, institutional strengthening, economic growth and social development often associated to federalism (or decentralization) may remain on paper, seldom and partially becoming law-in-action. But the one, lasting result of decentralization and quasi-federalism that characterized both transitions is the “civilization” of the conflict, that can justify the endurance of the enthusiasm for this form of governance in Africa, where the political, social and cultural value of successful democratic transitions should not be underestimated.