

**UNIVERSITY OF THE WESTERN CAPE**



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WESTERN CAPE**

**FACULTY OF LAW**

**Decentralisation and Constitutionalism in Africa:  
A Comparative Analysis of South Africa and Zimbabwe**

By

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A mini-thesis submitted in partial fulfilment of the requirements for the degree of Master of  
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University of the Western Cape

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**15 November 2019**

**Key Words:** Constitution, Constitutionalism, Decentralisation, Democracy, Devolution, Federalism, Human Rights, Independent Judiciary, Rule of Law, Separation of Powers, Supremacy of the Constitution, Unitary System

## Plagiarism Declaration

I, **Fungai Paul Mudau**, do hereby declare that *'Decentralisation and Constitutionalism in Africa: A Comparative Analysis of South Africa and Zimbabwe'* is my original work and has not been submitted for any degree or examination in any university or institution of higher learning. While I have relied on numerous sources and materials to develop the main argument presented in this mini-thesis, all the materials and sources used are duly acknowledged and are properly referenced.

Signature: 

Date: **15 November 2019**

**Supervisor: Prof Nico Steytler**

Signature:

Date:



**Co-supervisor: Mrs Melissa Ziswa**

Signature:

Date:

## Dedication

*To*

*My mother: Tambu Sibanda*

*My daughters: Thabile and Thato*

*And*

*'The departed Methuselah': Rakgolo Alick Nindi (18 October 1919 – 15 December 2018)*

*whom this year marks his centenary birthday.*



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## List of Abbreviations and Acronyms

<b>ANC</b>	African National Congress
<b>Codesa</b>	Convention for a Democratic South Africa
<b>COPAC</b>	Constitutional Parliamentary Select Committee
<b>DA</b>	Democratic Alliance
<b>GNA</b>	Government of National Unity
<b>GPA</b>	Global Political Agreement
<b>IFP</b>	Inkatha Freedom Party
<b>MDC-M</b>	Movement for Democratic Change - Mutambara
<b>MDC-T</b>	Movement for Democratic Change - Tsvangirai
<b>NP</b>	National Party
<b>NNP</b>	New National Party
<b>SADC</b>	Southern African Development Community
<b>UANC</b>	United African National Council
<b>ZANU-PF</b>	Zimbabwe African National Union - Patriotic Front
<b>ZAPU</b>	Zimbabwe African People's Union
<b>ZDF</b>	Zimbabwe Defence Force

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# Chapter One: Introduction

## 1.1 Problem statement

Since the early 1990s, the move towards decentralisation has been given prominence in African constitutions.<sup>1</sup> Countries that embarked on ambitious decentralisation processes had to make the necessary constitutional reforms.<sup>2</sup> The emergence and proliferation of constitutional entrenchment of decentralisation in Africa was long overdue and thus necessitated by the popular widespread discontent expressed against leaders who ‘personalize power and concentrate it within a privileged clique in the capital city’.<sup>3</sup>

While stifling the inroads of liberal democracy, authoritarian rulerships, single-party state systems and military dictatorships contributed immensely to the downward trajectory of political development in post-colonial Africa.<sup>4</sup> Evidently, the intent and purpose for the quest to consolidate the complementary relationship between decentralisation and constitutionalism is aimed at domesticating the Leviathan – the untrammelled ruler.<sup>5</sup>

Similarly, both the 1996 Constitution of South Africa,<sup>6</sup> and the 2013 newly adopted Constitution of Zimbabwe,<sup>7</sup> which are the supreme laws of each country,<sup>8</sup> also provide for decentralised

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<sup>1</sup> Fombad CM ‘Constitutional entrenchment of decentralisation in Africa: An overview of trends and tendencies’ (2018) (62)2 *Journal for African Law* 175.

<sup>2</sup> Ahmad E & Brosio G *Does decentralization enhance service delivery and poverty reduction?* (2009) 1.

<sup>3</sup> Fombad (2018) 175.

<sup>4</sup> Steytler N ‘Domesticating the Leviathan: Constitutionalism and federalism in Africa’ (2016) 24(2) *African Journal of International and Comparative Law* 272. Mudau FP *The role of the African Charter on Values and Principles of Public Service and Administration in promoting good governance in Africa: A comparative study on Uganda and South Africa* (unpublished LLM dissertation, University of Pretoria, 2017) 1.

<sup>5</sup> Brudner A ‘The Evolution of Authority’ in Capps P & Olsen HP (Eds) *Legal Authority Beyond the State* (2018) 32. See also Steytler (2016) 272.

<sup>6</sup> s 40(1) of the Constitution of the Republic of South Africa, 1996 (the 1996 South African Constitution).

<sup>7</sup> s 5 of the Constitution of the Republic of Zimbabwe, Amendment No. 20 of 2013 (the 2013 Zimbabwean Constitution).

<sup>8</sup> s 2 of the 1996 South African Constitution; and s 2 of the 2013 Zimbabwean Constitution.

systems of government. These constitutions establish government at three levels – national, provincial and local. Although there are no precise objectives for constitutionally entrenching decentralisation, its adoption varies from one country to another.<sup>9</sup> Generally, while depending on the legal-political environment of each country, the exact objectives of decentralisation have proven to be numerous and varying in scale. In the context of both South Africa and Zimbabwe, the overall object is to bring the government closer to the people in order to realise, *inter alia*, peace, democracy, good governance and development.<sup>10</sup>

South Africa has a multi-sphere system of government operating in accordance with a quasi-federal state structure,<sup>11</sup> whereas Zimbabwe’s multi-tier system of government functions within the parameters of a decentralised unitary state structure.<sup>12</sup> In spite of the fact that both countries have adopted decentralised forms of government in order to seek solutions to the challenges they faced, the ramifications of having different state structures and systems as per their constitutional frameworks inevitably warrant that the implementation of decentralisation in South Africa and Zimbabwe are on separate and distinct planes.

In South Africa, since the dawn of democracy in 1994, the elements of constitutionalism as enshrined in the Constitution have been realised in practice by the government of the day.<sup>13</sup> A key milestone that best captures the depth and extent of the effective implementation of decentralisation is demonstrated by the existence of fully-fledged provincial and local governments. Fundamentally, this forms part of the broad commitment to constitutionalism and

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<sup>9</sup> Fombad (2018) 176.

<sup>10</sup> s 41(1) of the South African Constitution; and ss 264(2) and 265(1) of the Zimbabwean Constitution.

<sup>11</sup> Tepeciklioglu EE ‘South African federalism: Constitution-making process and the decline of the federalism debate’ (2018) 13 *Journal of Yasar University* 164.

<sup>12</sup> Chigwata TC *Provincial and Local Government Reform in Zimbabwe: An analysis of the Law, Policy and Practice* (2018) 100.

<sup>13</sup> Steytler N ‘The Dynamic Relationship between Devolution and Constitutionalism in South Africa’ in Fombad CM & Steytler N (Eds) *Decentralization and Constitutionalism in Africa* (2019b) 151.

the devolution of power at the national level as spearheaded by the national governing party, the African National Congress (ANC).<sup>14</sup> Given the nature and dynamics involved in the build-up to the famed democratic transition in 1994, the correlation between decentralisation and constitutionalism has been a resounding feat.<sup>15</sup> This is partially attributed to the far-reaching commitment to devolution of power and constitutionalism, and the astute adherence to the rule of law, and the well-developed and advanced law and policy on multi-level governance.<sup>16</sup>

Against this backdrop, the problem therefore arises from the fact that while the state of decentralisation and constitutionalism has made significant strides in South Africa, contrastingly, since the adoption of the new Constitution in 2013, devolution has not yet been fully implemented in Zimbabwe.<sup>17</sup> Most notably, the non-implementation of devolution is evidenced, among other disconcerting factors, by the absence of provincial and metropolitan councils which are provided for in terms of sections 268 and 269 of the 2013 Zimbabwean Constitution, respectively.

Since gaining independence in 1980, Zimbabwe has been grappling with the crisis of governance. The national governing party, the Zimbabwe African National Union – Patriotic Front (ZANU-PF) led by former President Robert Mugabe had inherited repressive mechanisms of operation.<sup>18</sup> Nonetheless, in the beginning, Mugabe’s governance style was commended as ‘a model for post-

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<sup>14</sup> Steytler (2019b) 152. See also Feinstein A ‘Decentralisation: The South African experience’ (2015) 2 available at <<https://www.gpgovernance.net/wp-content/uploads/2015/07/Decentralisation-the-south-african-experience-feinstein1.pdf>> (accessed 21 August 2019).

<sup>15</sup> Steytler (2019b) 151. See also Powell D ‘Fudging Federalism’: Devolution and Peace-making in South Africa’s Transition from Apartheid to a Constitutional Democratic State (1990-1996)’ in Steytler N & Ghai YP (Eds) *Kenyan-South African Dialogue on Devolution* (2015) 32.

<sup>16</sup> Steytler (2019b) 151. See also De Visser J & Steytler N ‘Multilevel government in South Africa, Ethiopia and Kenya: Observations from the practice of designing and implementing multilevel government systems’, occasional paper (2018) 1.

<sup>17</sup> Mapuva J ‘Local governance, democratisation and constitutionalism in Zimbabwe’ (2014) 5 *International Journal of Politics and Good Governance* 20.

<sup>18</sup> Masunungure EV ‘Zimbabwe’s militarized, electoral authoritarianism’ (2011) 65(1) *Journal of International Affairs* 49-50. See also Mhandara L & Poee A ‘Mediating a convoluted conflict: South Africa’s approach to the inter-party negotiations in Zimbabwe’, occasional paper (2017) 8.

colonial governance' due to its promotion of national peace and reconciliation. This soothed the fears of the white population and sought to emancipate and empower 'the long oppressed black population'.<sup>19</sup> However, not long after independence Zimbabwe descended into autocracy after a short experiment of flawed democratic rule.<sup>20</sup>

As a consequence, both historically and contemporarily, Zimbabwe has spent a substantial number of years under an authoritarian rule fraught with a one-party state system,<sup>21</sup> diluted separation of powers and excessive politicisation of the judiciary,<sup>22</sup> and easy constitutional amendments.<sup>23</sup> These challenges to constitutionalism have been compounded by the erosion of good governance, gross human rights violations and the shallow roots of constitutional democracy and its administrative institutions.<sup>24</sup> More profoundly, Zimbabwe also faces an obstinate centralist and hegemonic political culture which breeds impunity and is intolerant of both the devolved political structures and the corresponding multi-party system of democratic government.<sup>25</sup> This confluence of factors culminates with the visible reluctance to heed and to adhere to the devolution of power as steered by the 2013 constitutional reforms.<sup>26</sup>

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<sup>19</sup> Ibrahim AA 'Democracy, political instability and the African crisis of underdevelopment' (2013) 1 *Journal of Power, Politics & Governance* 62.

<sup>20</sup> Leon T 'The state of liberal democracy in Africa: Resurgence or retreat?' (2010) available at <<https://object.cato.org/sites/cato.org/files/pubs/pdf/dpa12.pdf>> (accessed 25 September 2019).

<sup>21</sup> Chikerema AF & Chakunda V 'Political culture and democratic governance in Zimbabwe' (2014) 2 *Journal of Power, Politics & Governance* 61.

<sup>22</sup> Chiduzo L 'Towards the protection of human rights: Do the new Zimbabwean constitutional provisions on judicial independence suffice?' (2014) 17(1) *PER/PELJ* 368.

<sup>23</sup> Mhodi PT *The constitutional experience of Zimbabwe: Some basic fundamental tenets of constitutionalism which the new constitution should embody* (unpublished LLM dissertation, University of KwaZulu-Natal, 2013) 15.

<sup>24</sup> Masunungure (2011) 49-50. See also Chikerema & Chakunda (2014) 55.

<sup>25</sup> Matlosa K 'Political culture and democratic governance in Southern Africa' (2003) 8(1) *African e-Journals Project* 92-95. See also Masunungure EV & Ndoma S 'The popular quest for devolution in Zimbabwe' (2013) available at <<https://www.files.ethz.ch/isn/164675/afrobrieffno114.pdf>> (accessed 4 August 2019).

<sup>26</sup> Moyo P & Ncube C 'Devolution of power in Zimbabwe's new constitutional order: Opportunities and potential constraints' (2014) 18 *Law Democracy and Development* 298.

As a result, in spite of its constitutionalisation, devolution is yet to be fully implemented, six years after its enshrinement in Zimbabwe's 2013 new Constitution. This is primarily due to lack of political commitment, political strife and flaws contained in the constitutional provisions.<sup>27</sup> The sub-national government structures lack the necessary political, administrative and fiscal capacity as well as legitimacy to govern over their own jurisdictions.<sup>28</sup> Therefore, the Zimbabwean decentralised unitary system is classified to be 'anchored on a strong centralist ideology that suffocates the autonomy of sub-national institutions'.<sup>29</sup>

In the current juncture, the new political administration of President Emmerson Mnangagwa has expressed the intention to implement devolution during the 2018-2022 government term.<sup>30</sup> However, there is a lack of clarity regarding the implementation of devolution, and the 2013 Constitution provides little guidance while parliament is dominated by the ZANU-PF party that opposes devolution.<sup>31</sup> A plethora of issues has been identified to be central to the debate on devolution. This encompasses the historical background of mistrusts in certain regions of the country which are long suspected as taking devolution "as an opportunity for a separate state, a

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<sup>27</sup> Chikwawawa C 'Constitutionalisation and implementation of devolution in Zimbabwe' (2019) 9(3) *International Journal of Scientific and Research Publication* 19.

<sup>28</sup> Sibanda N *The evolution of decentralisation policy in developing countries: A policy analysis of devolution in Zimbabwe* (unpublished masters dissertation, University of KwaZulu-Natal, 2013) 70.

<sup>29</sup> Chakunda V 'A critical analysis of the dynamics of intergovernmental relations in Zimbabwe' (2018) 6(3) *Journal of Political Sciences & Public Affairs* 1.

<sup>30</sup> Chigwata TC 'Emerging debates about, and prospects for, devolution in Zimbabwe' (2019) 1 available at <https://zimlil.org/zw/blog/Emerging%20debates%20about%20and%20prospects%20for%20devolution%20in%20Zimbabwe.pdf> (accessed 15 September 2019).

<sup>31</sup> Muchadenyika D 'The Inevitable: Devolution in Zimbabwe – From Constitution-Making to the Future' in De Visser J, Steytler N, Powell D *et al* (Eds) *Constitution-Building in Africa* (2015) 126.

behaviour that smacks of secessionism”.<sup>32</sup> Other issues include disputes pertaining to spatial and territorial organisation, natural resource management and fiscal resource allocation.<sup>33</sup>

The implementation itself requires a cautious roadmap as an improperly designed decentralisation framework undermines the objectives of decentralisation.<sup>34</sup> The defect can be exacerbated if the state of constitutionalism is impugned by the absence of constitutionality of laws. Hence, it is worth underscoring at the outset the significance of projecting constitutionalism as a prerequisite for the successful implementation of decentralisation. While cognisant of the vigorous political environment in Zimbabwe, it is yet to be seen whether devolution and constitutionalism “will be implemented in letter and spirit”.<sup>35</sup>

## 1.2 Research questions

The primary research question is as follows: What does decentralisation and constitutionalism entail and what is the linkage between these two variables? With a view to developing the primary research question, the study will also address the following secondary questions:

- (a) Is constitutionalism an indispensable precondition for decentralisation in Africa?
- (b) Has constitutionalism, as both a politico-legal philosophy and practice been central to the successful implementation of decentralisation in South Africa?
- (c) If yes, can the same correlation be applicable in Zimbabwe?

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<sup>32</sup> Mapuva J & Miti GP ‘Exploring the uncharted territory of devolution in Zimbabwe’ (2019) 11(2) *Journal of African Studies and Development* 14. See also Tsododo B ‘The folly of secessionist, tribal politics’ (2014) available at <https://www.herald.co.zw/the-folly-of-secessionist-tribal-politics/> (accessed 4 August 2019).

<sup>33</sup> Chirisa I, Muzenda A & Manyeruke C ‘The devolution debate and the new constitution of Zimbabwe: An exploratory evaluation’ (2013) 2(2) *Southern Peace Review Journal* 86.

<sup>34</sup> Ziswa MNS *An analysis of the decentralisation framework provided for in the African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development, 2014* (unpublished LLM research paper, the University of the Western Cape, 2017) 12.

<sup>35</sup> Mapuva (2014) 24. See also Chikwawawa (2019) 19.

- (d) What is the state of decentralisation and constitutionalism in Zimbabwe?
- (e) What can Zimbabwe learn from the successful quintessential model of South Africa?
- (f) How can constitutionalism be built in Zimbabwe?

### 1.3 Argument

The research argues that there is a mutually reinforcing relationship between modern constitutionalism and decentralisation as closely linked and compatible concepts. Therefore, constitutionalism is an indispensable precondition for decentralisation. The argument is substantiated by the South African case study where constitutionalism, both as a politico-legal philosophy and practice, has been instrumental to the effective implementation of decentralisation. The success is largely credited to the astute adherence to the rule of law and the well-developed and advanced law and policy on multi-level governance which emanates centrally from the broad commitment to devolution of power and constitutionalism at the national level.

Nonetheless, major challenges still persist in South Africa, particularly in terms of service delivery, development, equality, capacity and competence, much of which relates to the fragility at the local level of government.<sup>36</sup> The failure of local government is due to a lack of commitment to constitutionalism and the insistent non-compliance with the rule of law that are ascribed to wide-scale corruption and bad governance.<sup>37</sup> Accordingly, this research argues that the already entrenched and implemented decentralisation framework in South Africa needs to be supplemented by a corresponding viable practice of constitutionalism and compliance with the

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<sup>36</sup> De Visser & Steytler (2018) 1.

<sup>37</sup> Dlalisa WTM *Strategies for enhancing good governance in South African local government* (unpublished masters dissertation, Stellenbosch University, 2009) 1. See also February J 'Local government in South Africa – mostly corrupt, largely dysfunctional' (2018) available at <<https://www.dailymaverick.co.za/opinionista/2018-04-26-local-government-in-south-africa-mostly-corrupt-largely-dysfunctional/>> (accessed 13 August 2019).

rule of law in all spheres of government, including the local level that is often prone to ‘elite capture’.<sup>38</sup>

A strong impetus for scholarly examination of comparative constitutional systems and norms came with the collapse of communist and authoritarian regimes in the 1990s and the subsequent wave of constitutional writing.<sup>39</sup> In line with this historical reality, the theory and practice relating to the implementation of decentralisation and constitutionalism must positively refract each country’s constitutional choices and if necessary, could comparatively be reflected in contrast to the successful experiences of other multi-level states. As a consequence, demonstrating the significant impact of comparative constitutionalism in the appraisal of effective decentralised forms of government. Nonetheless, the level of constitutional entrenchment of decentralisation in multi-level states is of course determined by what the constitution specifically provides.

Therefore, while underlying a devolutionist standpoint, the research further argues that the 2013 Zimbabwean Constitution contains provisions that are fairly endowed with enormous potential to propel the effective implementation of decentralisation and constitutionalism. In contrast to the South African case, the achievement of this goal is unquestionably contingent on the requisite good political commitment at the national level. According to Mudau, this is because commensurate political will plays a crucial role in setting the agenda, success and failure of any intervention.<sup>40</sup> Having a constitutional entrenchment of devolution without practical observance to constitutionalism and rule of law defeats the purpose of the constitutionalisation of devolution. Ultimately, resulting in the promise of the highly acclaimed constitutional reforms of 2013 coming

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<sup>38</sup> The phrase ‘elite capture’ refers to a situation where local level of government is not adequately empowered both financially and authoritatively and certain local elites interfere and take control of the democratic process and state resources, see Musgrave MK & Wong S ‘Towards a more nuanced theory of elite capture in development projects. The importance of context and theories of power’ (2016) 9(3) *Journal of Sustainable Development* 88-89.

<sup>39</sup> Dorsen N, Rosenfield M, Sajo A *et al* (Eds) *Comparative Constitutionalism: Cases and Materials* (2003) iii.

<sup>40</sup> Mudau (2017) 34.

to naught. In view of that, it is further argued and emphasised that the absence of constitutionalism in Zimbabwe is the root cause for the non-implementation of devolution owing to an obstinate centralist and hegemonic political culture of impunity that is intolerant to devolved political structures and the corresponding multi-party system of democratic government.

The research further argues that, since the nature and processes of the intended devolution of power in Zimbabwe remains unclear, compliance with the rule of law and respect to the supremacy of the constitution as an indication of instilling a culture of constitutionalism alone, cannot take place overnight and in vacuum. Rather than to pursue devolution anyhow, a cautious roadmap meant to properly design a decentralisation framework must be fashioned in order to avoid plunging the country into massive turmoil and increased developmental challenges. This key point resonates well with general concerns on the potential dangers of full-scale decentralisation in developing countries. In the current juncture, there is no set standard as to the level of political decentralisation that countries should choose – in most countries this is largely an accident of history and political decisions,<sup>41</sup> and which may be a similar case in Zimbabwe owing to the aftermath of the catastrophic disputed presidential elections in 2008.

Lastly, the tangible realisation of a mutually supporting relationship between decentralisation and constitutionalism rationalises how South Africa's constitutional democracy and its decentralised system of government serves as typical case study. Therefore, the ultimate argument of the research is that South Africa sets a quintessential model that could guide Zimbabwe and other multi-level states in Africa concerning the effective implementation of decentralisation and constitutionalism.

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<sup>41</sup> Pillay P 'Decentralisation and Service Delivery' in Mc Lenna A & Munslow B (Eds) *The Politics of Service Delivery* (2009) 140.

## 1.4 Literature review

This section presents the literature review of the mini-thesis, hence setting out how the current research study relates to the existing scholarship.

The article by Fombad, *Constitutional entrenchment of decentralisation in Africa: An overview of trends and tendencies*,<sup>42</sup> is a comparative study which examines ‘the concept of decentralisation and its manifestations in contemporary African constitutional design’.<sup>43</sup> In the appraisal, while advancing a generalised approach with the inclusion of minimal expositions of South Africa and Zimbabwe, the study gives a general overview of the extent of constitutional entrenchment of decentralisation in the African practice. In the same vein, the work merely highlights that there is a high level of decentralisation found in the 2013 Constitution of Zimbabwe.<sup>44</sup> Additionally, among other relatively few descriptions, it states that South Africa has a high level of fiscal decentralisation without giving a comprehensive and critical analysis of the constitutional provisions that are relevant to the subject matter of the examination. The work’s submission on both South Africa and Zimbabwe lacks a detailed exploration on the reciprocal relationship between decentralisation and constitutionalism. Accordingly, from the lens of comparative constitutionalism, the work does not offer a closer, in-depth and critical analysis on the complementarity between decentralisation and constitutionalism in South Africa and Zimbabwe.

The article by Aderibigbe, *Decentralisation and constitutionalism in Africa: A theoretical exploration for sustainable distributive justice*, problematises the excessive centralisation of federal system in most African states.<sup>45</sup> According to the article, excessive centralisation prevents

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<sup>42</sup> Fombad (2018) 175.

<sup>43</sup> Fombad (2018) 175.

<sup>44</sup> Fombad (2018) 194.

<sup>45</sup> Aderibigbe M ‘Decentralisation and constitutionalism in Africa: A theoretical exploration for sustainable distributive justice’ (2018) 8(1) *Academic Journals* 1.

self-expression, autonomy and the avenues for negotiations towards the attainment of equity and justice.<sup>46</sup> Even though the work provides a general overview of the meaning of decentralisation and constitutionalism, it still lacks a clear guidance as to how that relationship between the two variables could be strengthened in order to tame a strong centralist rulership. Therefore, the article is silent on how to attain, consolidate and sustain a functional relationship between decentralisation and constitutionalism.

In a book chapter entitled *The relationship between decentralisation and constitutionalism in Africa: Concepts, conflicts and hypothesis*,<sup>47</sup> Steytler explores the symbiotic relationship between decentralisation and constitutionalism in Africa. The work introduces the concepts, conflicts and hypotheses in relation to whether decentralisation is a dependent variable and constitutionalism is an independent variable or whether the question may be reversed.<sup>48</sup> Although the work provides a useful background on the correlation between decentralisation and constitutionalism in Africa, it still lacks a closer, comprehensive and critical survey of the linkage between decentralisation and constitutionalism in South Africa and Zimbabwe.

In another book chapter entitled *The dynamic relationship between devolution and constitutionalism in South Africa*, Steytler discusses the relationship between decentralisation and constitutionalism in South Africa.<sup>49</sup> The exploration reveals that South Africa's devolution of power to provincial and local governments is flourishing due to the broad commitment at national level. However, the practice of devolution in sub-national government has been tainted by corruption and maladministration, a reprehensible occurrence that emasculates the impressive

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<sup>46</sup> Aderibigbe (2018) 1.

<sup>47</sup> Steytler N 'The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts and Hypothesis' in Fombad CM and Steytler N (Eds) *Decentralisation and Constitutionalism in Africa* (2019a) 2.

<sup>48</sup> Steytler (2019a) 43.

<sup>49</sup> Steytler N 'The Dynamic Relationship between Devolution and Constitutionalism in South Africa' in Fombad CM & Steytler N (Eds) *Decentralisation and Constitutionalism in Africa* (2019b) 152.

inroads of constitutionalism. Nonetheless, all things considered, with the inclusion of a thriving multi-party system of democratic government as well as the significant role of the Public Protector, it seems reasonable to infer that this book chapter places South Africa at the pole position of setting a typical precedent on how to effectively implement decentralisation and constitutionalism in Africa. Accordingly, the present study partially builds on this work with a particular focus on the key drivers for effective implementation of decentralisation and constitutionalism in South Africa.

In *From South Africa to Zimbabwe with devolution: Comparing the constitutional powers of local governments*, by Sekgala,<sup>50</sup> the concept of devolution pertinent to the systems of allocation of powers to local government in accordance to the constitutions of South Africa and Zimbabwe is examined. The work solely concentrates in uncovering the similarities and differences of the systems of constitutional allocation of powers to local government to the exclusion of national and provincial levels of government. More so, the work's limited scope shies away from deliberately analysing the nature of the direct relationship between devolution and constitutionalism. Instead, it only focuses in exposing the benefits and disadvantages of the systems of allocation of powers to local government. Eventually, the work does not, in a comparative perspective, critically examine the direct relationship between decentralisation and constitutionalism in South Africa and Zimbabwe.

The article entitled *Constitutionalisation and implementation of devolution in Zimbabwe* by Chikwawawa seeks to interpret section 264 of the 2013 Zimbabwean Constitution that provides for devolution of governmental powers and responsibilities, and to explain how the dynamics on the ground have negated the objectives contained in this provision.<sup>51</sup> The article does not analyse

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<sup>50</sup> Sekgala MP 'From South Africa to Zimbabwe with devolution: Comparing the constitutional powers of local governments' (2017) 2 *Journal of Public Administration and Development Alternatives* 105.

<sup>51</sup> Chikwawawa (2019) 19.

the reciprocal relationship between decentralisation and constitutionalism, but only presents arguments as to how and why section 264 of the 2013 Constitution does not sufficiently compel the government to implement devolution.

Thus far, the maximum efforts for guiding the development of a reinvigorated legal framework that fosters the constitutional obligations for multi-level governance and devolution of power in Zimbabwe emanates from the book entitled *Provincial and Local Government Reform in Zimbabwe: An analysis of the Law, Policy and Practice* by Chigwata.<sup>52</sup> The book constitutes the most thorough, credible and comprehensive work crafted on the Zimbabwean state's re-organisation. Although the book discusses the constitutional and legal framework for decentralisation, it does not directly address the relationship between decentralisation and constitutionalism in Zimbabwe.

One major work worth mentioning is the book chapter by Chigwata. The work, entitled *Decentralisation and Constitutionalism in Zimbabwe: Can the Leviathan be Tamed?*, investigates the direct relationship between decentralisation and constitutionalism in Zimbabwe.<sup>53</sup> The probe exposes the flaws in the entrenchment of constitutional framework for decentralisation and reveals some available contingencies on how devolution could still be implemented owing to the government's commitment to constitutionalism. Nonetheless, the work does not directly address some of the crucial questions posed by this study.

Recent survey of the literature on the structure of government concludes that theoretical contributions to the studies of multi-level governance has asserted the advent and proliferation of the crucial linkage between decentralisation and constitutionalism in Africa. The relevant scholarly

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<sup>52</sup> Chigwata (2018) 6.

<sup>53</sup> Chigwata T 'Decentralisation and Constitutionalism in Africa: Can the Leviathan be Tamed?' in Fombad CM & Steytler N (Eds) *Decentralisation and Constitutionalism in Africa* (2019b) 302.

works included in this extensive literature review have, in varying degrees, attempted to address the symbiotic relationship between decentralisation and constitutionalism. Even so, the survey discloses that most of the literature lack the description of arguments that outline constitutionalism as both a descriptive doctrine and prescriptive doctrine.<sup>54</sup> In addition, from the focal point of comparative perspective, there is still scarcity of scholarly works specifically on South Africa and Zimbabwe. While the absence of literature offers prospects for the present work, it also presents a limitation.

### **1.5 Significance of the study**

Generally, evidence of a functional decentralisation framework that has been implemented owing to a strict compliance with constitutionalism and rule of law in Africa can be deemed to be weak and unconvincing. Therefore, this study is set to significantly amplify the South African case which, through the broad commitment to devolution of power and constitutionalism at national level, flourishes due to its well-developed and advanced law and policy on multi-level governance. The South African system of multi-level governance represents an eye-catching and impactful jurisprudence that deservedly serves as a quintessential model of guiding the effective implementation of decentralisation framework in Zimbabwe which has been galvanised anew by the 2013 Constitution.

In light of the gaps and silences of the existing scholarship, the significance of the study hinges on its far-reaching potential to extrapolating the foundation of understanding the importance of the mutually reinforcing relationship between modern constitutionalism and decentralisation as closely linked and compatible concepts. Accordingly, the significance of this study is justified on

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<sup>54</sup> De Vos P & Freedman W *South Africa Constitutional Law in Context* (2014) 40.

the grounds that it aims to resolutely advance the notion that the effective constitutional implementation of decentralisation in Zimbabwe is contingent on the nature and extent to which constitutionalism is enshrined, both in theory and practice.

Lastly, the study intends to also stimulate and encourage further research and inquiry on ways in which other African multi-level states in general and Zimbabwe in particular, can effectively implement devolution and constitutionalism in order to enhance efforts to attain the objectives of decentralisation, *inter alia*, limiting the abuse of state power, peace, democracy, good governance and development.<sup>55</sup>

## **1.6 Research methodology**

The study is based mainly on desktop and library research. The literature review includes both primary and secondary sources that are relevant to the subject matter of the study. The primary sources that are consulted comprise of international and regional legal instruments, the 1996 Constitution of South Africa and the 2013 Constitution of Zimbabwe, legislations, policy directives, case laws and official documents of the South African and Zimbabwean governments and other international and regional instruments. The secondary sources that are relied upon include books and chapters in books, journals articles, newspaper articles, theses and dissertations, reports, working papers, conference papers and relevant internet sources.

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<sup>55</sup> s 41(1) 1996 South African Constitution; and ss 264(2) & 265(1) 2013 Zimbabwean Constitution. Fombad (2018) 176. Faguet JP 'Decentralization and governance', discussion paper (2011) 17.

## 1.7 Structure of the study

The mini-thesis comprises of six chapters.

**Chapter One** is the introductory chapter that provides the problem statement and background to the study. It contains sections that provide the research questions, research argument, literature review, significance of the research and research methodology.

**Chapter Two** is the theoretical framework that provides a paradigm of decentralisation and constitutionalism in Africa. From the lens of international literature, this chapter provides the basis of understanding the importance of the symbiotic relationship between constitutionalism and decentralisation.

**Chapter Three** presents an analysis of South Africa's constitutional framework pertinent to the constitutional entrenchment and implementation of decentralisation and constitutionalism.

From a comparative perspective, **Chapter Four** assesses the nature and extent of constitutional provision for devolution and constitutionalism in Zimbabwe against the highly acclaimed South African constitutional framework. This entails gauging the strength of constitutional entrenchment of decentralisation and assessing the extent to which the 2013 Zimbabwean Constitution provides for the constitutionalism and devolution.

**Chapter Five** aims to duly expose the key drivers behind the non-implementation of devolution in Zimbabwe. Accordingly, this chapter also ascertains whether constitutionalism is a precondition for the effective implementation of decentralisation and the attainment of a fully-fledged system of multi-level governance in Zimbabwe as steered by the 2013 constitutional reforms.

Lastly, **Chapter Six** presents the key findings of the mini-thesis, and provides recommendations relating to the effective implementation of constitutionalism, devolution and a fully-fledged system of multi-level governance in Zimbabwe.



# Chapter Two: Theoretical Framework: The Paradigm of Decentralisation and Constitutionalism

## 2.1 Introduction

During the attainment of independence, the new political administrations in Africa adopted the systems of government which were predominantly decentralised in one form or another.<sup>56</sup> However, owing to a variety of reasons, the systems were gradually centralised in order to establish strong centres.<sup>57</sup> Furthermore, the constitutions of most African governments which acquired independence in the 1960s contained elements of constitutionalism.<sup>58</sup> Nevertheless, within some few years these constitutions were ‘abrogated, nullified, or rewritten’.<sup>59</sup> The principal motive for such a downward constitutional trajectory was to establish and entrench single-party state systems and unlimited authoritarian regimes. The idea of a decentralised state that was solidly embedded in constitutionalism signals how the modernised constitutional systems that transpired in post-Cold War Africa strives to direct a different paradigmatic shift where the unbridled power of dictators and kleptocrats has to be constitutionally structured and constrained.<sup>60</sup>

The theoretical prescriptions of constitutionalism extend beyond merely *describing* what a particular constitution does, but *prescribes* the manner in which the constitution and constitutional law seeks to actualise the domestication of arbitrary rule of an autocracy or a dictatorship.<sup>61</sup> Simultaneously, the quest to realise constitutionalism increases the potential of pursuing the

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<sup>56</sup> Fombad (2018) 176.

<sup>57</sup> Fombad (2018) 176.

<sup>58</sup> These elements included provisions for the protection of human rights, separation of powers and an independent judiciary, see Akiba O ‘Constitutional government and the future of constitutionalism in Africa’ in Akiba O (Ed) *Constitutionalism and Society in Africa* (2004) 2.

<sup>59</sup> Akiba (2004) 2.

<sup>60</sup> Steytler (2019a) 26. See also Currie I and De Waal J *The Bill of Rights Handbook* (2016) 8.

<sup>61</sup> Currie & De Waal (2016) 8.

objectives of decentralisation such as limiting the concentration of state powers at the centre and the attainment of peace, democracy, good governance and development.

In light of the above, this chapter presents the theoretical framework of the study. This involves providing a paradigm of decentralisation and constitutionalism in Africa. From the lens of international literature and state practice in Africa, the chapter expounds and extrapolates the foundation of understanding the prominence given to the mutually reinforcing relationship between modern constitutionalism and decentralisation as closely linked and compatible concepts. The presentation commences by first setting out the general overview and conceptualisation for decentralisation; and subsequently traverses to the meaning and construct of constitutionalism. Finally, the chapter concludes by demonstrating the vital linkage between decentralisation and constitutionalism. Within this context, the ultimate goal of this chapter is to authenticate the leading argument of the study that constitutionalism is an indispensable precondition for decentralisation in Africa.

## **2.2 A general overview of decentralisation**

### **2.2.1 Definition of decentralisation**

Decentralisation is an ambiguous, generic and highly contested term covering a wide range of concepts and has encountered numerous and varying degrees of definitions and classifications within different disciplines, both theoretically and practically. Fombad posits that decentralisation is a complex and multi-faceted concept.<sup>62</sup>

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<sup>62</sup> Fombad (2018) 181.

Fombad adds that, due to the evolution and complexity of multi-level governance in Africa in particular and globally in general, the last three decades have witnessed challenges in terms of providing a precise definition to the concept of decentralisation as well as its nature and scope.<sup>63</sup>

Steytler states that in the literature, the concept of decentralisation is given both a narrow and broad meaning.<sup>64</sup> As a consequence, De Visser points out that the usage of both the broad and narrow definitions of decentralisation interchangeably often causes confusion.<sup>65</sup> In its narrow sense, Elazar describes decentralisation as the process involving a discretionary transfer of power by the central government to local government on a non-permanent basis.<sup>66</sup> In addition, Elazar argues that decentralisation has a normative meaning which is inherently hierarchical, and accordingly, reflecting ‘a pyramid of governments with gradations of power flowing down from the top’.<sup>67</sup> Within this scope, De Visser adds that ‘if there was no centre, there would be no decentralisation but rather two or more completely separate entities’.<sup>68</sup> Accordingly, the exposition made by both Elazar and De Visser denote decentralisation as a normative concept involving the transfer of power from the national level to a sub-national level of government or to any other institution or agency outside the regulation and direct control of the national government.

Elazar’s understanding of decentralisation resonates well with the African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development.<sup>69</sup> Under article 1 of the Charter, the term decentralisation is defined as ‘the transfer of power, responsibilities,

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<sup>63</sup> Fombad (2018) 178.

<sup>64</sup> Steytler (2019a) 31.

<sup>65</sup> De Visser J *Developmental local government: A case study of South Africa* (2005) 13.

<sup>66</sup> Elazar D ‘Federalism vs decentralization: The drift from authenticity’ in Kincaid J (Ed) *Federalism* (2011) 79-88.

<sup>67</sup> Elazar (2011) 83. See also Bosire C ‘The Constitutional and Legal Framework of Devolved Government and its Relevance to Development in Kenya’ in Mbondenyi MK, Asaala EO, Kabau T *et al* (Eds) *Human rights and democratic governance in Kenya: A post-2007 appraisal* (2015) 214.

<sup>68</sup> De Visser (2005) 14.

<sup>69</sup> African Charter on the Values and Principles of Decentralisation, Local Governance and Local development, 2014 (the African Charter on Decentralisation or the Charter).

capacities and resources from national to all sub-national levels of government with the aim of strengthening the ability of the latter to both foster people's participation and delivery of quality services'.<sup>70</sup> With a deliberate provision of 'all sub-national levels of government' within the frame of reference of the Charter, the term is inclusively used to encompass both regional and local governments.<sup>71</sup> Nonetheless, the Charter does not provide for constitutionally protected powers of sub-national levels of government. It merely provides that their powers have to be devolved through national legislation.<sup>72</sup>

Rondinelli *et al* broadly define the term as:

The transfer of responsibility for planning, management, and the raising and allocation of resources from the central government and its agencies to field units of government agencies, subordinate units or levels of government, semi-autonomous public authorities or corporations, area-wide, regional or functional authorities, or non-governmental private or voluntary organizations.<sup>73</sup>

The broad sense of definition expressed in the definition above can also be interpreted in a federal context where decentralisation refers to both federal units and local governments.<sup>74</sup> Instead of centralising powers, the process includes extending the autonomy of the constituent units.<sup>75</sup> In a similar way, this study inclusively uses the term decentralisation in reference to both federal units and local governments. It entails the transfer of power to sub-national levels of government through the constitution or national legislation where such governments are capable of making

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<sup>70</sup> art 1 of the African Charter on Decentralisation.

<sup>71</sup> arts 5(4), 6(2), 7(5), 11(a), 16(4)(a) & 18(1)(a)(ii) of the African Charter on Decentralisation.

<sup>72</sup> arts 5(1)-(2) & 7(1)-(2) the African Charter on Decentralisation.

<sup>73</sup> Rondinelli DA, Nellis JR & Cheema GS *Decentralization in Developing Countries: A Review of Recent Experiences* (1984) 13.

<sup>74</sup> Steytler (2019a) 31.

<sup>75</sup> Steytler (2019a) 31.

final decisions pertinent to a number of predetermined functional areas.<sup>76</sup> Fombad contends that, although the constitutional entrenchment of a well-designed decentralisation system may not automatically guarantee the effective implementation of decentralisation, it still enhances its prospects.<sup>77</sup> In addition, it also creates high likelihood for deepening democracy, constitutionalism and respect for the rule of law. Nonetheless, the effectiveness of decentralising powers to sub-national governments may only provide impressive strides if the constitution itself explicitly spells out such powers while it is implemented.

### 2.2.2 Federalism and federation

The term ‘federalism’ lacks a precise meaning and this is evidenced by vast scholarly debates aimed at providing its meaning and usage. A basic principle of federalism is that it involves at least two orders of government (federal and regional/state) with a combination of ‘shared-rule’ and ‘self-rule’ which operate within a single political system where neither order of government is constitutionally subordinate to the other.<sup>78</sup>

Bosire elucidates that a descriptive term of federalism is in reference to ‘a certain category of political institutions’,<sup>79</sup> while federalism’s normative use signifies an idea (as opposed to a structure) that comprises of combined elements of shared-rule and self-rule in a multi-level government.<sup>80</sup> Generally, its institutional arrangements refer to federal political systems such as ‘federations, certain kinds of unions, federacies, associated states, leagues and cross-border

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<sup>76</sup> Steytler (2019a) 31.

<sup>77</sup> Fombad (2018) 195.

<sup>78</sup> Watts RL ‘Federal idea and its contemporary relevance’ (2007) 3 available at <https://www.queensu.ca/iigr/sites/webpublish.queensu.ca.iigrwww/files/files/pub/archive/books/TheFederalIdeaWatts2007.pdf> (accessed 1 July 2019).

<sup>79</sup> Bosire CM *Devolution for development, conflict resolution, and limiting central power: An analysis of the Constitution of Kenya 2010* (unpublished PhD thesis, the University of the Western Cape, 2013) 15. See also Watts RL *Comparing Federal Systems* (2008) 8.

<sup>80</sup> Bosire (2013) 15.

functional authorities'.<sup>81</sup> Fessha refers to federation as 'a tangible institutional reality of the federal principle',<sup>82</sup> which comprises the structures, institutions and techniques that render the federal idea into an institutional reality. This study makes use of the descriptive term of federalism which refers to its institutional structure: the federation.

Steytler submits that federalism has four main objectives.<sup>83</sup> The first is to promote and maintain peace as well as state-building in fragile states. The aim is to enable multi-cultural societies to maintain the state's territorial integrity,<sup>84</sup> and resolve conflict through the accommodation of minority and marginalised (often ethnic) groups in an inclusive system of government. The second objective is to counter and curb the abuse of centralised governance, where power is generally concentrated in the hands of an authoritarian ruler, by transferring power from the centre to sub-national governments.<sup>85</sup> The third objective is to promote development. This is achievable by bringing the government closer to the people where development projects reckon with regional and local preferences, and with equitable distribution of resources across the country.<sup>86</sup> This is meant to facilitate quality service delivery and to encourage active public participation in development projects. Lastly, federalism enhances democracy by providing communities with the opportunity to directly participate in matters of local concerns, and with an increased space for responsibility and accountability.<sup>87</sup>

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<sup>81</sup> Fessha YT *Institutional recognition and accommodation of ethnic diversity: Federalism in South Africa and Ethiopia* (unpublished PhD thesis, University of the Western Cape, 2008) 74-75.

<sup>82</sup> Fessha (2008) 73.

<sup>83</sup> Steytler (2019a) 32.

<sup>84</sup> Gasmelseid OAA *Federalism as Conflict-Management Device for Multiethnic and Multicultural Societies: The Case of Sudan* (2006) 63.

<sup>85</sup> Steytler (2019a) 32.

<sup>86</sup> Steytler (2019a) 32.

<sup>87</sup> Ramanathan R 'Federalism, urban decentralisation and citizen participation' (2007) 42(8) *Economic and Political Weekly* 674-676.

According to Watts, a classical federal system is premised on a ‘federal checklist’ that comprises of six constituent elements.<sup>88</sup> First, a supreme written constitution has to recognise at least two orders of government made of the federal and regional governments, which are directly accountable to their respective constituencies or citizens at the federal and regional levels.<sup>89</sup> Secondly, the federal and the regional governments exercise a wide range of exclusive powers (self-rule), including a degree of legislative, executive and fiscal autonomy.<sup>90</sup> Thirdly, the constitution prohibits either level of government from unilaterally altering its own powers and functions or those of the other.<sup>91</sup> Fourthly, a second chamber in the national legislature comprises of representatives from the regional government who safeguard the interests of sub-national governments (shared rule).<sup>92</sup> Fifthly, the constitution provides for a dispute resolution mechanism either through the judiciary or a referendum process.<sup>93</sup> Finally, the constitution provides for structures and institutions, principles and mechanisms that facilitate intergovernmental cooperation between the federal and regional governments in respect of shared or overlapping governmental responsibilities.<sup>94</sup>

### **2.2.2.1 Quasi-federalism**

From a federal perspective, there are different categories of systems which are often determined by their formal institutional structure, including the labels such as ‘decentralised federal system’,<sup>95</sup>

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<sup>88</sup> Watts (2008) 8.

<sup>89</sup> Bosire (2013) 15.

<sup>90</sup> Fombad (2018) 179-180.

<sup>91</sup> Fombad (2018) 180.

<sup>92</sup> Ghai (2015) 7.

<sup>93</sup> Bosire (2013) 16. See also Fombad (2018) 180.

<sup>94</sup> Watts (2007) 4.

<sup>95</sup> Vaughan S ‘Federalism in Ethiopia: Hybridity in Ambiguity?’ in Loughlin J, Kincaid J & Swenden W (Eds) *Routledge Handbook of Regionalism and Federalism* (2013) 428.

‘decentralised unitary state’,<sup>96</sup> ‘quasi-federalism’,<sup>97</sup> and ‘hybrid-federations’.<sup>98</sup> More specifically, the quasi-federalism refers to a system of government which combines the conventionally recognised constitutional elements of federalism with characteristics of a strong central government in practice (unitary system).<sup>99</sup> It is important to highlight that in a federal or quasi-federal system, the division of power between the various orders of government can take place either through a divided model of federalism or an integrated model of federalism.<sup>100</sup>

A divided model of federalism requires that the predetermined matters are strictly divided between the different levels of government. Each level is entitled to exercise its own exclusive powers and with very few, if any, concurrent powers.<sup>101</sup> Whereas in an integrated model of federalism, certain functional areas are allocated exclusively to one level of government, but most are concurrent powers.<sup>102</sup>

### **2.2.2.2 Decentralised unitary system**

Both in terms of theory and practice, and with an enduring search for a precise definition concepts as well as clear distinctions within various disciplines, the line between decentralisation, federalism and decentralised unitary systems have constantly revealed some blurred outcomes.<sup>103</sup>

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<sup>96</sup> Kaiser K, Mulumba JM & Verheijen T ‘The Political-Economy of Decentralization in the Democratic Republic of Congo (DRC)’ in Martinez-Vazquez J & Vaillancourt F (Eds) *Decentralization in Developing Countries: Global Perspectives on the Obstacles to Fiscal Devolution* (2011) 251.

<sup>97</sup> Watts RL ‘Typologies of Federalism’ in Loughlin J, Kincaid J & Swenden W (Eds) *Routledge Handbook of Regionalism and Federalism* (2013) 22.

<sup>98</sup> Suberu RT ‘Nigeria: A Centralizing Federation’ in Loughlin J, Kincaid J & Swenden W (Eds) *Routledge Handbook of Regionalism and Federalism* (2013) 416.

<sup>99</sup> Tepeciklioglu (2018) 164.

<sup>100</sup> De Vos & Freedman (2014) 268.

<sup>101</sup> De Vos & Freedman (2014) 268.

<sup>102</sup> Concurrency of powers refers to the existence of the same powers over the same functional areas, as in the case with national and provincial competencies over Schedule 4 functional areas provided by the 1996 South African Constitution, see Steytler N & Fessha YT ‘Defining local government powers and function’ (2007) 124(2) *The South African Law Journal* 320.

<sup>103</sup> Fombad (2018) 179. See also Work R ‘Overview of decentralisation worldwide: A stepping stone to improved governance and human development’, Conference Paper (2002) 7.

According to Watts, what basically distinguishes federations from decentralised unitary systems is that in unitary systems the government of the constituent units ultimately derive their authority from the central government, in federations each order of government derives its authority, not from another order of government, but from the constitution, and each relates directly to the citizens.<sup>104</sup> Dorsen *et al* state that in decentralised unitary state, ‘all powers emanate from the centre and radiate in various degrees to the periphery’.<sup>105</sup> However, presently, there is no state that has a complete unitary system and structures because every country in the world is composed of decentralised units.<sup>106</sup>

In comparison, the sub-national units in a federation enjoy an ‘original autonomy’ which is constitutionally guaranteed and protected, whereas the decentralised sub-units in a unitary state have ‘secondary autonomy’ which is conferred by ordinary legislation, and can be withdrawn at any time by the central government.<sup>107</sup> More so, in a decentralised unitary system of government, the sub-national units of government are subordinate to the national government and do not often exercise exclusive powers over certain specified matters. If not constitutionally provided and protected, their powers are mostly ‘devolved’, ‘deconcentrated’ and ‘delegated’ by an amendable national legislation and these powers could therefore be recentralised at any time.

### **2.2.3 Devolution**

Devolution is regarded as a more extensive form of decentralisation, refers to the complete diffusion, dispersion and transfer of political, financial and administrative powers from national to the elected sub-national governments, whose operations are mostly outside the regulation and

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<sup>104</sup> Watts (2007) 4.

<sup>105</sup> Dorsen *et al* (2003) 386.

<sup>106</sup> Work (2002) 7.

<sup>107</sup> Fombad (2018) 180.

direct control of the centre.<sup>108</sup> The sub-national governments have wide discretion, with legislative and executive powers conferred by the constitution or national legislation. Otherwise, the sub-national governments may be modestly restricted to implementing a set of national laws in a certain area. Generally, local governments which receive such powers, exercise these powers with a considerable degree of autonomy. The national government frequently exercises only indirect and legally constrained supervisory powers over the sub-national governments.

Additionally, devolution guarantees that the devolved political structures are directly linked to the sub-national electorates and citizens which make them to be directly accountable to their constituencies instead of the national government. While there is no precise and universal definition for devolution, Bosire states that the defining feature of devolution is the presence of arrangements of shared political powers between the central government and sub-national governments with significant autonomy.<sup>109</sup> It entails that the sub-national level of government is autonomous and it has specific geographically defined territorial boundaries which are legally recognised and within which it exercises its authority and perform its public functions.<sup>110</sup>

Recent trends in Africa indicates that most states are increasingly adopting constitutional reforms where the constitutions specifically and comprehensively provide for devolution of power to sub-

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<sup>108</sup> Chigwata (2018) 11. Chigwata indicates that the countries which have implemented decentralisation have adopted two or more forms of decentralisation and the result is often a mixture of these forms of decentralisation, see Chigwata TC *A critical analysis of decentralization in Zimbabwe: Focus on the position and role of a provincial governor* (unpublished masters research paper, University of the Western Cape, 2010) 16.

<sup>109</sup> Bosire (2013) 19. See also Fessha Y and Kirkby C 'A critical survey of subnational autonomy in African states' (2008) 38(2) *The Journal of Federalism* 249.

<sup>110</sup> United Cities and Local Governments 'Concept paper - Decentralisation processes at a crossroads: State of affairs and perspectives' (n.d) 2 available at [http://www.uclg-decentralisation.org/sites/default/files/concept\\_paper\\_cglu\\_comision\\_descentralizacion\\_EN.pdf](http://www.uclg-decentralisation.org/sites/default/files/concept_paper_cglu_comision_descentralizacion_EN.pdf) (accessed 19 August 2019).

national governments. For example, the 2010 Kenyan Constitution,<sup>111</sup> and the 2013 Zimbabwean Constitution.<sup>112</sup>

#### **2.2.4 Decentralisation (local government – statutory)**

Local government is difficult to define as it includes multiple institutions ranging from ‘mega-metropolitan governments to small village councils.’<sup>113</sup> In some cases, local governments are constitutionally recognised, but mostly, they are established by statute. Local governments are designed to perform a number of functions which include two most important roles. First, due to their close proximity to the people, local governments are customarily responsible for the provision of basic services,<sup>114</sup> such as water, sanitation, electricity, roads and health services.<sup>115</sup> The provision of such services is undertaken while exercising the right to govern the local affairs of their communities and to whom they are accountable to. This function resonates with Article 8(1) of the African Charter on Decentralisation which stipulates that local governments are to ‘exercise their powers having regard to local realities, values, and customs, as well as national principles, norms and standards’. Secondly, local governments often perform a number of functions delegated to them by the national government ‘under the latter’s control, direction, and review’.<sup>116</sup> Thus, local governments are accountable to the national government for the adequate performance of such functions.

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<sup>111</sup> Ch 11 2010 Kenyan Constitution.

<sup>112</sup> Ch 14 2013 Zimbabwean Constitution.

<sup>113</sup> Steytler (2019a) 34.

<sup>114</sup> Ziswa (2017) 18.

<sup>115</sup> Steytler (2019a) 34.

<sup>116</sup> Steytler (2019a) 34.

### 2.2.5 Deconcentration

Deconcentration is the weakest form of decentralisation.<sup>117</sup> It is understood as administrative decentralisation because it does not transfer substantive powers but the handing over of a certain administrative responsibility from central to local administrative offices in a form of departmental ministries or agencies.<sup>118</sup> The central government deconcentrates the responsibility of listed decision-making, financial and management functions by administrative means to various local administrative offices. Although regional offices may have wide discretion at the behest of the central government, they are directly accountable to the latter and not the people in the region they serve.<sup>119</sup> The subordinate units are under the management and control of officials directly appointed by the central government.<sup>120</sup> Administrative authority is not actually transferred to local administrative offices but remain at the centre. However, in case deconcentration is more than a mere re-organisation, the field agents are given some discretion ‘to plan and implement programs and projects, or to adjust central directives to local conditions, within guidelines set by central ministry or agency headquarters’.<sup>121</sup>

### 2.2.6 Delegation

As opposed to deconcentration, delegation gives more extensive authority to sub-national units that are either not directly controlled by the centre or are semi-autonomous but are accountable to it.<sup>122</sup> According to Rondinelli *et al*, delegation involves ‘the transfer of managerial responsibility

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<sup>117</sup> Chigwata (2018) 12.

<sup>118</sup> Chigwata (2018) 12. See also Rondinelli *et al* (1984) 14. Deconcentration entails the mere relocation of execution to the local level with decision-making power remaining at the centre, see Cabral L ‘Decentralisation in Africa: Scope, motivations and impact on service delivery and poverty’, working paper (2011) 2.

<sup>119</sup> Steytler (2019a) 35.

<sup>120</sup> Fombad (2018) 176.

<sup>121</sup> Rondinelli *et al* (1984) 14-15.

<sup>122</sup> Fombad (2018) 182.

for specifically defined functions to sub-national units that are outside the regular bureaucratic structure and that are only indirectly controlled by the central government'.<sup>123</sup> With wide discretion, the sub-national units often exercise powers delegated by national legislation. However, the central government can, at any time, withdraw the delegated authority. There is a principal-agent relationship: the central government being the principal and the subnational units as agents.<sup>124</sup>

### **2.2.7 Types of decentralisation**

Conventionally, within the topology of decentralisation, there are various types of decentralisation: political decentralisation, administrative decentralisation, fiscal decentralisation and market decentralisation. This section defines only three types, to the exclusion of market decentralisation. Litvack and Seddon highlight that each type of decentralisation has 'its own different characteristics, policy implications, and conditions for success'.<sup>125</sup>

#### **2.2.7.1 Political decentralisation**

According to Fombad, political decentralisation takes place when the central government allows the elected and empowered sub-national units, usually regional bodies and local authorities, to exercise political power and authority.<sup>126</sup> Contextually, devolution is the strongest form of political decentralisation because it ushers in the transfer of enormous responsibility, decision-making, resources and revenue-raising powers to regional or local governments.

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<sup>123</sup> Rondinelli *et al* (1984) 19.

<sup>124</sup> Chigwata (2018) 11.

<sup>125</sup> Litvack J & Seddon J 'Decentralization briefing notes', working paper (1999) 2.

<sup>126</sup> Oloya C *Decentralisation as a tool in managing the ethnic question: A case study of Uganda* (unpublished LLM dissertation, University of Pretoria, 2011) 15. See also Fombad (2018) 181.

Nath states that the aim of political decentralisation is to amplify public decision-making of empowered citizens and their elected representatives.<sup>127</sup> In this respect, political decentralisation perfectly correlates with pluralistic politics and representative government.<sup>128</sup> Equally important, it provides citizens and their representative with ample opportunities in terms of influencing policy formulations and implementations.<sup>129</sup> Subject to the degree of devolution, the central government's supervisory powers may be significantly limited. While being autonomous and fully independent of the centre, the sub-national governments exercise wide discretion, including having legislative powers. Otherwise, they may solely implement a set of national laws in a specified functional area. In order to ensure accountability and transparency, political decentralisation customarily requires the necessary constitutional, legal and regulatory framework.<sup>130</sup>

#### **2.2.7.2 Administrative decentralisation**

Administrative decentralisation entails the transfer of decision-making authority, resources and responsibility for the provision of specified public services and activities from central government to sub-national governments, agencies, voluntary organisations, line-ministries and field offices.<sup>131</sup>

Naha importantly notes that administrative decentralisation confers to the local government the powers to recruit, discipline, dismiss and remunerate its own staff.<sup>132</sup> Administrative decentralisation can be in the form of devolution, delegation or deconcentration. In terms of accountability, there is a significant distinction between devolution on one hand, and

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<sup>127</sup> Nath V 'Political decentralisation – a complementary rather than a substitution approach' (2001) 1 available at <https://www.cddc.vt.edu/knownet/lse-decent.pdf> (accessed 29 October 2019).

<sup>128</sup> Heydenrych PW 'Deepening democracy and enhancing multi-level governance: deficiencies of and prospects for local government ward committees in South Africa' (2008) 73(4) *Koers* 705.

<sup>129</sup> Nath V 'Political decentralisation – a complementary rather than a substitution approach' (2001) 1 available at <https://www.cddc.vt.edu/knownet/lse-decent.pdf> (accessed 29 October 2019).

<sup>130</sup> Fombad (2018) 181.

<sup>131</sup> Fombad (2018) 181; and Oloya (2011) 14. See also Muna WK *Towards decentralisation: a critical analysis of decentralising governance in Kenya* (unpublished masters dissertation, University of KwaZulu-Natal, 2012) 17.

<sup>132</sup> Naha IM *Full decentralisation of powers, resources and functions in the Kingdom of Lesotho: An evaluation from a developmental local government perspective* (unpublished masters dissertation, Stellenbosch University, 2015) 48.

deconcentration and delegation on the other. With regards to the former, the devolved authorities are downwardly accountable to their constituencies, in the case of the latter, accountability is upwardly directed to the central government.

### **2.2.7.3 Fiscal decentralisation**

Fiscal decentralisation refers to the allocation of financial resources and revenue-generating authority to sub-national governments. It also concerns the degree of fiscal autonomy, which entails the *right* and *ability* to manage local revenue collection and expenditures and modulate the local budget constraint.<sup>133</sup>

Additionally, fiscal decentralisation also relates to subsidisation of local service delivery.<sup>134</sup> The quality of both political and administrative decentralisation largely depends on the nature and availability of financial resources. Fombad indicates that the efficacy of fiscal decentralisation is contingent on the manner in which the three important aspects of resource allocation have been addressed. First, the allocation of expenditure responsibility, by determining which level of government pays for what functional expenses. Secondly, the assignment of revenue-raising powers, by determining which level raises which taxes, charges and surcharges. Finally, prescribing a definite framework for intergovernmental fiscal transfers for the purpose of ensuring that there is a mechanism that properly allows all levels of government to ‘share revenues and equalise any imbalances that are bound to arise’.<sup>135</sup>

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<sup>133</sup> Beer-Tóth K *Local financial autonomy in theory and practice: The impact of fiscal decentralisation in Hungary* (unpublished PhD thesis, University of Fribourg Switzerland, 2009) 4.

<sup>134</sup> Oates W ‘An essay on fiscal federalism’ (1999) 37(3) *Journal of Economic Literature* 1121.

<sup>135</sup> Fombad (2018) 183.

## 2.2.8 The rationale for decentralisation

Most countries in the world have adopted multi-level systems of government. Regardless of whether their state structures function in a unitary or federal system, the uniform rationale for decentralisation as a broad concept covers numerous and various governmental and developmental objectives. These include: limiting the concentration of power at the centre and realising development, deepening democracy as well as promoting and sustaining peace.

### 2.2.8.1 Decentralisation for limiting power

A key object of decentralisation is to counter the abuse of centralised governance by limiting state power,<sup>136</sup> through dispersing powers across the different levels of governments. In this regard, certain powers of the central government that are often concentrated in the hands of an authoritarian president are transferred to sub-national governments.<sup>137</sup> International literature reveals that most of the thriving democracies meet the *limit condition*, which limits the stakes of state power by protecting the interests of citizens.<sup>138</sup> Faguet states that in ‘mature democracies’ the limitation of abuse of power is achievable through the enforcement of institutional rules.<sup>139</sup> This largely entails a strict adherence to the laws that constitutionally constrain state power in order to prevent the violation of peoples’ rights.

### 2.2.8.2 Decentralisation for development

In most developing countries a central concern arises from the persistent grappling with rising inequalities and uneven development.<sup>140</sup> In consequence, development becomes the objective of

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<sup>136</sup> Steytler (2019a) 26.

<sup>137</sup> Fombad (2018) 184.

<sup>138</sup> Faguet (2011) 17.

<sup>139</sup> Faguet (2011) 17.

<sup>140</sup> Bosire (2013) 20-21.

devolving power. A majority of development initiatives pursued by sub-national governments have taken place in the context of decentralisation. This is achievable by bringing the government closer to the people where development projects reckon with regional and local preferences and with equitable distribution of resources across the country.<sup>141</sup> Such development fosters the quality of service delivery and encourages greater public participation in development.<sup>142</sup> In the process, public representatives and bureaucrats become more responsive and accountable to the local people pertinent to the development programmes and provision of service delivery.<sup>143</sup>

### **2.2.8.3 Decentralisation for democracy**

A decentralised system of government has the potential to deepen democracy.<sup>144</sup> Decentralisation promotes democracy by establishing democratic governance at sub-national levels. It therefore provides a legitimate ground for local government and ensures that the ethos of democracy ‘permeate the entire polity from the bottom up’.<sup>145</sup> In a democratic state the elected public officials have to be accountable to the citizens.<sup>146</sup> A culture of participatory democracy increases accountability and the locally elected representatives become more responsiveness while bolstering the standard of service delivery.<sup>147</sup>

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<sup>141</sup> Steytler (2019a) 32.

<sup>142</sup> Fombad (2018) 183. See also Kauzya J ‘Decentralization: Prospects for peace, democracy and development’, discussion paper (2005) 5-6.

<sup>143</sup> Smith BC ‘The Decentralization of Political Power’ in Smith BC (Ed) *Good Governance and Development* (2007) 102.

<sup>144</sup> Chigwata (2018) 4.

<sup>145</sup> Fombad (2018) 184.

<sup>146</sup> Chigwata (2018) 4.

<sup>147</sup> United Nations Development Programme ‘Overview of decentralisation worldwide: A stepping stone to improved governance and human development’, Conference Paper (2002) 4.

#### **2.2.8.4 Decentralisation for peace**

Another important objective of decentralisation is its potential of peace-making and state-building in fragile states that face challenges in managing a very diverse populations.<sup>148</sup> Most of these states are highly divided based on ethnicity, religion, culture, language and race. As a compensatory tool for the fragmented polity, decentralisation is utilised to accommodate minorities and marginalised groups in an inclusive system of government.<sup>149</sup> For this reason, the minority groups resort to utilising the formal sub-national structures in order to promote and protect their interests, as opposed to finding recourse through violence or secession.<sup>150</sup> In spite of its promise to promote peace, the potential of decentralisation may, however, be limited in cases where ethnic groups are not geographically concentrated.

#### **2.2.9 Dangers of decentralisation**

Notwithstanding the rationale of decentralisation provided in the previous section, there are still some perturbing negatives associated with decentralisation which may reversely endanger the goals of decentralisation, including the maintenance of national unity and indivisibility of a state. First, decentralisation is often regarded as a major cause for fuelling separatist movements.<sup>151</sup> This dilemma often arises in cases of tensions between the act for self-determination while vying for more regional autonomy, and the preservation of territorial integrity coinciding with national boundaries in the protection against secession. Secondly, decentralisation also opens the floodgates to rampant corruption. In this context, through capturing of a disproportionate share of the profits,

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<sup>148</sup> Fombad (2018) 183.

<sup>149</sup> Fombad (2018) 183.

<sup>150</sup> Chigwata (2018) 5.

<sup>151</sup> Heijke M & van den Berg D 'Dynamics between decentralisation and peace building' (2011) 8 available at <https://www.paxvoorvrede.nl/media/files/dynamics-between-decentralisation-and-peace-building-2011.pdf> (accessed 4 August 2019).

the local elites are associated with appropriation of resources to the detriment of ordinary people.<sup>152</sup> Finally, decentralisation often results in the reinforcement and exacerbation of regional disparities where the income levels between a country's regions are vastly different when naturally resources are concentrated in one region.<sup>153</sup> As a result, it becomes difficult to have an effective policy of financial and resources redistribution.

## 2.3 A general overview of constitutionalism

### 2.3.1 Understanding the constitution and constitutionalism

For the purpose of ensuring a proper description of arguments, it is important to first establish a common understanding of the meaning of a 'constitution' and its derivative, 'constitutionalism'. A 'constitution' is an organic and fundamental law of a state that sets out the basic principles that establishes the state, the structures and processes of government and embodies the rights of people.<sup>154</sup> Generally, a 'constitution' is referred to as a written document that contains a set of fundamental legal-political rules that govern both social and institutional relationships.<sup>155</sup> However, practice has shown that not all constitutions are written.<sup>156</sup> Constitutions establish state institutions, allocate powers to these institutions and, essentially, define the limits of their powers.<sup>157</sup>

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<sup>152</sup> Musgrave & Wong (2016) 87-88.

<sup>153</sup> Pillay (2009) 144.

<sup>154</sup> Bulmer E *What is a constitution? Principles and concepts* (2012) 2. Mzikamanda RR 'Constitutionalism and the judiciary: A perspective from Southern Africa' (2011) available at [http://www.justice.gov.za/alraesa/conferences/2011malawi/constitutionalism-and-the-judiciary\\_mzikamanda.pdf](http://www.justice.gov.za/alraesa/conferences/2011malawi/constitutionalism-and-the-judiciary_mzikamanda.pdf) (accessed 4 August 2019) 2.

<sup>155</sup> Awolich AA 'The challenge of constitutionalism and separation of powers doctrine in South Sudan', Brief Policy, The Sudd Institute. (2016) 2.

<sup>156</sup> Awolich (2016) 2.

<sup>157</sup> Nwabueze B *Constitutional democracy in Africa* (2003) 36.

In its modern form, constitutionalism is a body of theoretical prescriptions. In principle, it is an idea or doctrine of a government limited by law. Fombad believes that constitutionalism ‘encompasses the idea that a government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule but also that such a government should be able to operate efficiently and in a way that it can effectively operate within its constitutional limitations’.<sup>158</sup> For the constitution to have legitimacy while protecting citizens from arbitrary rule, it must be accepted by people.<sup>159</sup>

As with any ‘ism’ constitutionalism captures values and goals.<sup>160</sup> Steytler vividly expounds that in its liberal democratic form, constitutionalism means: ‘in terms of a constitution, state power is limited, exercised in a democratic, accountable manner, and executed in a non-arbitrary way through a system of enforceable rules’.<sup>161</sup> Essentially, constitutionalism requires that state power must be defined and limited by law in order to protect societal interests.<sup>162</sup> Accordingly, the principle of limitation applies in two ways. First, within a given competence, it circumscribes a set of things that the various organs of state can do. Secondly, it prescribes the procedures to be followed when doing those things within their competence.<sup>163</sup> Therefore, only certain state institutions can exercise certain predetermined powers, and may only do so by following the procedures prescribed for them.

Fombad states that the modern concepts which rests on core elements of constitutionalism can be stated as enshrined in provisions dealing with: the recognition and protection of fundamental rights

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<sup>158</sup> Fombad CM ‘Constitutional reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects’ (2011) 59 *Buffalo Law Review* 1013-1014.

<sup>159</sup> Backer LC ‘From constitution to constitutionalism: A global framework for legitimate public power systems’ (2009) 113(3) *Penn State Law Review* 675-676.

<sup>160</sup> Steytler (2019a) 26.

<sup>161</sup> Steytler (2019a) 26.

<sup>162</sup> Currie & De Waal (2016) 8.

<sup>163</sup> Currie & De Waal (2016) 8.

and freedoms; the separation of powers; an independent judiciary; the review of the constitutionality of laws; the control of the amendment of the constitution; and state institutions that support, promote and sustain constitutional democracy.<sup>164</sup> Nonetheless, the presence of these elements in a constitution does not automatically guarantee constitutionalism.<sup>165</sup>

Besides, Okoth-Ogendo adds that there is a possibility to have ‘constitutions without constitutionalism’.<sup>166</sup> As a result, constitutionalism therefore involves ‘a commitment by the political elite to respect and abide by constitutional limits’.<sup>167</sup> The absence of constitutionalism in post-colonial Africa has led a number of African scholars to decry that the post-colonial condition in Africa is one of ‘constitutions without constitutionalism’.<sup>168</sup>

### **2.3.2 Constitutional expressions of constitutionalism**

In its descriptive sense, constitutionalism can be viewed as a doctrine that provides a description of institutions, structures and procedures that constitute the constitutional system of a particular state.<sup>169</sup> This understanding of constitutionalism is formalistic in nature as it focuses on explaining the distribution and limitations of state power, the relations between the branches of government and the relations between the different levels of government as per the constitution.

Constitutionalism as a descriptive doctrine is actually concerned with whether state power is being used in compliance with or in contravention of democratic norms or human rights standards. In other words, it shuns away from making value judgments as to whether the state in question

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<sup>164</sup> Fombad (2011) 1014.

<sup>165</sup> Fombad (2011) 1014.

<sup>166</sup> Okoth-Ogendo HWO ‘Constitutions without constitutionalism: An African political paradox’ in Greenberg D, Kartz SN, Oliviero B *et al* (Eds) *Constitutionalism and democracy: Transitions in the contemporary world* (1993) 65.

<sup>167</sup> Okoth-Ogendo (1993) 65. See also Fombad C and Unegbedion NA ‘Presidential Term Limits and Other Impact on Constitutionalism in Africa’ in Fombad C & Murray C (Eds) *Fostering Constitutionalism in Africa* (2010) 1.

<sup>168</sup> Okoth-Ogendo (2003) 65.

<sup>169</sup> De Vos & Freedman (2014) 40.

adheres to or upholds its own constitutional limits or rules.<sup>170</sup> An important aspect of constitutionalism entails having an efficient and effective mechanism that controls and enforces adherence with the letter and spirit of the constitution.<sup>171</sup>

### **2.3.3 Implementation of constitutionalism**

In a prescriptive sense, constitutionalism seeks to define in general terms the manner in which state power is allocated and exercised. In terms of this understanding, constitutionalism assumes some prescriptive force by establishing the norms and principles that define a constitutional government.<sup>172</sup> As highlighted earlier, the nature of constitutionalism as a prescriptive doctrine extends beyond merely describing what a particular constitution does, but prescribes the manner in which the constitution and constitutional law seeks to actualise the domestication of arbitrary rule of an autocracy or a dictatorship.<sup>173</sup> The constitutional principles associated with constitutionalism include constitutional supremacy, justiciability and entrenchment as a way of ensuring limited government as opposed to the arbitrary rule.<sup>174</sup>

The sections below succinctly expound on how some of the core elements of constitutionalism as listed by Fombad can advance the implementation of decentralisation in Africa. Fombad asserts that these core elements of constitutionalism are based on the latest amendments of the constitutions of Angola, Botswana, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe.<sup>175</sup>

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<sup>170</sup> De Vos & Freedman (2014) 40.

<sup>171</sup> Fombad (2007) 18.

<sup>172</sup> Akiba (2004) 5-6.

<sup>173</sup> Currie & De Waal (2016) 8.

<sup>174</sup> Currie & De Waal (2016) 8-9.

<sup>175</sup> The study by Fombad is based on the amended Constitutions of Angola (25 August 1992), Botswana (30 September 1966), Lesotho (25 March 1993), Madagascar (19 August 1992), Malawi (18 May 1994), Mauritius (12 March 1968), Mozambique (2 November 1990), Namibia (9 February 1990), South Africa (8 May 1996), Swaziland (24 August 1991), Zambia (24 August 1991) and Zimbabwe (21 December 1979), see Fombad CM 'Challenges to

### 2.3.3.1 Supremacy of the constitution and rule of law

Before deliberating on the core elements of constitutionalism as listed by Fombad, it is essential to first discuss the associated principles of law which also deal with the limitation of state power: supremacy of the constitution and the rule of law.<sup>176</sup> The first principle, supremacy of the constitution, dictates that the constitutional rules and principles are binding on all branches and levels of government and have precedence over any other rules made by the government. Any law that is inconsistent with the constitution, either on procedural or substantive grounds, will automatically have no force of law.<sup>177</sup>

The constitutionalism is further supported by the principle of rule of law.<sup>178</sup> In its most basic form, the rule of law is meant to protect basic individual rights as it requires the government to act in accordance with the law and fair procedures. This entails two facets. First, all organs of state must abide by the law.<sup>179</sup> The second is that the state is prohibited from exercising power over anyone, except when the law permits it to do so.<sup>180</sup> In other words, a law must authorise everything that the state does. In the absence of the rule of law there can be no constitutionalism.<sup>181</sup>

### 2.3.3.2 The recognition and protection of fundamental rights and freedoms

The recognition and protection of fundamental human rights and freedoms is a norm of constitutionalism that is enshrined in the constitutions of all African countries.<sup>182</sup> Accordingly,

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constitutionalism and constitutional rights in Africa and the enabling role of political parties: Lessons and perspectives from Southern Africa' (2007) 55 *The American Journal of Comparative Law* 11.

<sup>176</sup> Currie & De Waal (2016) 8-9.

<sup>177</sup> See *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995) para 62.

<sup>178</sup> Currie & De Waal (2016) 9.

<sup>179</sup> Currie & De Waal (2016) 10.

<sup>180</sup> See *Minister for Justice and Constitutional Development v Chonco and Others* (CCT 42/09) [2009] ZACC 25; 2010 (1) SACR 325 (CC); 2010 (2) BCLR 140 (CC); 2010 (4) SA 82 (CC) (30 September 2009) para 27.

<sup>181</sup> Fombad (2007) 8.

<sup>182</sup> Fombad (2007) 11.

through multi-party democracy, citizens in devolved political structures have the right to choose their own representatives at sub-national level of government.<sup>183</sup> It is hereby argued that, when the government is physically closer to the people, constitutionalism is promoted due to increased opportunities for public participation in democratic governance and having increased prospects for accountability which can help to limit the abuse of power. However, the theory and practice of multi-party democracy has proven that there is intolerance of having opposition parties govern at the sub-national level.<sup>184</sup> In political environments where different political parties govern at national and sub-national governments, this arrangement of multi-level government often sets the stage for political contestation and non-cooperation.<sup>185</sup> More profoundly, the central government often compromises the institutional integrity and autonomy of sub-national governments. Consequently, such a downward trajectory amounts to an infringement of citizens' civil and political rights to democratically elect their own leaders at sub-national levels of government.

### **2.3.3.3 The separation of powers and checks and balances**

A vital component of modern constitutionalism is the doctrine of separation of powers and checks and balances which is aimed at limiting the concentration of power.<sup>186</sup> In its simplest form, this doctrine requires the classification of government functions into legislative, executive and judicial, and prescribes that separate branches of government must perform each function.<sup>187</sup> The dispersal and sharing of powers horizontally and vertically to the separate branches and different levels of government is regarded as a solution to the concentration of power around the president and

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<sup>183</sup> Art 4(1) of the African Charter on Democracy, Elections and Governance, 2007, (the African Charter on Democracy) requires that state parties must promote democracy, the principle of the rule of law and human rights.

<sup>184</sup> Toubeau S and Wagner M 'Explaining party positions on decentralization' (2015) 45 *British Journal of Political Science* 98.

<sup>185</sup> Toubeau & Wagner (2015) 98

<sup>186</sup> Fombad (2007) 12-13.

<sup>187</sup> Currie & De Waal (2016) 18.

presidency in Africa.<sup>188</sup> Accordingly, the three branches of government, namely the executive, legislative and judiciary are kept separate from each other,<sup>189</sup> because the checks and balances between the three prevent the abuse of power by any of them. Decentralisation can be viewed as a species of this doctrine: it contains both the national legislature and executive by dividing state power between two or more levels of government. In essence, with the appropriate checks and balances between the different levels of government, this doctrine complements the object of decentralisation by preventing the concentration and abuse of power by a single authority.

#### **2.3.3.4 An independent judiciary**

An independent judiciary is an essential and rational correction to the doctrine separation of powers.<sup>190</sup> It is absolutely essential that judicial independence should be constitutionally entrenched because it is a necessary precondition for ensuring that courts are effectively functional.<sup>191</sup> Any law which impedes or threatens the autonomy and powers of sub-national governments must be constitutionally reviewed by an independent judiciary. An independent judiciary can affirm the legal protection of sub-national government's powers where they have the right to address the courts, to ensure the free exercise of their powers provided by the constitution or law.<sup>192</sup> If sub-national level of government cannot address the courts in order to assert its powers, then it is a constitution without constitutionalism. Besides, in order to ensure constitutional

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<sup>188</sup> 188 Fombad (2007) 195.

<sup>189</sup> Fombad CM 'The separation of powers and constitutionalism in Africa: The case of Botswana' (2005) 25(2) *Boston College Third World Law Journal* 301.

<sup>190</sup> Fombad (2007) 15. An independent judiciary is 'foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law', see *Justice Alliance of South Africa v President of the Republic of South Africa and others* 2011(5) SA 388 (CC).

<sup>191</sup> Fombad (2007) 15.

<sup>192</sup> art 11 European Charter of Local Self-Government, 1985.

justice for constitutional violations and to enforce constitutional obligations, it is necessary for citizens to be entitled to a mechanism by way of legal redress through the courts.

### **2.3.3.5 The review of the constitutionality of laws**

An important aspect of constitutionalism entails having an efficient and effective mechanism that controls and enforces the adherence to the constitution.<sup>193</sup> In the absence of this, the constitution can be rendered worthless. According to De Visser and November, the sub-national governments will affirm their autonomy on the premise of the constitution or statutes, senior levels of governments have to exercise legislative or executive supervision within the confines of the same rule book.<sup>194</sup> In both instances, the assertion of autonomy may take place against the will of the higher levels of government. Therefore, it is crucial that the law should determine limits to power through reviewing the constitutionality of laws that impacts on sub-national levels of government.

### **2.3.3.6 The control of the amendment of the constitution**

In the introductory section of this chapter, it was highlighted that the constitutions of most African governments which acquired independence in the 1960s contained elements of constitutionalism.<sup>195</sup> However, within some few years these constitutions were ‘abrogated, nullified, or rewritten’.<sup>196</sup> According to Fombad, ‘a constitution is or should be an enduring document’.<sup>197</sup> The constitution is unlike any other law because it is the supreme law of the land that derives its legitimacy from the sovereign will of the people.<sup>198</sup> If the constitution can be

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<sup>193</sup> Fombad (2007) 18.

<sup>194</sup> De Visser J & November J ‘Overseeing the overseers assessing compliance with municipal intervention rules in South Africa’ (2017) 9 *Hague Journal on the Rule of Law* 110.

<sup>195</sup> Akiba (2004) 2.

<sup>196</sup> Akiba (2004) 2.

<sup>197</sup> Fombad (2007) 21.

<sup>198</sup> Fombad (2007) 21.

amended ‘easily, casually, carelessly’, by deceit or by implication through the acts of a select few holding power, it loses its value as the supreme law of the country.<sup>199</sup> In this respect, constitutionalism precludes arbitrary suspension, circumvention or disregard of the constitution by the political organs of government. In instances where the constitution requires alteration, the process of amendment must conform to an already established procedure that safeguards the will of the people.

Chigwata therefore argues that, in its quest to secure the existence of sub-national governments, the effectiveness of the constitutional safeguards rests on how ‘stringent the procedures for amending constitutional provisions protecting subnational governments are’.<sup>200</sup> Additionally, these constitutional safeguards also rely on the existence of the rule of the law. Otherwise, the constitution and court judgments protecting sub-national autonomy can simply be ignored.<sup>201</sup>

## **2.4 The case for constitutionalism as a catalyst to the implementation of decentralisation: The link between constitutionalism and decentralisation**

The trend towards adopting liberal-democratic constitutionalism was in direct response to highly autocratic states which scarcely limited the executive powers and were fraught with intolerance to multi-party democracy, violation of human rights and transmogrification of the rule of law into rule through law.<sup>202</sup> Although Africa has witnessed a wave of democracy in the 1990s and the adoption and coming into force of the African Charter on Democracy, ‘a strong presidency still dominates both the legislature and the judiciary’.<sup>203</sup> Instead of restraining the government, the

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<sup>199</sup> Fombad (2007) 21.

<sup>200</sup> Chigwata (2019) 3.

<sup>201</sup> Chigwata (2019) 3.

<sup>202</sup> Steytler (2019a) 37.

<sup>203</sup> Steytler (2019a) 37.

constitution is used as an enabler to exert the unlimited powers of the president. Such manifestations in a state do not only undermine constitutionalism, but also have profound implications to the implementation of decentralisation.

International literature and practice overwhelmingly conclude that ‘the effectiveness of any system of decentralisation depends as much on its design as it does on the political will of the government and the readiness of its political and administrative officials to implement it’.<sup>204</sup> This clearly presents two crucial and interdependent variables. In case where the constitution explicitly and sufficiently provides for decentralisation of powers, this may positively impact the government’s willingness to implement decentralisation. Although the constitutional entrenchment of a well-designed decentralisation system may not automatically guarantee the effective implementation of decentralisation, it still enhances its prospects,<sup>205</sup> and further creates a high likelihood for deepening democracy, and respect for the rule of law. Therefore, when the constitution explicitly provides for a decentralisation framework, it enhances the effectiveness of decentralising powers to sub-national levels of government.

Although the entrenchment of decentralisation in the constitution is a positive step towards increasing people’s participation in governance, in the absence of a clearly and properly designed decentralisation framework, this may negatively impact on the government’s ability to implement decentralisation. De Visser argues that: “progressive ideas and political rhetoric about devolution of power to subnational governments needs to be met with the political will at central level to relinquish real power to those subnational entities”.<sup>206</sup> Nonetheless, the final outcome of decentralisation reforms do not depend only on the political will, or the legal and technical

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<sup>204</sup> Fombad (2018) 195.

<sup>205</sup> Fombad (2018) 195.

<sup>206</sup> De Visser (2005) 30.

undertakings but also on the designs and manner in which the decentralisation process is implemented.<sup>207</sup>

When bemoaning the lack of constitutionalism in Africa, Fombad states as follows:

Many of the continent's problems have been caused, not by the absence of constitutions *per se*, but rather by the ease with which constitutional provisions were abrogated, subverted, suspended or brazenly ignored. In short, an absence of constitutionalism and little respect for the rule of law.<sup>208</sup>

Indeed, in cases where constitutionalism is absent or very weak, the relationship between decentralisation and constitutionalism becomes more problematic. For instance, in post-conflict states where federal arrangements are used to promote and secure peace, the absence of the essential 'federal conditions' renders the attainment of peace very remote: 'the lack of trust, willingness to compromise, and respect for constitutionality, has made it difficult to obtain accommodation or to operate a federal institutional effectively'.<sup>209</sup>

One of the objects of decentralisation is it to limit centralised power.<sup>210</sup> Similarly, constitutionalism requires that state power must be constitutionally structured in order to prevent the centralisation and abuse of power. Clearly, in one form or another, there is a mutually reinforcing relationship between modern constitutionalism and decentralisation; they are closely linked and compatible concepts because both aim at countering the abuse of state power.

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<sup>207</sup> Regulski J 'Decentralisation Issues, a Polish experience' in Musch A (ed) *Decentralisation and Legitimacy: Aladin Yearbook 2001/2002* (2003) 44.

<sup>208</sup> Fombad (2007) 3.

<sup>209</sup> Watts RL 'Comparing Federal Political Systems' in Gagnon A, Keil S & Muller S (eds) *Understanding Federalism and Federation* (2015) 27.

<sup>210</sup> Steytler (2019a) 26.

A majority of states in post-colonial Africa embarked on ambitious decentralisation strategies, with the recognition of local government as an important structures in promoting self-government and efficiency.<sup>211</sup> However, the lack of political will to decentralise powers stalled the decentralisation strategies, owing to centralisation and the erosion of local government powers.

According to De Visser and November, decentralisation is by definition a rules-based system.<sup>212</sup> Adherence to these rules is a key factor in gauging the integrity of a decentralised system of government. Faguet adds that in ‘mature democracies’ the limitation of abuse of power is achievable through the enforcement of institutional rules.<sup>213</sup> Additionally, Steytler argues that ‘if the rule of law is the praxis, then decentralisation as a rule-driven system of division of powers should thrive’.<sup>214</sup> The law gives shape to a decentralised system of government and determines the degree of sub-national autonomy as well as the scope to which the ‘senior’ governments can limit that autonomy.<sup>215</sup> The law is a therefore key determinant in the limitation of power. Sub-national governments should assert their autonomy based constitutional or statutory rules and senior governments will exercise supervision, using rules from the same rulebook. In both cases, this may take place against the will of the counterpart.<sup>216</sup>

Steytler argues that in the absence of, or in the event of superficial realisation of constitutionalism, the efforts towards decentralisation may be doomed.<sup>217</sup> In other words, lack of constitutionalism is marked by the non- or partial enforcement of the constitution which embodies all the necessary elements of constitutionalism. If there is little or no respect for the rule of law it becomes

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<sup>211</sup> De Visser JW *Developmental Local Government: A case of South Africa* (2005) 30.

<sup>212</sup> De Visser & November (2017) 110.

<sup>213</sup> Faguet (2011) 17.

<sup>214</sup> Steytler (2019a) 26.

<sup>215</sup> De Visser & November (2017) 110.

<sup>216</sup> De Visser & November (2017) 110.

<sup>217</sup> Steytler (2019a) 25.

impossible to mitigate the centralisation and abuse of power. Instead, realisation of the objects of decentralisation remains distantly slim. The vital linkage between these two inter-dependent variables means constitutionalism has become an indispensable precondition for the effective implementation of decentralisation. An impressive constitutional framework for decentralisation cannot exist in vacuum but requires the practical implementation of the constitution itself which may simultaneously usher in the actual implementation of decentralisation.

## **2.6 Conclusion**

This chapter provided the paradigm of decentralisation and constitutionalism in Africa. With comprehensive reference to international literature and state practice in Africa, the chapter expounded and extrapolated the foundation of understanding the mutually reinforcing relationship between modern constitutionalism and decentralisation as closely linked and compatible concepts. Within this context, the ultimate goal of this chapter is to authenticate the leading argument of the study that constitutionalism is an indispensable precondition for decentralisation in Africa. The research has established that the effective implementation of decentralisation in Africa is heavily reliant on the level of political will and commitment to constitutionalism and rule of law at national level. Good political will that is accompanied by practical adherence to constitutionalism and rule of law ensures that the constitutionalisation of decentralisation becomes a practical reality.

## **Chapter Three: A Critical Analysis of South Africa's Constitutional Framework Pertinent to Decentralisation and Constitutionalism**

### **3.1. Introduction**

Chapter three presents a critical analysis of South Africa's constitutional framework with regard to the constitutional entrenchment and implementation of decentralisation and constitutionalism. While South Africa has effectively implemented decentralisation and constitutionalism,<sup>218</sup> the chapter details and sets out the key drivers of the success. The chapter first set out South Africa's decentralisation model according to its constitutional, legal and policy framework. Thereafter, the chapter provides an outline of South Africa's current state of constitutionalism. Lastly, the chapter culminates with a practical analysis of the direct relationship between decentralisation and constitutionalism by describing how South Africa has effectively implemented these mutually reinforcing variables.

### **3.2 A historical background of devolution in South Africa's transition from apartheid to a constitutional democracy**

South Africa's 'apartheid was a compressive system of racial engineering at all levels of society' that was built on a colonial history of racial segregation, was enshrined in law and enforced by the state'.<sup>219</sup> The state under the apartheid system was not a single territorial entity but a fractured structure that combined unitary, federal and consociational elements.<sup>220</sup> The Republic of South Africa ('white South Africa') was a unitary state with four non-elected provincial administrations

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<sup>218</sup> Steytler (2019) 152.

<sup>219</sup> Powell (2015) 32.

<sup>220</sup> Powell (2015) 35.

which encompassed 86 per cent of the land surface and the entire productive economy of the country.

Although the objective of establishing a complete racial state has failed, the effort to create a system of white minority rule over more than four decades succeeded. This is evidenced by institutional racial cleavages and structural inequalities that still persist to this day.<sup>221</sup> Political exclusion and economic rule by white minority was founded on the political exclusion and economic marginalisation of the black majority.

The majority of the black population were denied the rights to citizenship including political representation, participation in the economy, and were prohibited from residing in the country's territory except for stringently controlled work purposes. Later, blacks living in urban areas were granted rights to elect local authorities. This was a tactic for allowing some rights to a settled African urban population through devolution but without conceding to full democracy in towns and cities.<sup>222</sup> The apartheid constitutional system which provided for parliamentary sovereignty as opposed to constitutional supremacy, was strictly enforced and did not comply with the principles of modern constitutionalism.<sup>223</sup> Notably, the apartheid constitutional system did not contain provisions dealing with: fundamental human rights and freedoms; democratic rule; limited government; clear-cut prescriptions for separation of powers and checks and balances; judicial constraints on Parliament and its legislation; as well as supremacy of the constitution.<sup>224</sup>

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<sup>221</sup> Powell (2015) 34.

<sup>222</sup> Powell (2015) 32.

<sup>223</sup> The South African constitutions were the Union Constitution (South Africa 1909), the Republican Constitution (Constitution of the Republic of South Africa Act 32 of 1996) and the Tricameral Constitution (Constitution of the Republic of South Africa Act 110 of 1983.

<sup>224</sup> Currie & De Waal (2016) 2-3.

In the 1990s, South Africa had protracted political negotiations which were aimed at producing a suitable formula for democratic majority rule while inclusively offering minorities a political stake in the new order. However, the main challenge concerned the uncertainty on the nature of a state which had to substitute the 'state-entrenched white rule (apartheid)'.<sup>225</sup> Cognisant of the country's history of racial oppression, the debate about the state structure and system became the subject of massive contention.

By using ethnic federalism, the ruling National Party (NP) had created 'independent' ethnic homelands. This system was used in order to divide and rule South Africa with ease. The NP which had for many years presided over an extremely centralist regime, wanted strong provinces. The ANC portrayed devolution as merely a subterfuge to majority rule. The suspicion was that the NP sought to create 'strong federal units would be a method of legitimating apartheid's homelands and the creating of a separate white *Volkstaat*'.<sup>226</sup> With the intention to undertake a major restructuring of the South African society, the ANC advocated for a centralised government.

The white support-base of the NP was dispersed across the country and it could not necessarily associate decentralisation with the protection of territorially based ethnic interests.<sup>227</sup> Instead, it viewed decentralisation as a measure of taming a strong central government. For the NP, the locus of power remained with the national government. As result, the sharing of power had to take place at the national level.

The first round of negotiations between the NP and the ANC took place at the Convention for a Democratic South Africa (Codesa), and later at the Multi-Party Negotiating Forum. A major area

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<sup>225</sup> Powell (2015) 32.

<sup>226</sup> Steytler N & Mettler J 'Federal arrangements as a peacemaking device during South Africa's transition to democracy' (2001) 31(4) *Publius: The Journal of Federalism* 93.

<sup>227</sup> Steytler & Mettler (2001) 93.

of debate concerned the control of the power to be exercised by the national executive.<sup>228</sup> Initially the negotiating parties did not agree on the establishment of provinces and devolution of power to these sub-national units, but later reached a compromise. They reached a breakthrough in negotiations when they agreed on the creation of a government of national unity. This deal has made the NP to put its faith primarily in ‘shared rule (literally through the device of a government of national unity), rather than self-rule’ at sub-national level.<sup>229</sup>

### 3.2.1 The Constitutional Principles

In order to forge ahead with the transition from apartheid to democracy, the hostile and distrustful negotiating parties entered into a two-stage process of constitution-making.<sup>230</sup> The first stage involved closed-door negotiations wherein participating parties would adopt an interim constitution and make arrangements for a transitional government of national unity.<sup>231</sup> The second stage involved the holding of multi-party democratic election aimed at electing a new government as well as a Constitutional Assembly that would produce a 'final' Constitution for post-apartheid South Africa.<sup>232</sup>

In order to ensure the legal continuity of the South African state, the pre-democratic Tricameral Parliament formally adopted the interim Constitution. After the first democratic elections of 1994, a new Parliament together with a Government of National Unity were established and began to function in accordance with the 1993 Constitution, which came into force on 27 April 1994.

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<sup>228</sup> Steytler & Mettler (2001) 94.

<sup>229</sup> Steytler & Mettler (2001) 94.

<sup>230</sup> Ebrahim H & Miller LE ‘Creating the Birth Certificate of a New South Africa: Constitution Making after Apartheid’ in Miller LE (Ed) *Framing in Times of Transition: Case Studies in Constitution Making* (2010) 120.

<sup>231</sup> Constitution of the Republic of South African Act 200 of 1993 (the 1993 Constitution).

<sup>232</sup> Klug H ‘South Africa’s Constitutional Court: Enabling democracy and promoting law in the transition from apartheid’ (2008) 3 *The American Journal for Comparative Law* (2008) 3.

An essential feature of this two-stage process required that the final Constitution had to be consistent with 34 Constitutional Principles agreed to by the various political parties during the multi-party negotiating process and enshrined in Schedule 4 of the 1993 Constitution.<sup>233</sup> Most of these principles dealt with the structure of government. The principles provided that:

- government shall be structured at national, provincial and local levels;<sup>234</sup>
- the powers and functions of national and provincial levels of government had to be defined in the final Constitution and they should not be substantially less or substantially inferior to those provided for in the 1993 Constitution;<sup>235</sup>
- the functions of the national and provincial levels of government had to include exclusive and concurrent powers;<sup>236</sup>
- the allocation of a competence to either the national or provincial sphere had to be in accordance with listed criteria;<sup>237</sup>
- the national sphere had to be precluded from exercising its powers so as to encroach on the geographical, functional and institutional integrity of the provinces;<sup>238</sup> and
- disputes concerning legislative powers allocated by the Constitution concurrently to the national and provincial spheres had to be resolved by a court of law.<sup>239</sup>

Additionally, the final Constitution had to set out a framework dealing with the powers, functions and structures of local government.<sup>240</sup> More so, each level of government had to be guaranteed a

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<sup>233</sup> ‘Constitutional principles’ (sometimes called ‘guiding principles’) refer to documented principles or concepts that are intended to provide substantive and/or procedural guidance to a constitutional process, see ‘Constitutional Principles’ <<http://www.onu.cl/es/wp-content/uploads/2016/06/01-Principles.pdf>> (accessed 4 August 2019).

<sup>234</sup> Principle XVI of Schedule 4 1993 Constitution.

<sup>235</sup> Principle XVIII of Schedule 4 1993 Constitution.

<sup>236</sup> Principle XIX of Schedule 4 1993 Constitution.

<sup>237</sup> Principle XXI of Schedule 4 1993 Constitution.

<sup>238</sup> Principle XXII of Schedule 4 1993 Constitution.

<sup>239</sup> Principle XXIII of Schedule 4 1993 Constitution.

<sup>240</sup> Principle XXIV of Schedule 4 1993 Constitution.

constitutional right to an equitable share of revenue collected nationally in order to ensure that the provincial and local levels of government are capable of providing basic services and executing the functions allocated to them.<sup>241</sup>

The interim Constitution was not drafted and adopted by a democratically elected body. In contrast, the 1996 Constitution is a product of democratically elected Constitutional Assembly.<sup>242</sup>

The Constitutional Assembly was mandated to produce a constitution that conformed to the 34 Constitutional Principles within a period of two years. In order to ensure that the final Constitution has met the Constitutional Principles, the Constitutional Court was required to certify the draft final constitutional text.<sup>243</sup> On 8 May 1996, the final constitutional text was adopted by the Constitutional Assembly and later submitted to the Constitutional Court for certification. The court's task was an unprecedented and extraordinary exercise of judicial review.<sup>244</sup>

In the *Certification of the Constitution of the Republic of South Africa, 1996*, Constitutional Court held that the question of whether the powers and functions allocated to the provinces were substantially less or substantially inferior to those provided for in the 1993 Constitution was the most difficult question it had to deal with.<sup>245</sup> After evaluating the allocation of the powers to various spheres of government and assessing the breadth of the override clause that allows the national legislation to prevail over provincial legislation in certain instances, the Court concluded that the diminution in provincial powers was substantial and that this was inconsistent with the Constitutional Principle XVIII.<sup>246</sup> This required the drafters to reorder the arrangements, affording more powers to the provinces and restricting the scope of the override clause before it met the

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<sup>241</sup> Principle XXVI of Schedule 4 1993 Constitution.

<sup>242</sup> Currie & De Waal (2016) 6.

<sup>243</sup> ss 72(1) 1993 Constitution.

<sup>244</sup> Currie & De Waal (2016) 6.

<sup>245</sup> (CCT 23/96) [1996] ZACC 26, 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) para 472.

<sup>246</sup> *First Certification* paras 480-1.

approval of the Court. In *Certification of the Amended Text of the Constitution of The Republic Of South Africa, 1996*, the Constitutional Court found that the revised override clause (section 146) was more stringently drafted and removed any presumption in favour of national legislation.<sup>247</sup> This, together with the adjustment of the allocation of powers to the provinces, satisfied the Court that the amended text complied with Constitutional Principle XVIII.<sup>248</sup>

### **3.3 Constitutional framework of multi-level governance and devolution**

#### **3.3.1 Structure of multi-level system of government**

The 1996 Constitution has established a system of multi-level government.<sup>249</sup> The government consists of the national, provincial and local spheres of governments which are ‘distinctive, interdependent and interrelated’.<sup>250</sup> The ‘distinctive’ feature denotes the degree of ‘self-rule’ of provincial and local governments as they exercise constitutionally guaranteed powers and functions and are entitled to have access to revenue sources. According to Fessha, the usage of the term ‘sphere’ in the 1996 Constitution, in contrast to the more common ‘level’ or ‘tier’, was deliberate.<sup>251</sup> The term denotes a non-hierarchical relationship between the different spheres of government.<sup>252</sup> Judging from its constitutional components and formal institutional structures, South Africa’s decentralised system of government has been classified as a ‘quasi-federal system’.<sup>253</sup> Accordingly, Watts refers to South Africa as a ‘quasi-federation’.<sup>254</sup>

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<sup>247</sup> (CCT37) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996) paras 109-10.

<sup>248</sup> De Vos & Freedman (2014) 271.

<sup>249</sup> The phrase ‘multi-level system of government’ denotes the various forms of government in which government is organised at more than one level or at different tiers, see Chigwata (2018) 23.

<sup>250</sup> s 40(1) 1996 Constitution.

<sup>251</sup> Fessha Y ‘Devolved Political Structures in South Africa: A Void Waiting to be Filled by Subnational Politics’ in Steytler N & Ghai YP (Eds) *Kenyan-South African Dialogue on Devolution* (2015) 119.

<sup>252</sup> Fessha (2015) 119.

<sup>253</sup> Steytler N & De Visser J ‘Fragile Federations and the Dynamics of Devolution’ in Parlemo F & Albar E (Eds) *Federalism as decision-making* (2015) 79.

<sup>254</sup> Watts (2013) 22.

Presently, South Africa comprises of a national government, 9 provincial governments and 257 municipalities.<sup>255</sup>

### **3.3.2 Principles of co-operative government**

Every sphere of government exercises legislative and executive powers within the functional areas listed in Schedule 4 and Schedule 5 of the Constitution. The three spheres of government are required to partake in the development of communities and provision of service delivery in different ways. For the purpose of funding their own expenditure mandates in order to deliver basic services to the people, the Constitution has also adopted a system of fiscal decentralisation which entails the allocation of finances and revenue-raising powers within an intergovernmental fiscal relation system.<sup>256</sup>

Additionally, Section 41(1) of the Constitution provides for the principles of co-operative government, which prescribes the standards of intergovernmental conduct that binds the three orders of government to work together for the common good of the country. Such a constitutional provision reflects an integrated federal approach which is marked by structures and institutions, principles and mechanisms that facilitate intergovernmental cooperation between the federal government and the constituent units in respect of shared or overlapping governmental responsibilities. These principles are a variation to those that promote competitive governance. Instead of placing constraints on the spheres of government by imposing positive obligations, these principles ensure that they cooperative with one another. With the intent to give effect to the

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<sup>255</sup> South African Government 'Local government' available at <<https://www.gov.za/about-government/government-system/local-government>> (accessed 13 August 2019).

<sup>256</sup> Khumalo B, Jugal M & Dawood G 'South Africa's intergovernmental fiscal relations system' in Steytler N & Ghai Y (Eds) *Kenya-South Africa Dialogue on Devolution* (2015) 203.

constitutional recognition of the principles of cooperative government, several pieces of legislation have been enacted.

Another key point to emphasise is that the national government is charged with the overall responsibility of developing a uniform set of policy objectives, norms and standards.<sup>257</sup> The provincial governments have an oversight role over local government.<sup>258</sup> Local government has directly been assigned a service delivery mandate and development objectives.<sup>259</sup> Judging in terms of the law, policy and practice, the system of multi-level government is impressively advanced and effective.<sup>260</sup>

### **3.3.3 Provincial government**

South Africa comprises of nine provinces, namely the Eastern Cape, Free State, Gauteng, Kwazulu-Natal, Mpumalanga, Northern Cape, Limpopo, North West and Western Cape.<sup>261</sup> Chapter 6 of the Constitution is specifically dedicated to regulate the governance of provinces and it sets out the structures, powers and functions of the provincial legislatures,<sup>262</sup> as well as provincial executive authorities.<sup>263</sup> Therefore, provinces have been established as governments with fully-fledged legislatures and executives and have a wide discretion with legislative and executive powers conferred by the constitution or national legislation. De Vos and Freedman state that while judging from the structure and powers bestowed by the Constitution on the nine provinces, provinces are required to fulfil at least three important interrelated but distinct functions.<sup>264</sup> First,

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<sup>257</sup> s 146(2)(b) 1996 Constitution.

<sup>258</sup> s 155(7) 1996 Constitution.

<sup>259</sup> ss 152(1) & 153(1) 1996 Constitution.

<sup>260</sup> De Visser & Steytler (2018) 1.

<sup>261</sup> s 103(1) 1996 Constitution.

<sup>262</sup> ss 104-124 1996 Constitution.

<sup>263</sup> ss 125-141 1996 Constitution.

<sup>264</sup> De Vos & Freedman (2014) 278.

provinces provide a close link between voters and their government to ensure that the government addresses the particular concerns and unique challenges and needs of discrete geographical areas. Secondly, provinces are required to implement national policies and plans relating to important service delivery areas such as housing, health care, policing and education. Finally, provinces are also required to oversee the smooth running of the local sphere of government within the boundaries of the provinces.<sup>265</sup>

Largely, the nine provinces have similar structures and powers. Each province is constitutionally allowed to pass a provincial constitution.<sup>266</sup> So far, the Western Cape is the only province that has a provincial constitution.<sup>267</sup> Nonetheless, such a constitution cannot confer more substantial powers on a province or deviate from the basic structures of governance of the province as set out in the national Constitution.<sup>268</sup> The provinces remain creatures of the national Constitution and precluded from altering their character or relationship with the other levels of government through their provincial constitution-making powers.<sup>269</sup> This prohibition resonates with one of the classical elements of federalism that precludes either level of government (between the federation and federal unit) from unilaterally altering its own powers and functions or those of the other. Unlike the Western Cape provincial constitution, the KwaZulu-Natal constitution failed to meet the certification test after the Constitutional Court identified numerous shortcomings in it, and the starkest flaws were categorised as the ‘usurpation of national powers’.<sup>270</sup>

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<sup>265</sup> De Vos & Freedman (2014) 278.

<sup>266</sup> ss 104(1)(a) & 142 1996 Constitution.

<sup>267</sup> Fessha (2015) 119.

<sup>268</sup> See *Certification of the Kwazulu-Natal Constitution* (CCT15/96) [1996] ZACC 17; 1996 (11) BCLR 1419; 1996 (4) SA 1098 (6 September 1996).

<sup>269</sup> See *Certification of the Kwazulu-Natal Constitution* para 8. See also *Certification of the Constitution of the Western Cape*, 1997 (CCT6/97) [1997] ZACC 8; 1997 (12) BCLR 1653; 1998 (1) SA 655 (2 September 1997) para 8.

<sup>270</sup> See *Certification of the Constitution of the Province of KwaZulu-Natal*, 1996 (11) BCLR 1419 (CC) paras 14ff.

### 3.3.3.1 Provincial substantive powers

The legislative authority of each province is vested in its provincial legislature.<sup>271</sup> The provincial legislature has the legislative powers to enact legislation with regard to any matter within the functional areas listed in Schedules 4 and 5 of the Constitution;<sup>272</sup> any matter outside the functional areas, and that is ‘expressly assigned’ to the province by national legislation;<sup>273</sup> and any matter for which a provision of the Constitution ‘envisages’ the enactment of provincial legislation.<sup>274</sup> Apart from the legislative powers outlined above, the Constitution also stipulates that ‘provincial legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4, is for all purposes legislation with regards to a matter listed in Schedule 4’.<sup>275</sup>

Members of the provincial legislatures which consist of between 30 and 80 members,<sup>276</sup> are elected in accordance with a proportional representation electoral system,<sup>277</sup> and are elected by the designated constituencies or citizens of each province.<sup>278</sup> With a view to promoting a limited, democratic and accountable government, provinces are directly accountable to their respective citizens.

The Constitution allows each province to determine the size of its provincial legislature, which must be done in accordance to the provincial constitution. While using its provincial constitution, the Western Cape is the only province that has enlarged membership of its legislature by opting

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<sup>271</sup> s 104(1) 1996 Constitution.

<sup>272</sup> s 104(1)(b)(i) & (ii) 1996 Constitution.

<sup>273</sup> s 104(1)(b)(iii) 1996 Constitution.

<sup>274</sup> s 104(1)(b)(iv) 1996 Constitution.

<sup>275</sup> s 104(4) 1996 Constitution.

<sup>276</sup> s 105 1996 Constitution.

<sup>277</sup> s 105(1)(d) 1996 Constitution.

<sup>278</sup> s 105(1)(b) 1996 Constitution.

for 42 seats.<sup>279</sup> A provincial legislature is elected for a term of five years,<sup>280</sup> and can be dissolved before expiry of that term.<sup>281</sup>

The executive authority of a province is vested in the Premier of that province,<sup>282</sup> who is elected by the provincial legislature from among its members.<sup>283</sup> Besides the above explicit powers conferred on the Premier and his or her executive, the provincial executive may also exercise any additional powers assigned by the national executive, subject to Section 99 of the Constitution. A province has executive authority in terms of those functional areas listed in Schedules 4 and 5 of the Constitution, but ‘only to the extent that the province has the administrative capacity to assist to assume effective responsibility’.<sup>284</sup> The Constitution obliges the national government to assist provinces to develop the administrative capacity required for the effective exercise of their powers and performance of their functions through legislative and other measures.<sup>285</sup>

As the head of the provincial government, the Premier is chosen by members of the party that secures the majority of seats in the legislature,<sup>286</sup> and together with members of the Executive Council, are accountable individually and collectively to the provincial legislature.<sup>287</sup> A Premier can be elected to serve a maximum of two five-year terms.<sup>288</sup> In a thriving multi-party democratic system of government, having regular elections at fixed intervals helps in enhancing service delivery. Competitive politics mean that the failure to satisfy electorates may provide citizens with mechanism to change the government through free and fair elections.

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<sup>279</sup> See *Premier of the Province of the Western Cape v Electoral Commission* 1999 BCLR 1209 (CC).

<sup>280</sup> s 108(1) 1996 Constitution.

<sup>281</sup> ss 108(2) & 109 1996 Constitution.

<sup>282</sup> s 125(1) 1996 Constitution.

<sup>283</sup> s 128(1) 1996 Constitution.

<sup>284</sup> s 125(3) 1996 Constitution.

<sup>285</sup> s 125(3) 1996 Constitution.

<sup>286</sup> Fessha (2015) 120.

<sup>287</sup> s 133(2) 1996 Constitution.

<sup>288</sup> s 130(2) 1996 Constitution.

A Premier may be removed from office before the expiry of the term of office on two grounds. First, a Premier can be impeached in terms of section 130(3) of the Constitution for a serious violation of the Constitution or law, serious misconduct or inability to perform the functions of office of the Premier. Second, in terms of section 141 of the Constitution, a majority of legislators may pass a vote of no confidence in the Premier. De Vos and Freedman argue that in the latter instance, a provincial legislature removes a Premier purely for political reasons.<sup>289</sup>

### 3.3.3.2 Fiscal powers

Fiscal decentralisation refers to the manner in which financial resources and revenue-generating powers and functions are allocated to sub-national units. Fiscal decentralisation encompasses fiscal autonomy, which is the autonomous right and power of sub-national governments to generate and collect revenue as well as to make their own expenditure decisions.<sup>290</sup>

South Africa's intergovernmental fiscal relations framework covers a financing system which came into effect in 1998, and is guided by the constitutional principles that take into consideration the context of provincial government.<sup>291</sup> Among the three spheres of government, the Constitution confers provinces with relatively limited devolved taxation powers as opposed to the national and local governments, and the powers are limited to taxes, levies and duties.<sup>292</sup> The Constitution provides further that, subject to national legislation, provinces have borrowing powers that are restricted to capital or current expenditure,<sup>293</sup> but may raise loans for current expenditure only when it is necessary for bridging purpose during a fiscal year. According to Khumalo *et al*, provinces

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<sup>289</sup> De Vos & Freedman (2014) 280.

<sup>290</sup> Beer-Tóth (2009) 4.

<sup>291</sup> Khumalo *et al* (2015) 203.

<sup>292</sup> s 228 1996 Constitution.

<sup>293</sup> s 230 1996 Constitution.

have limited sources of revenue because their only tax is gambling tax.<sup>294</sup> Consequently, they only concentrate their efforts on managing expenditure rather than increasing own revenue sources.<sup>295</sup> Khumalo *et al* state that the limited ability of provinces to maximise the collection of own revenue results in heavy reliance on intergovernmental transfers provided for in terms of section 214 of the Constitution.<sup>296</sup>

### **3.3.3.3 Administrative authority**

The Constitution does not directly confer administrative authority to the provinces. Section 195(2)(4) of the Constitution requires that national legislation must regulate the appointments of staff in public service and administration of every sphere of government. The Public Service Act<sup>297</sup> has been amended numerous times in order to give effect to section 195(2)(4) of the Constitution. The Act also governs the structure of provincial administrations, and allows the provinces to make their own appointments, remunerate, discipline and dismiss their own staff.<sup>298</sup>

## **3.3.4 Local government**

### **3.3.4.1 The evolution of local government reform**

#### **3.3.4.1.1 Status of local government before 1994**

Prior to 1994, local government was a creature of statute and without constitutionally protected powers.<sup>299</sup> As such, it lacked powers or rights with the exception of 'those expressly or impliedly

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<sup>294</sup> Khumalo *et al* (2015) 207.

<sup>295</sup> Khumalo *et al* (2015) 208.

<sup>296</sup> Khumalo *et al* (2015) 208.

<sup>297</sup> Public Service Act 86 of 1996.

<sup>298</sup> ss 9 & 11 Public Service Act.

<sup>299</sup> Steytler N & De Visser J *Local Government Law of South Africa* (2007) 1.

conferred upon it by a competent legislative authority'.<sup>300</sup> Moreover, local government failed to deliver basic services to the people as it was marked by an array of fragmented institutions. Instead, local government 'created huge spatial/settlement distortions, economic disparities, skewed urban economic logic, and massive service and infrastructure backlog'.<sup>301</sup> These fragmented institutions were racially segregated and were meant to ensure that white areas had developed infrastructures. Contrastingly, areas reserved for the black, coloured, and Indian communities were beset by under-development and poor service delivery.

#### **3.3.4.1.2 Status of local government after 1994**

The 1994 transition from apartheid to democracy ushered in a new constitutional dispensation that steered in a major change to the status of local government. While it was merely an administrative arm of national and provincial governments; it became 'a fully-fledged government with constitutionally protected powers'.<sup>302</sup> The Constitutional Court reaffirmed the drastically changed constitutional status of local government in *Fedsure Life Assurance and Others v Johannesburg Transitional Metropolitan Council* when it held that that local government ceases to be a public body that exercises delegated powers, but has original powers in terms of the 1993 Constitution.<sup>303</sup> These powers were later expanded in the 1996 Constitution.

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<sup>300</sup> Ntliziywana P *Professionalisation of local government: Legal avenues for enforcing compliance with competency requirements* (unpublished LLM research paper, University of the Western Cape, 2009)7.

<sup>301</sup> Ntliziywana P *The transformation of local government service delivery in South Africa: The failures and limits of legislating new public management* (unpublished PhD thesis, University of the Western Cape, 2018) 2.

<sup>302</sup> Ntliziywana (2009) 8.

<sup>303</sup> See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 (12) BCLR 1458 (CC).

### 3.3.4.2 Structures of local government

The authority to govern a municipality is vested in its municipal council.<sup>304</sup> The Constitution stipulates that ‘a municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution’.<sup>305</sup> The other levels of governments are precluded from interfering with a municipality’s ability or right to exercise its powers or perform its functions.<sup>306</sup> The high degree of constitutional protection of local autonomy enjoyed by municipalities in South Africa ensures that their autonomous status is not devoid of power.

The municipalities are divided into three categories: 8 metropolitans, 44 districts, and 205 local municipalities.<sup>307</sup> Municipal councils have been established in the entire South African territory for the purpose of governing local government affairs of their communities.<sup>308</sup> By having them in the whole territory of the country indicates that the government has been brought democratically closer to the people in order to effectively achieve the objectives of decentralisation. A municipal council consists of members elected on both proportional representation and ward-based representation systems, provided that the municipality has wards.<sup>309</sup>

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<sup>304</sup> s 151(2) 1996 Constitution.

<sup>305</sup> s 151(1) 1996 Constitution. See also s 4(1)(a) Local Government: Municipal Systems Act 32 of 2000 (Systems Act).

<sup>306</sup> s 151(4) 1996 Constitution. The principle of local autonomy entails the *right* and *ability* of local authorities in self-managing the public affairs at the local level by having a discretion in carrying out their duties and obligations, see Bilouseac I & Zaharia P ‘Clarifications on the principle of the autonomy in local public administration management’ (2014) 16 *Annales Universitatis Apulensis Series Oeconomica* 17.

<sup>307</sup> s 155(1)(a)-(c) 1996 Constitution and ss 1 & 2 of the Local Government: Municipal Structures Act 117 of 1998. See also South African Government ‘Local government’ available at <<https://www.gov.za/about-government/government-system/local-government>> (accessed 13 August 2019).

<sup>308</sup> ss 151(1) & (3) 1996 Constitution.

<sup>309</sup> s 157 1996 Constitution.

### 3.3.4.3 Original powers

The legislative and executive authorities of a municipality are vested in its municipal council.<sup>310</sup>

A municipality has the executive authority and the right to administer by-laws in any matters enumerated in Schedules 4B and 5B of the Constitution.<sup>311</sup> Additionally, section 156(2) of the 1996 Constitution confers to a municipality the executive authority and the right to administer local government matters listed in Schedules 4B and 5B of the Constitution.<sup>312</sup>

Due to the fact that these powers are directly conferred to the local government by the Constitution they therefore constitute the municipality's utmost important source of powers, and are classified as the 'original' powers of local government.<sup>313</sup> However, while exercising such powers, local government has to comply with the limitations stipulated by section 155(6)(a) and 7 of the Constitution – under the regulation by the national and provincial governments.<sup>314</sup>

At face value and through political decentralisation, South Africa's local government has been conferred with wide range of devolved powers which are constitutionally protected. As such, these powers are safeguarded against any removal or amendment by ordinary statutes or provincial acts. Any removal or amendment to their powers should only be effected by amending the Constitution itself. The security of existence conferred to the powers of local government shows that South Africa's constitutional framework on devolution of power is advanced and well-developed.

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<sup>310</sup> s 151(2) 1996 Constitution.

<sup>311</sup> s 156(2) 1996 Constitution.

<sup>312</sup> s 156(1) 1996 Constitution.

<sup>313</sup> De Visser J & May A 'Developmental local government: determining appropriate functions and powers', Discussion Paper (2007) 7.

<sup>314</sup> The national and provincial governments are constitutionally obliged to supervise the local government through regulation, monitoring, support and intervention.

#### 3.3.4.4 Assigned powers and subsidiarity

Local government does not only exercise the powers and functions listed in Schedules 4B and 5B of the Constitution, but it may also exercise any additional powers conferred to it in terms of the Constitution.<sup>315</sup> These powers which are derived from acts of assignment takes place when the national and provincial governments transfer authority to local government pertinent to a matter enumerated in Schedules 4A and 5A of the Constitution.<sup>316</sup> Such powers which are assigned to local government through national and provincial legislation are classified as ‘assigned powers’.<sup>317</sup> The assigned powers could either be legislative<sup>318</sup> or executive<sup>319</sup> assignment of authority. In addition, as a matter of constitutional obligation, the national and provincial governments must assign to a municipality, the administration of a matter listed in Schedule 4A or 5A of the Constitution, provided that the matter would best effectively be administered locally while accompanied with the municipality’s competent capacity to administer it.<sup>320</sup>

#### 3.3.4.5 Fiscal powers

A municipality’s legislative and executive authority is supplemented by original fiscal powers.<sup>321</sup> It has a right to impose rates on property and surcharges on fees for services rendered by the municipality or on its behalf.<sup>322</sup> Local government is therefore granted a firm base for generating revenue emanating from the imposition of property rates and charges on user fees (especially electricity).<sup>323</sup> National legislation may authorise a municipality to impose rates on other taxes and

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<sup>315</sup> s 156(4) 1996 Constitution.

<sup>316</sup> De Visser & May (2007) 7.

<sup>317</sup> De Visser & May (2007) 7.

<sup>318</sup> ss 44(1)(a)(iii) & 104(1)(c) 1996 Constitution.

<sup>319</sup> ss 99 and 126 1996 Constitution.

<sup>320</sup> s 156(4) 1996 Constitution.

<sup>321</sup> Steytler & De Visser (2007) 6.

<sup>322</sup> s 229(1)(a) 1996 Constitution. See also *City of Cape Town v Robertson* 2005 (3) BCLR 199 (CC) at para 61.

<sup>323</sup> Steytler & De Visser (2007) 6.

duties appropriate to the category of local government.<sup>324</sup> Nonetheless, a municipality cannot impose income tax, value-added tax, general sales tax or customs duties.<sup>325</sup> In order to enable it to provide basic services and perform the functions allocated to it, local government is entitled with the right to an equitable share of revenue raised nationally.<sup>326</sup> Additionally, local government ‘may receive other allocations from national government revenue, either conditionally or unconditionally’.<sup>327</sup>

#### **3.3.4.6 Administrative authority**

The Constitution bestows a municipal council with the power to employ personnel for the effective performance of its functions.<sup>328</sup> Additionally, a municipality is obliged to strive, within its administrative and financial capacity, to achieve the objects of local government.<sup>329</sup> A municipality is also required to ‘structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community’.<sup>330</sup>

### **3.4 Constitutional democracy: The basic elements of constitutionalism**

The adoption and coming into of the 1996 Constitution marked a significant constitutional change of South Africa from apartheid to a constitutional democracy. The 1996 Constitution ushered in a new constitutional order that provides for the basic elements of modern constitutionalism. These include fundamental human rights and freedoms;<sup>331</sup> which are contained in the Bill of Rights.<sup>332</sup> Currie and De Waal are of the view that the Bill of Rights is ‘the principal source of substantive

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<sup>324</sup> s 229(1)(b) 1996 Constitution.

<sup>325</sup> s 229(1)(b) 1996 Constitution.

<sup>326</sup> s 227(1)(a) 1996 Constitution.

<sup>327</sup> s 227(1)(b) 1996 Constitution.

<sup>328</sup> s 160(1)(d) 1996 Constitution.

<sup>329</sup> s 152(2) 1996 Constitution.

<sup>330</sup> s 153(a) 1996 Constitution.

<sup>331</sup> s 1(a) 1996 Constitution.

<sup>332</sup> ch 2 1996 Constitution.

constraints on public power in the Constitution'.<sup>333</sup> The Bill of Rights precludes the state from using its power given by the constitution in a manner that violates fundamental rights and freedoms.

The 1996 Constitution lists as part of the values of a democratic state, supremacy of the constitution and the rule of law,<sup>334</sup> and multi-party democracy and an accountable government.<sup>335</sup> It also provides for limited government,<sup>336</sup> which is central to ensuring that the government does not abuse its powers. A key component of modern constitutionalism which is contained in the 1996 Constitution is the separation of powers and checks and balances;<sup>337</sup> an element that prevents the over-concentration of powers in a single person or body. Additionally, the 1996 Constitution strengthens constitutionalism by providing for an independent judiciary,<sup>338</sup> which is a crucial provision meant to curb the excessive politicisation of the judiciary. It also requires the review of the constitutionality of laws,<sup>339</sup> and the control of the amendment of the constitution.<sup>340</sup> Therefore, judging from the descriptions made above, the 1996 Constitution meets the prescriptive elements of modern constitutionalism.

### **3.5 The practice of constitutionalism**

Buoyed up by the demise of the apartheid system in 1994 and with Nelson Mandela assuming the presidency, the racist and authoritarian regime was replaced by a constitutional democracy.<sup>341</sup>

Elements of constitutionalism have been realised by the government of the day. The government

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<sup>333</sup> Currie & De Waal (2016) 23.

<sup>334</sup> s 1(c) 1996 Constitution.

<sup>335</sup> s 1(d) 1996 Constitution.

<sup>336</sup> ss 44(4),

<sup>337</sup> The 1996 Constitution establishes the three branches of governments made of the Parliament (ch 4); President and nation executive (ch 5); and judiciary (ch 8).

<sup>338</sup> s 165(2) 1996 Constitution.

<sup>339</sup> s 79(4)-(5) 1996 Constitution.

<sup>340</sup> s 74 1996 Constitution.

<sup>341</sup> Steytler (2019b) 154.

immediately implemented the Constitution by effectively establishing provinces and municipalities as fully-fledged sub-national levels of government.<sup>342</sup> With the advent of the multi-party system of democratic government, regular, free and fair elections of national, provincial and local elections have been held at fixed intervals of a five-year periodic schedule.<sup>343</sup>

The commitment to devolution and constitutionalism has been bolstered by the ANC's willingness to cede power to opposition parties after losing control in sub-national governments. In the first democratic elections of 1994, two provinces of Kwazulu-Natal and the Western Cape, were won by the Inkatha Freedom Party (IFP) and the New National Party (NPP), respectively. From 2004, the ANC controlled all the nine provinces but relinquished the Western Cape to the Democratic Alliance (DA) after losing the 2009 elections.

The ANC had lost control of the City of Cape Town to a coalition led by the DA in 2006. During the 2016 local government elections, the ANC also lost control of three key metropolitan municipalities – namely, Nelson Mandela Bay, City of Tshwane and City of Johannesburg,<sup>344</sup> and duly handed over power to coalitions led by the DA again. The gesture further denotes the governing party's tolerance to devolved political structures and the corresponding multi-party system of democratic government within the spirit of the Constitution and multi-level governance.

However, there is rife non-compliance with the rule of law by state-owned enterprises, national departments, and provincial and local governments where 'the majority of provinces have been characterised by corruption and maladministration, while a third of all municipalities have been

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<sup>342</sup> Steytler (2019b) 151.

<sup>343</sup> Steytler (2019b) 154.

<sup>344</sup> Mkhabela H 'South African local elections 2016: From one party dominance to effective plural democracy', Policy Paper (2016) 1.

described officially as ‘frankly dysfunctional’, with a further third at risk of becoming dysfunctional’.<sup>345</sup>

These sordid developments indicate the lack of good governance at all levels of government and sub-national levels of government in particular. With the existence of fully-fledged provincial and local governments, another concern is the manner in which the sub-national governments could be transformed into efficient and effective institutions that contribute to South Africa’s broader development goals, which include poverty eradication, reduction of inter-regional inequalities and stimulation of economic growth.<sup>346</sup>

As enshrined in the 1996 Constitution, the supremacy of the constitution and rule of law form part of the foundational values of South Africa’s democratic state.<sup>347</sup> The Constitution is the supreme law of the country and all obligations imposed by it must be fulfilled.<sup>348</sup> In this context, Steytler states that an independent judiciary plays a pivotal role in the interpretation and enforcement of the Constitution.<sup>349</sup> The 1996 Constitution contains significant federal elements such as creating provincial and local governments, and an independent judiciary, with Constitutional Court as the apex. The courts therefore are bound to give shape and texture to this system.<sup>350</sup>

Since 1995, the jurisprudence that gives effect to the principle of limited government has been deeply pronounced by the Constitutional Court, the Supreme Court of Appeal and the High Court. Central to engraining a limited government is the courts’ massive ability to assert the constitutional

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<sup>345</sup> Steytler (2019b) 151-152. See also Ministry of Cooperative Governance and Traditional Affairs ‘Back to basics: Serving our communities better’ (2016) <[http://www.cogta.gov.za/cgta\\_2016/wp-content/uploads/2016/06/The-Back-to-Basics-Approach-Concept-Document.pdf](http://www.cogta.gov.za/cgta_2016/wp-content/uploads/2016/06/The-Back-to-Basics-Approach-Concept-Document.pdf)> (accessed 9 September 2019).

<sup>346</sup> Pillay (2009) 139.

<sup>347</sup> s 1(c) 1996 Constitution.

<sup>348</sup> s 2 1996 Constitution.

<sup>349</sup> Steytler N ‘The Constitutional Court of South Africa: Reinforcing an Hourglass System of Multi-Level Government’ in Aroney J & Kincaid J (Eds) *Courts in Federal Countries: Federalists or Unitarists?* (2017) 328.

<sup>350</sup> Steytler (2017) 328.

values of the supremacy of the constitution, the rule of law and the separation of powers, which are core elements of modern constitutionalism.<sup>351</sup> Nonetheless, in its interpretation of the federal provisions, the Constitutional Court has run short of giving full effect to the principle of self-rule of provincial governments. Instead, the Constitutional Court has constantly enforced local government's constitutional 'right to govern, on its own initiative, the local government affairs of its community'.<sup>352</sup>

In addition, although not emphasising on the substantive content of provincial self-rule, it has conscientiously reviewed compliance with procedural rules of intergovernmental relations.<sup>353</sup> For instance, in *Premier: Limpopo Province v Speaker; Limpopo Provincial Legislature and Others*, the Constitutional Court held that a provincial law regulating the financial affairs and practices of the provincial legislature was unconstitutional for falling outside the legislative competence of the provincial legislature.<sup>354</sup> Similar laws which were passed by five other provinces were also declared unconstitutional. Both the national executive and Parliament have been honouring the decisions of courts.<sup>355</sup> In this regard, respect for the rule of law has been a key feature of South Africa's thriving constitutional democracy. Former President Nelson Mandela, for instance, demonstrated an utmost respect to the court when he complied with a subpoena to testify in an open court while accounting for his decision of appointing a particular commission of inquiry.<sup>356</sup>

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<sup>351</sup> Steytler (2017) 328.

<sup>352</sup> s 151(3) 1996 Constitution.

<sup>353</sup> Steytler (2017) 328.

<sup>354</sup> (CCT 94/10) [2011] ZACC 25; 2011 (11) BCLR 1181 (CC); 2011 (6) SA 396 (CC) (11 August 2011) para 68.

<sup>355</sup> Steytler (2019b) 155.

<sup>356</sup> *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000)

### 3.6 Conclusion

South Africa's 1996 Constitution entrenches an impressive constitutional framework for decentralisation and constitutionalism. It encapsulates the core elements of modern constitutionalism which resonates well with the instruments of decentralisation. Since 1994, effective implementation of the Constitution is evidenced by the establishment of provincial and local governments. Accordingly, South Africa has a functional and fully-fledged system of multi-level government.

Having regular, free and fair elections at all levels of governance legitimises the devolved political structures. Above all, the allocation of powers to sub-national governments is complemented by an independent judiciary which often safeguards their powers and institutions. Where there have been contestations pertaining to the constitutionality of national executive powers, both Parliament and courts have been able to ensure that the executive complies with its constitutional obligations. More importantly, the government has constantly respected the decisions of courts which are aimed at affirming the autonomy and powers of sub-national governments within the confines of the supreme Constitution.

Constitutionalism, both as a politico-legal philosophy and practice, has been instrumental to the effective implementation of decentralisation in South Africa. From the achievement of democracy in 1994, the ANC's political will at national level in terms of complying with the rule of law and the well-developed and advanced law and policy on multi-level governance can be credited for the effective implementation of decentralisation and constitutionalism.

Nonetheless, the non-compliance with rule of law by provinces and municipalities amounts to a lack of constitutionalism at the sub-national levels of government. Respect for the rule of law by

all spheres of government is a precondition for the effective implementation of constitutionalism and decentralisation.



# **Chapter Four: A Critical Analysis of Zimbabwe's Constitutional Framework Pertinent to Decentralisation and Constitutionalism**

## **4.1. Introduction**

In a comparative perspective against the South African constitutional framework, chapter four assesses the nature and extent of constitutional provision of devolution and constitutionalism in the 2013 Constitution of Zimbabwe. This entails gauging the strength of constitutional entrenchment of decentralisation and assessing the nature and extent to which the 2013 Constitution provides for constitutionalism.

## **4.2 A brief history of Zimbabwe's constitutional framework for constitutionalism and decentralisation**

### **4.2.1 Historical background of constitutionalism**

Zimbabwe has undergone ninety years of colonial rule and decades of armed struggle against a white minority regime. Mugabe's ZANU-PF and Joshua Nkomo's Zimbabwe African People's Union (ZAPU) armed themselves and engaged in the war of liberation.<sup>357</sup> In the 1970s, both ZANU and ZAPU forces increased the armed struggle within the country. Boosted by the success of the struggle as well as international pressure, in 1978, the Rhodesian government of Ian Smith under Rhodesian Front conceded to enter into an internal settlement with Mugabe's ZANU-PF, Nkomo's ZAPU and Abel Muzorewa's United African National Council (UANC).

From 10 September to 21 December 1979, an all-party constitutional conference was held at Lancaster House in London and the main agenda was to reach an agreement on an independence

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<sup>357</sup> Ndulo M 'Zimbabwe's Unfulfilled Struggle for a Legitimate Constitutional Order' in Miller L (Ed) *Framing the State Times of Transition: Case Studies in Constitution Making* (2010) 180.

constitution that will also pave way for electing a new government for an independent Zimbabwe. In the same year, Zimbabwe inherited a new constitution (the Lancaster House Constitution).<sup>358</sup> Although the electoral campaign was marred by widespread voter intimidation, perpetrated by ZAPU, UANC, and ZANU-PF, elections took place in 1980. ZANU-PF won the elections and Mugabe assumed power and served as Zimbabwe's first independent Prime Minister while Canaan Banana was appointed President. Accordingly, Zimbabwe became an independent state on 19 April 1980.

The Lancaster House Constitution entrenched some of the core elements of constitutionalism as it contained constitutional principles such as: supremacy of the constitution;<sup>359</sup> fundamental rights and freedoms;<sup>360</sup> separation of powers;<sup>361</sup> and an independent judiciary.<sup>362</sup> The Lancaster House Constitution also provided for the constitutional review of laws,<sup>363</sup> and the control of the alteration of the constitution.<sup>364</sup> Although the Lancaster House Constitution had entrenched constitutionalism, there is a general consensus that in practice, the rule of law and constitutionalism were absent. This is evidenced by gross human rights which started from early 1983 to late 1987 during the commission of the Gukurahundi Massacre, which was a vicious cycle of violence and massacres of Ndebele civilians in Midlands and Matabeleland provinces carried out by the Zimbabwe National Army.<sup>365</sup>

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<sup>358</sup> Constitution of the Republic of Zimbabwe, Amendment No 19 of 1979 (the Lancaster House Constitution).

<sup>359</sup> s 3 Lancaster House Constitution.

<sup>360</sup> ch III Lancaster House Constitution.

<sup>361</sup> The Lancaster House Constitution established three branches of governments which were made of Parliament (ch V), the national executive (ch IV), and the judiciary (ch VIII).

<sup>362</sup> s 79B Lancaster House Constitution.

<sup>363</sup> s 51 Lancaster House Constitution.

<sup>364</sup> s 52 Lancaster House Constitution.

<sup>365</sup> Gusha I 'Memories of Gukurahundi massacre and the challenge of reconciliation' (2019) 45(1) *Studia Historiae Ecclesiasticae* 1.

## 4.2.2 Historical background of multi-level governance and devolution

The Lancaster House Constitution established a unitary system of government wherein provincial and local governments lacked constitutional recognition.<sup>366</sup> Additionally, local authorities, in particular urban, established by statute, enjoyed some level of discretion in certain functions that resembled elements of decentralisation. Although there was no clear-cut constitutional provision for devolution as the primary mode of transferring governmental powers and responsibilities to sub-national governments, Zimbabwe has always had a decentralised system of government. In actual fact, the sub-national governments exercised powers assigned to them under various Acts of Parliament.<sup>367</sup>

In the aftermath of the disputed presidential elections of 2008, the governing party ZANU-PF entered into power-sharing agreement with two major opposition parties: the Movement for Democratic Change (MDC-T) led by Morgan Tsvangirai and the Movement for Democratic Change (MDC-M) led by Arthur Mutambara.<sup>368</sup> The former President of South Africa, Thabo Mbeki was appointed by the Southern African Development Community (SADC) to facilitate the peace talks. At a later stage, the three parties reached an agreement which is now popularly known as the Global Political Agreement (GPA). The GPA required the formation of a Government of National Unity (GNU) which inclusively comprised the three parties. The GPA further provided for an inclusive and participatory constitution-making process aimed adopting a new constitution that would replace the independence Lancaster House Constitution.

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<sup>366</sup> Chigwata TC 'Emerging debates about, and prospects for, devolution in Zimbabwe' (2019) 2 available at <<https://zimlii.org/zw/blog/Emerging%20debates%20about%20and%20prospects%20for%20devolution%20in%20Zimbabwe.pdf>> (accessed 15 September 2019).

<sup>367</sup> Chigwata TC 'Emerging debates about, and prospects for, devolution in Zimbabwe' (2019) 2 available at <<https://zimlii.org/zw/blog/Emerging%20debates%20about%20and%20prospects%20for%20devolution%20in%20Zimbabwe.pdf>> (accessed 15 September 2019).

<sup>368</sup> Chigwata (2019) 303.

The commencement of the constitutional review process took place in 2009, under the auspices of the Constitutional Parliamentary Select Committee (COPAC). The three political parties were often at loggerheads especially on issues pertaining to devolution. Nonetheless, COPAC was capable of producing a draft constitution which was approved by Zimbabweans in a referendum held in March 2013. By virtue of being approved by the people, the new Constitution obtained its legitimacy to become the supreme law of the land.<sup>369</sup> The new Constitution proclaims some of the modern elements of constitutionalism as it explicitly provides for fundamental human rights and freedoms, constitutional supremacy and rule of law, separation of powers and judicial independence, and presidential term limits. Equally important, it also requires devolution of power to provincial and local governments. The adoption of devolution in the 2013 Constitution was in part, a direct response to the need of finding solutions to problems associated with the centralisation of power at the national level.

The adoption of devolution in the 2013 Constitution was a subject of massive contention and controversy. The governing ZANU-PF was against the constitutionalisation of devolution, ‘citing its potential to promote secession and undermine national unity’.<sup>370</sup> Whereas the advocacy to devolution came from the MDC formations and a majority of the Zimbabwean society which viewed devolution as having a potential to solve numerous challenges which the country has faced since independence. In order to bring the political impasse to an end, the government conducted an opinion poll during the constitutional review and revealed that 62 per cent of Zimbabweans supported devolution, albeit for differing reasons.<sup>371</sup>

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<sup>369</sup> Chigwata (2019) 304.

<sup>370</sup> Chigwata TC ‘Three Years into the Implementation of the Zimbabwean Constitution of 2013: Progress, Challenges, Prospects and Lessons’ Fombad CM (Ed) *The Implementation of Modern African Constitutions: Challenges and Prospects* (2016) 81-82.

<sup>371</sup> Chigwata (2019) 306.

### 4.3 Constitutional democracy: The basic elements of constitutionalism

Like its predecessor, the Lancaster House Constitution, the 2013 Constitution prescribes some of the core elements of modern constitutionalism. Section 3 provides that Zimbabwe is founded on, among others, the values and principles of supremacy of the constitution and the rule of law;<sup>372</sup> and fundamental human rights and freedom.<sup>373</sup> Moreover, the values and principles include a multi-party democratic political system; free, fair and regular elections as well as adequate representation of the electorate.<sup>374</sup> The 2013 Constitution allows for the review of the constitutionality of laws.<sup>375</sup> It also requires for observance of the principle of separation of powers,<sup>376</sup> and section 164(1) of the 2013 Constitution provides for judicial independence and requires the government to respect the independence of the judiciary and its judgments.<sup>377</sup>

However, the national executive has been conferred with unlimited powers to the extent that it may stifle the other arms of government. For instance, in terms of section 143 of the 2013 Constitution, the President has the power to dissolve Parliament. Accordingly, it is argued that such a provision regresses the objective of achieving a constitutional democracy. Out of fear of reprisals, it inherently coerces the legislature to heed to the wishes of the executive. Section 143 of the 2013 Constitution is therefore inconsistent with the accepted standards of modern constitutionalism, in particular, the doctrine of separation of powers.

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<sup>372</sup> ss 2 & 3(1)(a)-(b) 2013 Constitution.

<sup>373</sup> s 3(1)(c) 2013 Constitution.

<sup>374</sup> s 3(2)(a)-(b) 2013 Constitution.

<sup>375</sup> s 131(8)(b) 2013 Constitution.

<sup>376</sup> s 3(2)(e) 2013 Constitution.

<sup>377</sup> s 163(3) 2013 Constitution.

## 4.4 Constitutional framework of multi-level governance and devolution

### 4.4.1 An overview of devolution

The 2013 Constitution resulted in the constitutionalisation of decentralisation; and ‘devolution’ was the focal point of the newly adopted system of multi-level government.<sup>378</sup> The Constitution lists both decentralisation and devolution among its founding values and principles.<sup>379</sup> The founding values and principles include an element that complements the instruments of decentralisation in section 3(2)(f) which demands respect for the people from whom the authority to govern is derived.<sup>380</sup>

Above all, the emphasis on devolution by the Constitution can be justified by the fact that devolution is the strongest form of decentralisation.<sup>381</sup> Consequently, the Constitution deliberately gave precedence to devolution over other forms of decentralisation.<sup>382</sup> Chapter 14 of the Constitution is the only chapter of the Constitution that has its own preamble, which reads as follows:

Whereas it is desirable to ensure:

- (a) the preservation of national unity in Zimbabwe and the prevention of all forms of disunity and secessionism;
- (b) the democratic participation in government by all citizens and communities of Zimbabwe; and

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<sup>378</sup> Moyo & Ncube (2014) 295.

<sup>379</sup> s 3(2)(l) 2013 Constitution.

<sup>380</sup> s 3(2)(f) 2013 Constitution.

<sup>381</sup> Chigwata (2018) 11.

<sup>382</sup> Chigwata (2019) 307.

(c) the equitable allocation of national resources and the participation of local communities in the determination of development priorities within their areas;

there must be devolution of power and responsibilities to lower tiers of government in Zimbabwe.<sup>383</sup>

The very first paragraph of the preamble expresses the desire to preserve Zimbabwe's national unity and to prevent all forms of disunity and secessionism. From face value, this constitutional provision likens devolution as having the potential of encouraging disunity and secessionism.<sup>384</sup> Instead of entrenching decentralisation without reservations and inspiring confidence in a system of multi-level governance, the preamble purposefully instils and captures the doubts and fears against devolution.

One of the core features of a constitutional democracy which is captured by the preamble is an expression of desirability in allowing all citizens and communities to participate in a democratic government. The preamble's final provision states that devolution of power and responsibilities is desirable to ensure the equitable allocation of national resources and community participation in the determination of development activities within their areas. In the process, communities are being given ample opportunities in terms of voicing their needs, concerns and aspirations which must be prioritised in the decision-making processes that directly impacts their lives.

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<sup>383</sup> Preamble of Ch 14 Constitution 2013.

<sup>384</sup> Nyathi M & Ncube M 'The myth of devolution in Zimbabwe: The Reality Post – May 2013' (2017) *University of Botswana Law Journal* 37.

#### **4.4.2 The structure of multi-level system of government**

The 2013 Constitution stipulates that Zimbabwe is a unitary, democratic and sovereign Republic.<sup>385</sup> Section 5 institutes a multi-level system of government comprising of three tiers: the national, provincial and local governments. In the present juncture, Zimbabwe made of a national government, ten provincial governments and 92 local authorities divided into urban and rural councils.<sup>386</sup>

#### **4.4.3 Principles of cooperative government**

The 2013 Constitution requires the three tiers of government to cooperate and coordinate their activities within specific institutional frameworks.<sup>387</sup> Section 194(1)(g) states that the institutions and agencies of all the tiers of government have to cooperate with each other. In order to create and foster a well-functioning cooperative government, the 2013 Constitution provides for the general principles governing provincial and local government.<sup>388</sup>

An Act of Parliament has to provide appropriate mechanisms and procedures to facilitate coordination between the three tiers of government.<sup>389</sup> In comparison, section 41(1) of the 1996 Constitution of South Africa provides for the principles of co-operative government which binds specifically the three spheres of government. Whereas section 265(3) of the 2013 Constitution of Zimbabwe only stipulates the general principles of provincial and local government, to the exclusion of the central government. Although the 2013 Constitution also requires that Parliament has to enact legislation that facilitates the ‘coordination’ of activities between the three tiers of

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<sup>385</sup> s 1 2013 Constitution.

<sup>386</sup> Chigwata (2018) 105.

<sup>387</sup> Mapuva (2014) 20.

<sup>388</sup> s 265(1) 2013 Constitution.

<sup>389</sup> s 265(3) 2013 Constitution.

government, the constitutional status of the central government in the structure of cooperative government is not precisely provided. As a result, the central government which is charged with the responsibility for passing an Act of Parliament that facilitates the ‘coordination’ has the discretion to decide for or against co-operating with sub-national governments.

#### **4.4.4 Devolution of governmental powers and responsibilities**

Section 264(1) of the 2013 Constitution of Zimbabwe provides that ‘[w]henever appropriate, governmental powers and responsibilities must be devolved to provincial and metropolitan councils and local authorities which are competent to carry out those responsibilities efficiently and effectively’. This provision indicates that the 2013 Constitution does not directly devolve powers to provincial and local governments. Contrastingly, with a wholesale provision for devolution of power, the 1996 Constitution of South Africa directly allocates political, administrative and fiscal powers to local governments, while directly conferring political and fiscal powers to provincial governments.

Section 264(2) of the 2013 Constitution sets out the objectives of devolution. The provision stipulates that the objectives of devolution of governmental powers and responsibilities to provincial and metropolitan councils and local authorities are:

- (a) to give powers of local governance to the people and enhance their participation in the exercise of the powers of the State and in making decisions affecting them;
- (b) to promote democratic, effective, transparent, accountable and coherent government in Zimbabwe as a whole;
- (c) to preserve and foster the peace, national unity and indivisibility of Zimbabwe;

- (d) to recognise the right of communities to manage their own affairs and to further their development;
- (e) to ensure the equitable sharing of local and national resources; and
- (f) to transfer responsibilities and resources from the national government in order to establish a sound financial base for each provincial and metropolitan council and local authority.

Chigwata argues that ‘these objectives form part of a constitutional framework for multilevel government covering the political, administrative and fiscal instruments of decentralisation’.<sup>390</sup> From face value, section 264(2) of the 2013 Constitution largely captures the necessary instruments that could result in the effective decentralisation framework only if its provisions are given full effect in practice.

#### **4.4.5 Provincial government**

Zimbabwe is divided into ten provinces, namely Bulawayo, Harare, Manicaland, Mashonaland Central, Mashonaland East, Mashonaland West, Masvingo, Matabeleland North, Matabeleland South, and Midlands.<sup>391</sup> The provinces are the second tier of government. Each province is governed by a provincial council,<sup>392</sup> whereas Bulawayo and Harare are the only two metropolitan provinces and are therefore governed by the metropolitan councils.<sup>393</sup> The composition of provincial and metropolitan councils comprise of a combination of directly and indirectly elected and appointed officials.<sup>394</sup>

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<sup>390</sup> Chigwata (2019) 307.

<sup>391</sup> s 267 2013 Constitution.

<sup>392</sup> s 268(1) 2013 Constitution.

<sup>393</sup> s 269(1)(a)-(b) 2013 Constitution.

<sup>394</sup> ss 268(3) and 269 2013 Constitution.

#### 4.3.5.1 Functions of provincial and metropolitan councils

For a decentralisation framework to be fully functional, it must devolve substantial powers to democratically elected sub-national levels of government.<sup>395</sup> Nonetheless, the 2013 Constitution does not devolve substantial powers to provinces but merely provides that the provincial and metropolitan council are responsible for the social and economic development of their respective provinces. The functions of such a council include:

- (a) planning and implementing social and economic development activities in its province;
- (b) co-ordinating and implementing governmental programmes in its province;
- (c) planning and implementing measures for the conservation, improvement and management of natural resources in its province;
- (d) promoting tourism in its province, and developing facilities for that purpose;
- (e) monitoring and evaluating the use of resources in its province; and
- (f) exercising any other functions, including legislative functions, that may be conferred or imposed on it by or under an Act of Parliament.<sup>396</sup>

In comparison to provinces in South Africa which exercise a wide range of political powers that are directly devolved by the 1996 Constitution, section 270 of the 2013 Constitution of Zimbabwe merely list the developmental mandates of provincial and metropolitan councils. The actual powers to carry out such functions still needs to be devolved by an Act of Parliament.<sup>397</sup>

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<sup>395</sup> Manor J 'Understanding Decentralisation: Key Issues for Successful Design' in Ojendal J & Dellnas A (Eds) *The Imperative of Good Local Governance: Challenges for the Next Decade of Decentralisation* (2013) 32.

<sup>396</sup> s 270(1) 2013 Constitution.

<sup>397</sup> s 270(1)(f) 2013 Constitution.

#### **4.3.5.2 Fiscal powers**

Another dimension of decentralisation requires that that sub-national levels of government must be provided with fiscal powers, which involves the allocation of financial resources and revenue-generating powers.<sup>398</sup> The provincial and metropolitan councils have been charged with the responsibility of promoting social and economic development of their respective jurisdiction.<sup>399</sup> These functions inherently require provinces to have sufficient resources in order to fulfil their developmental mandate. However, the 2013 Constitution does not directly assign fiscal powers to provincial and metropolitan councils. In contrast, the 1996 Constitution of South Africa confers fiscal powers to provinces,<sup>400</sup> albeit with limited revenue-raising authority.

#### **4.4.5.3 Administrative authority**

The 2013 Constitution requires Parliament to enact legislation that provides for the establishment, structure and staff of provincial and metropolitan councils, and the manner in which they exercise their functions.<sup>401</sup> These functions are administrative in nature and section 270(2) of the 2013 Constitution empowers Parliament to determine whether the provincial and metropolitan councils could exercise administrative powers.

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<sup>398</sup> Beer-Tóth (2009) 4.

<sup>399</sup> ss 270(1) Constitution.

<sup>400</sup> The fiscal powers are limited to taxes, levies and duties, see ss 228 & 230 1996 South African Constitution.

<sup>401</sup> s 270(2) 2013 Constitution.

## 4.4.6 Local government

### 4.4.6.1 The structures of local government

The 2013 Constitution stipulates that urban and rural councils have been established to represent and manage the affairs of people in urban and rural areas, respectively.<sup>402</sup> Nonetheless, urban and rural councils do not source their powers directly from the 2013 Constitution, but derive their legal authority to govern from national legislation: section 38 of the Urban Councils Act,<sup>403</sup> and section 8(1) of the Rural District Councils Act,<sup>404</sup> respectively. The 2013 Constitution obliges that local authorities must be composed of directly elected councillors.<sup>405</sup>

### 4.3.6.2 Original powers

The 2013 Constitution of Zimbabwe does not directly provide and list local government powers and functions or provide for constitutionally protected powers. Whereas in the context of South Africa, local government exercises constitutionally protected powers in relation to functional areas listed in Schedules 4B and 5B of the 1996 Constitution.<sup>406</sup>

The 1996 Constitution of South Africa directly confers to municipalities legislative and executive powers.<sup>407</sup> Instead, the 2013 Constitution of Zimbabwe empowers an Act of Parliament to confer functions to local authorities, including the ‘power to make by-laws, regulations or rules for the effective administration of the areas for which they have been established’.<sup>408</sup> The notion of ‘original powers’ of local government in Zimbabwe is absent.

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<sup>402</sup> ss 274(1) & 275(1) 2013 Constitution.

<sup>403</sup> Urban Councils Act of 1973 (Chapter 29:15), (the UCA).

<sup>404</sup> Rural District Councils Act of 1988 (Chapter 29:13), (the RDCA).

<sup>405</sup> ss 274(2) & 275(2) 2013 Constitution.

<sup>406</sup> s 156(1) 1996 South African Constitution.

<sup>407</sup> s 151(4) 1996 South African Constitution.

<sup>408</sup> s 276(2) 2013 Constitution.

Additionally, 2013 Constitution stipulates that, subject to it and any legislation, a local authority has the right to govern, on its own initiatives, the local affairs of the people and has all the powers necessary for it to do so.<sup>409</sup>

#### **4.4.6.3 Assigned and devolved powers**

In South Africa, the local government can also exercise either legislative<sup>410</sup> or executive<sup>411</sup> powers assigned in terms of the 1996 Constitution.<sup>412</sup> However, in Zimbabwe, Section 264(1) of the 2013 Constitution provides for the devolution of governmental powers and responsibilities local authorities which are competent to carry out those responsibilities efficiently and effectively. Municipalities in South Africa exercise original and assigned powers, whereas local authorities in Zimbabwe exercise powers devolved by the central government.

The urban and rural councils exercise legislative powers<sup>413</sup> and executive powers<sup>414</sup> provided by the UCA and the RDCA which predate the 2013 Constitution by far. Yet, the Minister of Local Government who has the discretion to enact model by-laws must first approve the by-laws enacted by urban and rural councils.<sup>415</sup> Furthermore, the execution of powers by local authorities heavily depends on the extensive role of the Minister who has the power to regulate local government matters.<sup>416</sup> Surprisingly, the Minister who forms part of the national executive authority has the power to dictate whether or not, local authorities can enact and execute by-laws. Given the new

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<sup>409</sup> s 276(1) 2013 Constitution

<sup>410</sup> ss 44(1)(a)(iii) and 104(1)(c) 1996 South Africa Constitution.

<sup>411</sup> ss 99 and 126 1996 South African Constitution.

<sup>412</sup> s 156(4) 1996 South African Constitution.

<sup>413</sup> ss 228 UCA and 88 RDCA.

<sup>414</sup> See Third Schedule, UCA & First Schedule, RDCA.

<sup>415</sup> ss 229 and 230 UCA; ss 90 & 91 RDCA.

<sup>416</sup> ss 234 and 235 UCA; ss 69 & 71 RDCA.

constitutional dispensation, it is ideal that the UCA and the RDCA must conform to the objectives of devolution as provided by the 2013 Constitution.

#### **4.4.6.4 Fiscal powers**

According to Fombad, fiscal decentralisation relates to the financing of local governments and the extent to which local service delivery will be subsidised.<sup>417</sup> The 1996 Constitution of South Africa directly confers a municipality with revenue generating powers.<sup>418</sup> However, local authorities in Zimbabwe are not directly allocated fiscal powers by the 2013 Constitution. The 2013 Constitution does not, however, prohibit local authorities from exercising fiscal powers.<sup>419</sup> It requires Parliament to confer to local authorities through legislation, the power to levy rates and taxes to raise sufficient revenue to carry out their objects and responsibilities.<sup>420</sup> The South African local government has the right to an equitable share of revenue raised nationally.<sup>421</sup>

Local authorities may also receive other allocations from national government, either conditionally or unconditionally.<sup>422</sup> The 2013 Constitution provides for a similar equitable allocation of revenue between provincial and local tiers of government.<sup>423</sup> In a similar way to South Africa, the final determination of the division of revenue is made by an Act of Parliament. National legislation can also provide for other allocations to local authorities, subject to meeting any conditions attached to such allocations.<sup>424</sup>

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<sup>417</sup> Oates (1999) 1121.

<sup>418</sup> s 229(1)(a) 1996 South African Constitution.

<sup>419</sup> Chigwata TC & De Visser J 'Local government in the 2013 Constitution of Zimbabwe: Defining the boundaries of local autonomy' (2018) 10 *Hague Journal on the Rule of Law* 179.

<sup>420</sup> s 276(2)(b) 2013 Zimbabwean Constitution.

<sup>421</sup> s 227(1)(a) 1996 South African Constitution.

<sup>422</sup> s 227(1)(b) 1996 South African Constitution.

<sup>423</sup> s 301(1)(a) 2013 Constitution.

<sup>424</sup> s 301(1)(b) 2013 Constitution.

#### 4.4.6.5 Administrative powers

Administrative decentralisation confers to the local government the powers concerning the recruitment, remuneration, discipline and dismissal of its own staff.<sup>425</sup> While the 1996 Constitution of South Africa confers administrative powers to municipal councils,<sup>426</sup> the 2013 Constitution of Zimbabwe fails to provide with such powers. Nonetheless, Chigwata argues that if interpreted liberally, the expression of ‘the right to govern’ in the 2013 Constitution may guarantee local authorities with administrative powers.<sup>427</sup> Section 279 of the 2013 Constitution merely states that an Act of Parliament must provide for the procedure to be followed by councils of local authorities.

### 4.5 Conclusion

From a comparative perspective against the South African constitutional framework, this chapter analysed the constitutional provision of devolution and constitutionalism in Zimbabwe. This entailed gauging the strength of constitutional entrenchment of decentralisation and assessing the nature and extent to which the 2013 Constitution provides for constitutionalism.

The assessment in this chapter reveals that the strength of the constitutional entrenchment of decentralisation in Zimbabwe is weak especially when considering the lack of thorough and comprehensive guidance on how devolution could be implemented.<sup>428</sup> Despite the fact that 2013 Constitution provides a constitutional recognition to provincial and local governments, it still requires national legislation to devolve powers to the sub-national governments. In terms of transferring powers, this constitutional system is almost the same as during the reign of the

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<sup>425</sup> Naha (2015) 48.

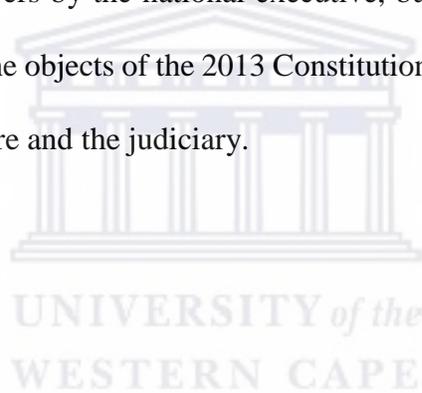
<sup>426</sup> ss 152(2), 153(a) & 160(1)(d) 1996 South African Constitution.

<sup>427</sup> Chigwata (2018) 254.

<sup>428</sup> Muchadenyika (2015) 115.

Lancaster House Constitution where the sub-national governments exercise powers delegated to them under various Acts of Parliament.<sup>429</sup>

In its founding values and principles, the 2013 Constitution of Zimbabwe provides for the modern concepts of decentralisation that coincides with the objects and instruments of decentralisation. Although the 2013 provides some of the core elements of constitutionalism, it negates the inroads of a democratic, limited and accountable government because it gives the President the power to dissolve Parliament.<sup>430</sup> Instead of upholding the rule of law in cases where the President is required to conform to values and principles of constitutional democracy, the legislature is coerced to heed to the wishes of the executive. Both decentralisation and constitutionalism are geared towards taming the centralisation of powers by the national executive, but Zimbabwe bears the traits of autocracy, which is contrary to the objects of the 2013 Constitution. It has a strong presidency that still dominates both the legislature and the judiciary.



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<sup>429</sup> Chigwata TC ‘Emerging debates about, and prospects for, devolution in Zimbabwe’ (2019) 2 available at <https://zimlii.org/zw/blog/Emerging%20debates%20about%20and%20prospects%20for%20devolution%20in%20Zimbabwe.pdf> (accessed 15 September 2019).

<sup>430</sup> s 143 2013 Constitution.

# **Chapter Five: The State of Constitutionalism and Decentralisation: The Non-Implementation of Constitutionalism and Devolution in Zimbabwe**

## **5.1. Introduction**

Since the adoption of Zimbabwe's new Constitution in 2013, devolution has not yet been fully implemented.<sup>431</sup> The immediate objective of chapter five is to identify and interrogate the primary strands that are central to the non-implementation of devolution and the absence of constitutionalism in Zimbabwe. This chapter also aims to ascertain whether constitutionalism is a prerequisite for the effective implementation of decentralisation in Zimbabwe. Therefore, substantiating the argument that constitutionalism, both as a politico-legal philosophy and practice, is instrumental to the effective implementation of decentralisation. Accordingly, from a practical basis, the chapter argues that the effective implementation of decentralisation largely hinges on the implementation of the 2013 Constitution, which requires a wholesale commitment to constitutionalism and the rule of law.

## **5.2 The general state of constitutionalism**

As a key element of constitutionalism, the doctrine of separation of powers ensures that there are checks and balances between the three arms of government as a way of preventing the abuse and concentration of power in a single person or body.<sup>432</sup> In the Zimbabwean experience where ZANU-PF dominates both the executive and Parliament, there is little separation of powers between these two branches of government. As a result, the doctrine of separation of powers has been breached

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<sup>431</sup> Chigwata TC 'Can Zimbabwe walk the talk of devolution?' (2019) 14(1) *Local Government Bulletin* available at <https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/volume-14-lgb/can-zimbabwe-walk-the-talk-of-devolution> (accessed 20 September 2019).

<sup>432</sup> Fombad (2007) 12-13.

numerous times.<sup>433</sup> Where courts have delivered judgements against the executive, their decisions have been ignored, therefore signalling the lack of respect for the rule of law.

Judicial independence which is a basic tenet of constitutionalism complements the doctrine of separation of powers. The 2013 Constitution of Zimbabwe affirms that courts are independent and their decisions are binding on all governmental institutions, which must obey their decisions.<sup>434</sup> However, the government of Zimbabwe is notorious of disobeying court judgements. During the fast-track land reform programme of 2000, ‘the Zimbabwean government, under the guise of ‘war veterans’, orchestrated a series of farm invasions’.<sup>435</sup> The Supreme Court invalidated the farm invasions as illegal, but the government ignored the court order.<sup>436</sup>

Over the years, judges have been subjected to external influences in high profile cases dealing with politically related issues, and as a consequence, resulting in the lack of protection of human rights.<sup>437</sup> For instance, in *Minister of Lands, Agriculture and Resettlement v Commercial Farmers Union*,<sup>438</sup> the court validated the fast-track land reform programme, hence overruling a judgement handed in the *Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement*,<sup>439</sup> where the court had ordered that farm invasions must stop due to their unlawfulness and violation of property rights as provided under the Lancaster House Constitution. The war veterans were enraged by the numerous court decisions that challenged the legality of land invasions and they allegedly resorted to intimidations, assaults and threats to kill judges.<sup>440</sup> As a result, the majority

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<sup>433</sup> Mapuva J ‘The trials and tribulations of constitutionalism and the constitution making process in Zimbabwe’ (2012) 11(1) *Alternatives Turkish Journal of International Relations* 210.

<sup>434</sup> s 163(3) 2013 Constitution.

<sup>435</sup> Mhodi (2013) 80.

<sup>436</sup> Mhodi (2013) 80.

<sup>437</sup> Chiduzza (2014) 399.

<sup>438</sup> 2001 2 ZLR 457 (S).

<sup>439</sup> 2000 2 ZLR 469 (SC).

<sup>440</sup> Makono D *The impact of the 2013 Constitution on judicial independence: The case of Zimbabwe (2008-2014)* (unpublished masters dissertation, Midlands State University, 2015) 9.

of affected judges resigned, leaving the executive with the opportunity to pack the judiciary with political appointees.<sup>441</sup>

While commenting on the illegal land invasions and refusal by the Zimbabwean government to adhere to the court decisions, Booyesen describes the political behaviour of ZANU-PF ‘as using a complex combination of constitutionalism-legality and the unconstitutional-paralegal to ensure political survival’.<sup>442</sup> Nonetheless, it hereby argued that the total disrespect of the court’s decision signals the absence of constitutionalism.

Another challenge with constitutionalism relates to the control to the amendment of the Constitution. Constitutionalism precludes arbitrary circumvention of the constitution by the political organs of government. Nonetheless, in the context of Zimbabwe, a number of constitutional amendments were aimed at reversing court decisions which have set the standards for conduct of a constitutional government.<sup>443</sup> For instance, the 2005 Amendment No 17 was a tool by the ‘state to restrict the freedom of persons to move out of Zimbabwe on the vague grounds of alleged public interest, national interests or economic interests of the state’.<sup>444</sup> This amendment sought to subvert the Constitutional Court decision in *Chirwa v Registrar General*,<sup>445</sup> which nullified such restrictions because they amount to the violation of freedom of movement provided in the Constitution.

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<sup>441</sup> Makono (2015) 10.

<sup>442</sup> Booyesen S ‘The dualities of contemporary Zimbabwean politics: Constitutionalism versus the law of power and the land 1999-2002’ (2003) 7(2&3) *African Studies Quarterly* 1.

<sup>443</sup> Zimbabwe Lawyers for Human Rights ‘Amendments to the constitution of Zimbabwe: A constant assault on democracy and constitutionalism’ available at <http://hrlibrary.umn.edu/research/constitution%20statement-sunday%20mirror.pdf> (accessed 15 November 2019).

<sup>444</sup> s 3 Constitution of the Republic of Zimbabwe, Amendment No 17 Act of 2005, amended section 22 of the Lancaster House Constitution.

<sup>445</sup> 1993 (1) ZLR 291 (S).

After more than a decade where Zimbabwe had officially operated under a single-party system, the political landscape changed when the MDC was formed in 1999 by Tsvangirai as an opposition party to Mugabe's ZANU-PF. The period between 2000 and 2008 was accompanied by massive political upheaval. Although the land question was an unfinished business of the liberation struggle, when the fast-track land reform was implemented in 2000, it was during an unprecedented humiliation of ZANU-PF when it had just recently lost a referendum on a new constitution to the MDC.<sup>446</sup> Some political commentators viewed the fast track land reform as having been more about the dealing with MDC than about land redistribution itself because during the referendum some white commercial farmers were reported to be the principal funders of the MDC.<sup>447</sup>

Electoral violence is a common tool employed by ZANU-PF to intimidate opposition and ultimately to nullify election results. Consequently, the democratisation of Zimbabwe often faces stumbling blocks. The 2002 presidential elections were marred by multiple controversies, including allegations of rigging, numerous legal challenges and the sudden changes of electoral laws. The MDC sought judicial recourse, but the petition was subjected to a trend of 'juridical prevarication and delays'.<sup>448</sup> At the time when the 2008 harmonised elections took place, the 2002 presidential election petition was still unresolved. Illegitimacy issues were aggravated, with both the legislature and executive dirtied by the allegations of electoral fraud and violence.<sup>449</sup>

More so, during the highly contested presidential elections of 2008, Tsvangirai of the MDC defeated the incumbent President Mugabe. However, Mugabe and his ZANU-PF party refused to

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<sup>446</sup> Kovacs RJ 'What makes a failed state? Examining the case of Zimbabwe' (2012) 3 available at <http://www.e-ir.in/2012/05/31/what-makes-a-failed-state-examining-the-case-of-zimbabwe/> (accessed on 14 November 2018).

<sup>447</sup> Selby A *White farmers in Zimbabwe 1890-2005* (unpublished PhD Thesis, University of Oxford, 2006) 1.

<sup>448</sup> Reeler T 'Subliminal terror? Human rights violations and torture in Zimbabwe during 2008', Report (2017) 6.

<sup>449</sup> Reeler (2017) 7.

concede defeat and contended the election results by claiming that Tsvangirai did not win a majority of the vote and therefore only a runoff election will settle the contest. While awaiting the run-off election, Zimbabwe was engulfed by widespread electoral violence launched against MDC supporters by the government security forces. As a result, Tsvangirai withdrew from the runoff election, paving way to Mugabe's victory.

In addition, section 3(2)(c) of the 2013 Constitution requires that there must be an orderly transfer of power following elections. However, the political circumstances and intra-party factional battles within ZANU-PF has led to the toppling from power the authoritarian ruler Robert Mugabe through *coup d'état* in November 2017. Consequently, Zimbabwe's political system has been heavily militarised.<sup>450</sup> The conflation between government and ZANU-PF with the Zimbabwean Defence Force (ZDF) assuming the prominent role of a 'privileged political actor and overseer of the entire political system',<sup>451</sup> indicates that President Mnangagwa is the political front and civilian face of a quasi-military rule in Zimbabwe.<sup>452</sup> Accordingly, the unconstitutional change of government shows that Zimbabwe is still undergoing a flawed democratic rule which is against democratic ethos espoused in modern constitutionalism.

The 2013 Constitution further provides that Zimbabwe has a multi-party democratic political system.<sup>453</sup> In this context, the constitutional conduct of the state should adhere to this provision

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<sup>450</sup>Hamill J 'The three barriers blocking Zimbabwe's progress: Zanu-PF, Mnangagwa and the military' (2017) available at <https://mg.co.za/article/2017-12-30-the-three-barriers-blocking-zimbabwes-progress-zanu-pf-mnangagwa-and-the-military> (accessed 23 September 2019).

<sup>451</sup>Hamill J 'The three barriers blocking Zimbabwe's progress: Zanu-PF, Mnangagwa and the military' (2017) available at <https://mg.co.za/article/2017-12-30-the-three-barriers-blocking-zimbabwes-progress-zanu-pf-mnangagwa-and-the-military> (accessed 23 September 2019).

<sup>452</sup> Several key military officers have been appointed to President Mnangagwa's cabinet, including Constantino Chiwenga, the First Vice-President of Zimbabwe (Retired Military Commander of the ZDF); Sibusiso Moyo, the Minister of Foreign Affairs and International Trade (Retired Major General in the Zimbabwe National Army); and Perence Shiri, the Minister of Lands, Agriculture and Rural Resettlement (Retired Commander of the Air Force of Zimbabwe).

<sup>453</sup> s 3(2)(a) 2013 Constitution.

and allow opposition parties to operate with freedom, within the confines of the 2013 Constitution. Nonetheless, the freedom of assembly and association of the MDC has often been clamped down by government.<sup>454</sup> Political meetings of the opposition are violently disrupted and people without the ZANU-PF membership cards are beaten. Accordingly, the arguments described above reveal that there is a general lack of constitutionalism in Zimbabwe which is marked by the partial enforcement of the 2013 Constitution.

### **5.3 The implementation of devolution and constitution**

International practice suggests that even though the constitutional entrenchment of decentralised system may not automatically guarantee the effective implementation of decentralisation, it still enhances its prospects.<sup>455</sup> However, the implementation of the constitution itself determines the extent to which constitutionalism is upheld.

Section 276 of the 2013 Constitution provides that local authorities have ‘the right to govern’ the local affairs of their people. Nonetheless, while exercising the right to govern; their powers are still conferred by national legislation which could possibly impair on their right to govern. Ultimately, the nature to which local authorities have the right to govern heavily depends on the degree of local autonomy provided by the 2013 Constitution. Unlike in South Africa, the courts in Zimbabwe have been unable to assert the jurisprudence of the principle of separation of powers where they could give full effect to the powers of local government and protect their right to govern.

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<sup>454</sup> ‘Zimbabwe: human rights in crisis – Shadow report to the African Commission on Human and Peoples’ Rights’ (2007) 38 available at <https://www.refworld.org/pdfid/4753e5d00.pdf> (accessed 15 November 2019).

<sup>455</sup> Fombad (2018) 195.

In a thriving legal-political environment, the interpretation of section 276 of the 2013 Constitution should be given full effect by courts with the intention to secure the powers of local authorities and their right to govern. In such cases, the level of commitment to constitutionalism and respect to the rule of law by the national government will determine whether local authorities are actually empowered in letter and spirit of the 2013 Constitution. For instances, since the adoption of the 2013 Constitution, a number of councillors from Gweru, Harare and Bulawayo have been suspended by the Minister responsible for local government under disputed circumstances.<sup>456</sup>

Previously, between 1999 and 2008, ‘the Minister suspended and/or dismissed a considerable number of councillors and/or councils on varying allegations of poor performance, ‘shady’ tendering procedures, corruption, mismanagement and incompetence’.<sup>457</sup> More profoundly, the courts whose judicial independence has been tampered with by the national executive, are unable to play a key role in the implementation of the 2013 Constitution. In the cases of *Hamutendi Kombayi and Ors v The Minister of Local Government, Public Works and National Housing and Ors HB*,<sup>458</sup> and *Manyenyeni v Minister, Local Government, Public Works and National Housing & Another*,<sup>459</sup> the inexplicable suspensions of councillors by the Minister constituted a continued disregard to the rule of law and constitutionalism. Given that the councillors represent the face of local self-democracy, their suspensions and removals constitute a blatant breach of democratic principles that form part of the basic tenets of constitutionalism.

In addition, six years has passed since the adoption of the new Constitution that provides for the establishment of provincial and metropolitan councils. However, the councils have not yet been

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<sup>456</sup> HB 5711.

<sup>457</sup> Chigwata & De Visser (2018) 176.

<sup>458</sup> 57116.

<sup>459</sup> (HH 385-16 HC 5903/16) [2016] ZWHHC 385 (29 June 2016).

established.<sup>460</sup> In contrast, provinces in South Africa have been established as fully-fledged governments.<sup>461</sup>

Over the years, an array of legislation has been enacted to regulate local government but these laws have not provided an enabling environment for citizen participation, resulting in the exclusion of citizens from participating in local government affairs.<sup>462</sup> This is in sharp contrast to the objective of decentralisation that aims at bringing the government closer to the people in order to realise, *inter alia*, peace, democracy, good governance and development.<sup>463</sup>

More so, local authorities have been turned into technocrats who administer local affairs of people at behest of the national government that has retained authority. Weaknesses in the provinces have been aggravated by their ambiguous role in the system of multi-level of government.<sup>464</sup>

In the process, the lack of constitutionalism is also indicated by the failure to implement the 2013 Constitution regarding the constitutional provision for devolution.<sup>465</sup> Consequently, there is no a fully-fledged system of multi-level governance in Zimbabwe.<sup>466</sup> Its non-implementation is largely ascribed to the government's failure to enact the relevant legislation that devolves power to provincial and metropolitan councils.<sup>467</sup> The absence of devolution signals inconformity to the constitutional values and principles of supremacy of the Constitution and the rule of law.<sup>468</sup> This

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<sup>460</sup> Chigwata TC 'Can Zimbabwe walk the talk of devolution?' (2019) available at <https://dullahomarinate.org.za/multilevel-govt/local-government-bulletin/volume-14-lgb/can-zimbabwe-walk-the-talk-of-devolution> (accessed 20 September 2019).

<sup>461</sup> Steytler (2019b) 152.

<sup>462</sup> Mapuva and Miti (2019) 12.

<sup>463</sup> ss 264(2) & 265(1) Constitution.

<sup>464</sup> Chigwenya A 'Decentralization without devolution and its impacts on service delivery: The case of Masvingo municipality in Zimbabwe' (2010) 12(1) *Journal of Sustainable Development in Africa* 1.

<sup>465</sup> Matlosa (2003 92-95. See also Masunungure EV & Ndoma S 'The popular quest for devolution in Zimbabwe' (2013) available at <https://www.files.ethz.ch/isn/164675/afrobrieffno114.pdf> (accessed 4 August 2019).

<sup>466</sup> Chigwata (2019) 318.

<sup>467</sup> Centre for Community Development in Zimbabwe (CCDZ) & Harare Residents Trust (HRT) 'Policy brief on the implementation of devolution in Zimbabwe: Recommendations on the structure/composition, functions and funding of Provincial and Metropolitan Councils (PMCs)' (2018) 2.

<sup>468</sup> s 3(1)(a)-(b) 2013 Constitution.

clearly indicates that Zimbabwe is still grappling with challenges to constitutionalism. The lack of effective and efficient institutional structures and political commitment impedes implementation of decentralisation reforms.<sup>469</sup> Hence, there is a lack of broad commitment to constitutionalism and rule of law by the national government.

## **5.4 Key obstacles to the implementation of devolution**

This section discusses some of the primary factors that have contributed immensely to the failure by the Zimbabwean government to implement devolution and constitutionalism since the adoption of the constitutional framework for devolution in 2013.

### **5.4.1 Challenges in entrenching constitutional democracy**

The 2013 Constitution has established government at multiple levels – national, provincial and local.<sup>470</sup> Each of the constitutional structures directly links the political structure to the relevant electorate.<sup>471</sup> For that reason, the 2013 Constitution stipulates that Zimbabwe’s founding values and principles include having a multi-party democratic political system;<sup>472</sup> the orderly transfer of power following elections;<sup>473</sup> and respect for the rights of all political parties;<sup>474</sup> and respect for the people, from whom the authority to govern is derived.<sup>475</sup> These constitutional values and envisages that the democratically elected political parties and candidates should control and govern the provincial and metropolitan councils and local authorities.<sup>476</sup>

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<sup>469</sup> Chikwawawa (2019) 21.

<sup>470</sup> s 5 2013 Constitution.

<sup>471</sup> ss 268, 269, 274 & 275 2013 Zimbabwean Constitution. See also Fessha (2015) 125.

<sup>472</sup> s 3(2)(a) 2013 Constitution.

<sup>473</sup> s 3(2)(c) 2013 Constitution.

<sup>474</sup> s 3(2)(d) 2013 Constitution.

<sup>475</sup> s 3(f)(d) 2013 Constitution.

<sup>476</sup> Commonwealth Local Government Forum ‘Strengthening capacity for local governance and service delivery in Zimbabwe project - The Constitution of Zimbabwe 2013 as a basis for local government transformation: A reflective analysis’ (2016) 10, available at

Nonetheless, in most cases where different political parties govern at national and sub-national governments, this system and structure of multi-level governance often sets the stage for fierce political contestation.<sup>477</sup> Political contestation in Zimbabwe has increased owing to the growth of urban opposition where the MDC has won elections and took control of urban areas such as Bulawayo, Chitungwiza, Gweru and Harare.<sup>478</sup> One of the typical examples emanates from the cases of *Dareremusha Cooperative v The Minister of Local Government, Public Works and Urban Development*,<sup>479</sup> and *Batsirai Children's Care v The Minister of Local Government, Public Works and Urban Development and others*,<sup>480</sup> where although in violations of human rights, the courts justified the unlawful demolition of informal settlements by the government in a bid to dilute the urban support of the MDC.

#### 5.4.2 Lack of political will

The facilitation of the implementation of devolution requires political will at the national level.<sup>481</sup> Nonetheless, given that Parliament is controlled by ZANU-PF which is opposed to devolution, it continues to suppress the efforts towards the implementation of devolution due to Parliament's deliberate failure to pass national legislation that devolves powers to sub-national governments.<sup>482</sup>

In 2014, Parliament failed to enact the Draft Provincial and Metropolitan Councils Bill aimed at establishing Provincial and Metropolitan Councils because the Bill did not comply with the

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[http://www.clgf.org.uk/default/assets/file/publications/reports/local\\_government\\_constitutionalisation\\_in\\_zimbabwe\\_clgf\\_2016.pdf](http://www.clgf.org.uk/default/assets/file/publications/reports/local_government_constitutionalisation_in_zimbabwe_clgf_2016.pdf) (accessed 27 April 2019).

<sup>477</sup> Toubeau & Wagner (2015) 98.

<sup>478</sup> Commonwealth Local Government Forum (2016) 12. See also Chigwata (2019) 317.

<sup>479</sup> (Harare High Court) unreported case number 2467/05.

<sup>480</sup> (Harare High Court) unreported case number 2566/05.

<sup>481</sup> Chauvel J *et al* 'Political trust and transparency in multi-level governance: New findings from the French regions' (2017) available at <https://ecpr.eu/Filestore/PaperProposal/76e2dfba-447f-471c-ad4b-b97b2ffe1a72.pdf> (accessed 13 August 2019).

<sup>482</sup> Chigwata TC *The Law and Policy for Provincial and Local Government in Zimbabwe: The Potential to Realise Development, Build Democracy and Sustain Peace* (unpublished PhD thesis, University of the Western Cape, 2014) 227.

devolutionary requirements espoused by the 2013 Constitution.<sup>483</sup> Instead, ‘there have been reversals and an attempt to completely do away with provincial and metropolitan councils to scuttle devolution’.<sup>484</sup>

Additionally, in 2016, Parliament promulgated the Local Government Amendment Act,<sup>485</sup> which has been criticised for serving against the spirit of devolution and multilevel governance anchored in the 2013 Constitution.<sup>486</sup> The Act confers wide powers to the Minister of Local Government that include exercising an undue interference in the operations of local authorities and the discretion to convene an independent tribunal to adjudicate on the suspension and removal from office of the democratically elected chairpersons, mayors and councillors.<sup>487</sup>

The 2013 Constitution prescribes a cooperative government for the purpose of creating and fostering good working relations between the three tiers of government.<sup>488</sup> The 2013 Constitution therefore requires the promulgation of an Act of Parliament that provides for the mechanisms and procedures that facilitates the system of cooperative government.<sup>489</sup> In order to uphold the rule of law, the relevant Act of Parliament must be consistent with the principles of cooperative governance contained in the 2013 Constitution.<sup>490</sup> Ultimately, the effectiveness of cooperative government will largely depend on how the legislation will define and provide the necessary mechanisms and procedures to facilitate co-ordination between the three tiers of government.<sup>491</sup>

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<sup>483</sup> Chigwata (2019) 318.

<sup>484</sup> CCDZ & HRT (2018) 2.

<sup>485</sup> The Local Government Laws Amendment Act, 2016 (the LGLAA). The primary objective of this Act is to amend the RDC & the UCA.

<sup>486</sup> CCDZ & HRT (2018) 2.

<sup>487</sup> Part II and Part III of the LGLAA. See also CCDZ & HRT (2018) 2.

<sup>488</sup> ss 194(1)(g) 265(1) 2013 Constitution.

<sup>489</sup> s 265(3) 2013 Constitution.

<sup>490</sup> Moyo & Ncube (2014) 295.

<sup>491</sup> Moyo & Ncube (2014) 295.

The governing party enjoys commanding political dominance in Parliament and the implementation of the system of multi-level government and devolution is automatically at the mercy of ZANU-PF. A majority of local authorities are under the control of ZANU-PF, except in urban areas, notably Harare, Chitungwiza, Gweru, and Bulawayo.<sup>492</sup> Cognisant of the dominance of the MDC in these strategic cities and other urban areas, the implementation of devolution may have fortified the ‘opposition’s dominance at the sub-national level and amplified its challenge to the ZANU-PF’s power-hold at the national level’.<sup>493</sup> This could be one of the major reasons as to why the ZANU-PF government is reluctant to implement devolution, meaning it clearly would empower these cities.<sup>494</sup> In consequence, political patronage, partisanship and manipulation often eclipse the constitutional provisions for decentralisation and constitutionalism.

#### **5.4.2.1 Conflation of self-government with secessionism**

The preamble of Chapter 14 of the 2013 Constitution which specifically provide for devolution of governmental powers and responsibilities expresses the desire to preserve Zimbabwe’s national unity and to prevent all forms of disunity and secessionism. While the 2013 Constitution is the supreme law of the country it purposefully instils and captures the doubts and fears against devolution.

Moyo and Ncube indicate that the failure to implement the 2013 Constitution in Zimbabwe is because:

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<sup>492</sup> Chigwata (2019) 317.

<sup>493</sup> Chigwata (2019) 317.

<sup>494</sup> Chigwata (2019) 317.

One of the fears of devolution propagated by ZANU-PF and other anti-devolutionists is that devolution in Zimbabwe would threaten the unitary character of the State by encouraging regional secessionist politics, especially in Matabeleland.<sup>495</sup>

Certain regions of the country such as Matabeleland North and South are viewed as trying to secede under the guise of devolution.<sup>496</sup> Due to mixed political rhetoric from politicians between the ZANU-PF and the MDC formations, the line between openly advocating for secession or devolution is still blurred.<sup>497</sup>

It should be noted that during the constitution-making process, the ZANU PF made it clear that it was opposed to devolution.<sup>498</sup> Even after the adoption of the 2013 Constitution, various statements made by ZANU-PF officials indicate that it has remained resolute in its opposition to devolution because it has the potential of dividing the country and causing disunity.<sup>499</sup> ZANU-PF's former leader, Mugabe has best articulated the argument as follows: 'Those things are done in big countries, not a small country like ours... Some are talking about separating Matabeleland region to become a country; that is impossible we don't want that'.<sup>500</sup> However, Moyo and Ncube dismiss this narrative as weak because it is a deliberate conflation of self-government or territorial autonomy with secessionism.<sup>501</sup>

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<sup>495</sup> Moyo & Ncube (2014) 298.

<sup>496</sup> Mapuva & Miti GP (2019) 14. See also Tsododo B 'The folly of secessionist, tribal politics' (2014) available at <https://www.herald.co.zw/the-folly-of-secessionist-tribal-politics/> (accessed 4 August 2019).

<sup>497</sup> Moyo F 'In Zimbabwe's Matabeleland, politicians openly advocate for secession or devolution' (22 May 2018) available at <https://globalpressjournal.com/africa/zimbabwe/zimbabwes-matabeleland-talk-devolution-secession-begins-grow/> (accessed 03 October 2019).

<sup>498</sup> Chikwawawa (2019) 20.

<sup>499</sup> Masunungure EV & Ndoma S 'The popular quest for devolution in Zimbabwe' (2013) available at <https://www.files.ethz.ch/isn/164675/afrobrieffno114.pdf> (accessed 4 August 2019).

<sup>500</sup> Masunungure EV & Ndoma S 'The popular quest for devolution in Zimbabwe' (2013) available at <https://www.files.ethz.ch/isn/164675/afrobrieffno114.pdf> (accessed 4 August 2019).

<sup>501</sup> Moyo & Ncube (2014) 298

While each constitutional structure directly links the devolved political structures to the sub-national electorate,<sup>502</sup> the 2013 Constitution requires respect for the people, from whom the authority to govern is derived.<sup>503</sup> Therefore, the conflation of self-government with secessionism denies people their rights to elect their own leaders who must be accountable to them. The partial enforcement of the 2013 Constitution results in the superficial implementation of constitutionalism.

### **5.4.3 Legal ambiguities**

Section 264 of the 2013 Constitution contains legal ambiguities that hinders the effective implementation of devolution.<sup>504</sup> The provision stipulates that '[w]henver appropriate, governmental powers and responsibilities must be devolved to provincial and metropolitan councils and local authorities which are competent to carry out those responsibilities'.<sup>505</sup> The requirement based on 'competency' to 'efficiently and effectively' carry out the responsibilities could be utilised by the central government to totally disempower the sub-national governments.

Indeed, the final decision on the devolution of power and responsibilities is qualified and conditioned on the sub-national governments' competence to carry out the responsibilities efficiently and effectively. Chikwawawa argues that competent or incompetent can also be subjective as the provision fails to stipulate any benchmark for the determination of competence or lack thereof.<sup>506</sup> The government can use this section as a pretext for not implementing devolution while denying democratic space to citizens and political parties at sub-national levels

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<sup>502</sup> ss 268, 269, 274 & 275 2013 Constitution. See also Fessha (2015) 125.

<sup>503</sup> s 3(f)(d) 2013 Constitution.

<sup>504</sup> Muzenda A & Chirisa I 'Legal ambiguity and symbolic structures: Local government reform in Zimbabwe', Discussion Paper (2018) 8.

<sup>505</sup> s 264(1) 2013 Constitution.

<sup>506</sup> Chikwawawa (2019) 21.

of government.<sup>507</sup> Accordingly, section 264 of the 2013 Constitution has fundamental loopholes as it does not sufficiently oblige the national government to devolve power to the sub-national governments.<sup>508</sup>

Central to this pressing concern is the fact that an Act of Parliament can easily be amended as opposed to altering the 2013 Constitution itself. Within this context, the insecurities relate to lack of appropriate constitutional safeguards to powers of the provincial and metropolitan councils and local authorities. The central government may, through national legislation, recentralise the powers at any time. For instance, Chigwata and Ziswa point out as follows:

The recentralisation in 2006 of water and sanitation services in Zimbabwe is argued to have been driven by the need to leave the opposition dominated urban councils with less power and influence in urban areas.<sup>509</sup>

All things considered, it is argued that, since the 2013 Constitution fails to give clarity as to the legal and institutional design of devolution, the constitutional framework for decentralisation is therefore rendered weak. Nonetheless, the government should implement 2013 Constitution because all state institutions have to uphold the rule of law and supremacy of the constitution.

## 5.5 Conclusion

Despite the fact that Zimbabwe's 2013 Constitution may provide for the core elements and modern concepts of constitutionalism, its provision for a decentralisation framework is obscured by legal

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<sup>507</sup> Chikwawawa (2019) 21.

<sup>508</sup> Chikwawawa (2019) 21.

<sup>509</sup> Chigwata TC & Ziswa M 'Entrenching decentralisation in Africa: A review of the African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development' (2018) 10 *Hague Journal on the Rule of Law* 306.

ambiguities and the little guidance on how devolution must be implemented. Therefore, it is concluded that Zimbabwe's devolved unitary system is fragile because of its weak constitutional provision for decentralisation. In addition, this fragility is compounded by the national government's persistent breach of the 2013 Constitution as it fails to enact the necessary laws geared towards the implementation of devolution.

There is a general lack of constitutionalism which is evidenced by the partial enforcement of the 2013 Constitution. This is evidenced by, among other factors, by gross human rights violations as well as by having shallow roots of constitutional democracy, interference with the independence of the judiciary, and the encroachment on the institutional integrity of the local government. The sub-national governments lack the necessary constitutional safeguards to protect their powers and jurisdictions.

The lack of political commitment to constitutionalism by the ZANU-PF government is the foremost obstacle to the effective implementation of constitutionalism and devolution. Accordingly, given Zimbabwe's authoritarian political culture, it remains to be seen whether the 2013 Constitution will be implemented by the current political administration of President Mnangagwa. Additionally, having established the lack of broad commitment to constitutionalism by the national government, this confirms that constitutionalism, both as a politico-legal philosophy and practice, can be instrumental to the successful implementation of decentralisation in Zimbabwe if the national government decides to comply with the devolutionary requirements set out in the 2013 Constitution.

Political rhetoric at the national level when President Mnangagwa expressed the desire to implement devolution has to be complemented by practice, reflecting an astute adherence to supremacy of the Constitution and the rule of law.

The 2013 Constitution requires Parliament to devolve powers and responsibilities to sub-national governments. The course of devolution is left to the determination of the national governing ZANU-PF which is reluctant to implement devolution. The failure by Parliament to ensure that the Draft Provincial and Metropolitan Councils Bill reflects the requirements of the 2013 Constitution signals that Parliament which is controlled by ZANU-PF is opposed to devolution. Parliament must align the old statutes and enact new legislation that is consistent with the constitutional spirit and principles of devolution and multi-level governance.



## **Chapter Six: Conclusion and Recommendations**

### **6.1 Introduction**

The objective of this mini-thesis was to answer the question: What does decentralisation and constitutionalism entail and what is the linkage between these two variables? With a view to developing the primary research question, the study also addressed the following secondary questions:

- (a) Is constitutionalism an indispensable precondition for decentralisation in Africa?
- (b) Has constitutionalism, as both a politico-legal philosophy and practice been central to the successful implementation of decentralisation in South Africa?
- (c) If yes, can the same correlation be applicable in Zimbabwe?
- (d) What is the state of decentralisation and constitutionalism in Zimbabwe?
- (e) What can Zimbabwe learn from the successful quintessential model of South Africa?
- (f) How can constitutionalism be built in Zimbabwe?

### **6.2 Answering the research questions**

#### **6.2.1 Defining decentralisation, understanding constitutionalism and outlining the linkage between these two variables**

First, the study has established that decentralisation is an ambiguous, generic and highly contested term covering a wide range of concepts and has encountered numerous and varying degrees of definitions and classifications within different disciplines, both theoretically and practically. Inherently, decentralisation requires that there must be a central government that transfers powers to a sub-national levels of government which could either be regional and local governments or

both.<sup>510</sup> The transfer of such powers could be effected through the constitution or national legislation, provided that the sub-national governments are capable of making final decisions pertinent to a number of predetermined functional areas.<sup>511</sup>

Secondly, the study revealed that constitutionalism is a body of theoretical prescriptions. In principle, it is an idea or doctrine of a government limited by law. As with any 'ism' constitutionalism captures values and goals.<sup>512</sup> In its liberal democratic form, constitutionalism means: 'in terms of a constitution, state power is limited, exercised in a democratic, accountable manner, and executed in a non-arbitrary way through a system of enforceable rules'.<sup>513</sup> Essentially, constitutionalism requires that state power must be defined and limited by law in order to protect societal interests.<sup>514</sup>

Finally, the study established that one of the objects of decentralisation is to limit centralised power.<sup>515</sup> Similarly, constitutionalism requires that state power must be constitutionally structured in order to prevent the centralisation and abuse of power. Clearly, in one form or another, there is a mutually reinforcing relationship between modern constitutionalism and decentralisation; they are closely linked and compatible concepts because both are aimed at countering the abuse of state power.

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<sup>510</sup> arts 5(4), 6(2), 7(5), 11(a), 16(4)(a) & 18(1)(a)(ii) of the African Charter on Decentralisation.

<sup>511</sup> Steytler (2019a) 31.

<sup>512</sup> Steytler (2019a) 26.

<sup>513</sup> Steytler (2019a) 26.

<sup>514</sup> Currie & De Waal (2016) 8.

<sup>515</sup> Steytler (2019a) 26.

## **6.2.2 Constitutionalism as politico-legal philosophy and practice in the implementation of decentralisation**

Since 1994, the ANC government has observed in practice the elements of modern constitutionalism as enshrined in the Constitution. The nature of the effective implementation of decentralisation is demonstrated by the existence of fully-fledged provincial and local governments. Central to the implementation of decentralisation and constitutionalism is the broad commitment to devolution of power and constitutionalism at the national level as spearheaded by the national governing party, the ANC. To a large extent, the effective implementation of decentralisation is largely attributed to the far-reaching commitment to devolution of power and constitutionalism, and the astute adherence to the rule of law and the well-developed and advanced law and policy on multi-level governance. The effective implementation of devolution is credited to the impressive constitutional framework that has ensured, as part of rule of law, the provision of a firm foundation for decentralisation and constitutionalism. For that reason, constitutionalism, both as a politico-legal philosophy and practice, has been instrumental to the successful implementation of decentralisation in South Africa. The governing ANC has constantly displayed the necessary political will in terms of complying with the rule of law and the supremacy of the Constitution.

Since 1994, South Africa has been having regular, free and fair elections at all levels of government. This this legitimises the devolved political structures that are conferred with the powers to govern sub-national governments. Above all, the allocation of powers to sub-national levels of government is complemented by an independent judiciary which has played a crucial role in safeguarding their constitutional powers and institutions.

One of the research questions posed above is whether South Africa's approach to constitutionalism can bear the same correlation to be applicable in Zimbabwe. This study therefore answers the question in the affirmative that indeed, South Africa sets a quintessential model that could guide Zimbabwe and other multi-level states in Africa with regard to the effective implementation of constitutionalism and decentralisation.

### **6.2.3 The state of decentralisation and constitutionalism in Zimbabwe**

In Zimbabwe, the absence of constitutionalism and little respect for the rule of law are clear evidence that there is no political will to adhere to the potentially far-reaching provisions of the 2013 Constitution. Devolution has not yet been fully implemented since its adoption during the 2013 constitutional reforms, resulting in the absence of a fully-fledged system of multi-level governance in Zimbabwe.<sup>516</sup> A major key driver to non-implementation of devolution lies in the government's failure to enact the relevant legislation that devolves power to provincial and metropolitan councils.<sup>517</sup> All things considered, it is reasonable to conclude by stating that inconformity to the constitutional values and principles of supremacy of the Constitution and the rule of law indicates that Zimbabwe is partially committed to constitutionalism.

Other primary factors include a political culture of intolerance to devolved political structures; lack of political will to implement devolution; the deliberate conflation of self-government with secessionism; as well as legal ambiguities and uncertainties pertinent constitutional provision for decentralisation. Zimbabwe can only be able to build a culture of constitutionalism and increase the prospects of effectively implementing devolution when all state institutions, including the national government decide to implement the 2013 Constitution in practice.

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<sup>516</sup> Chigwata (2019) 318.

<sup>517</sup> CCDZ & HRT (2018) 2.

### 6.3 Recommendations

Although there are weaknesses in the constitutional provisions for devolution, the 2013 Constitution of Zimbabwe empowers Parliament to implement devolution through national legislation. Therefore, it is recommended that Parliament has to respect the supremacy of the Constitution and the rule of law, by passing the relevant legislation required to facilitate the implementation of devolution. The relevant legislation meant to implement devolution must provide clarity as to the nature and processes for the intended devolution of power.

Due to the fact that the nature and processes of the intended devolution of power remains unclear, the compliance to the rule of law and respect to the supremacy of the constitution cannot take place overnight and in vacuum. Rather than to pursue devolution anyhow, a cautious roadmap meant to properly design a decentralisation framework must be fashioned in order to avoid plunging the country into massive turmoil and increased developmental challenges.

The new constitutional dispensation requires the central government to fully comply with the rule of law by devolving powers to provincial and metropolitan councils and local authorities in line with the spirit and objects of devolution articulated in the 2013 Constitution. The adoption of devolution requires that the outdated Acts of Parliament that govern sub-national governments such as the LGLAA, the UCA, the RDCA, and the PCAA, have to be aligned with the new constitutional order.<sup>518</sup>

The 2013 Constitution does not directly confer powers and responsibilities to sub-national government, but requires that such powers must be devolved by an Act of Parliament. Rather than to leave such a wide berth to Parliament, the 2013 Constitution ought to be positively amended so

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<sup>518</sup> Chigwata (2018) 99.

as to directly confer original powers to provincial and metropolitan councils as well as local authorities.

In addition, section 276(1) of the 2013 Constitution vaguely provides that, ‘subject to this Constitution and any Act of Parliament, a local authority has the right to govern, on its own initiative, the local affairs of the people within the area for which it has been established, and has all the powers necessary for it to do so’. Nevertheless, such powers and functions are to be conferred to local authorities by an Act of Parliament. Consequently, when there is a lack of a clear-cut constitutional provision that safeguards the autonomy and powers of local authorities, the central government has the discretion to interfere with and/or recentralise the statutorily devolved powers at any given time.<sup>519</sup> Hence, there is a need to protectively entrench the autonomy and powers of local government by adding a constitutional provision to that end.

Decentralisation aims at limiting the concentration of power in the central government, and the realisation of development, deepen democracy and sustain peace. As a result, there has to be an availability of the necessary structures, adequate resources and capacities in order to ensure that the system of multi-level government is fully functional.

The reason that led to the constitutional recognition of devolution was the desire to do away with the over-centralisation of power in Zimbabwe.<sup>520</sup> While taking into account Zimbabwe’s history of having a ‘political system marked by centralisation through the adoption of a *de facto* one party state rule and [an] authoritarian political culture by ZANU-PF since independence,<sup>521</sup> there is a

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<sup>519</sup> Chigwata (2018) 244.

<sup>520</sup> Chigwata (2019) 306.

<sup>521</sup> Chikerema & Chakunda (2014) 61.

need to ensure that Parliament and the courts prevent the reversal of authoritarian rule and the centralisation of power in the presidency.

While the current political administration led by President Emmerson Mnangagwa has expressed the intention to implement devolution during the 2018-2022 government term,<sup>522</sup> the President must demonstrate his commitment to constitutionalism and the rule of law by ensuring that the government enacts the relevant laws that will properly design the nature of devolution and spearhead the implementation of devolution. In addition, the governing ZANU-PF has to desist from conflating devolution with secession because the deliberate conflation of these two variables is used as one of the main factors aimed at stifling the implementation of devolution

Ultimately, as with the South African experience, the effective implementation of devolution and constitutionalism in Zimbabwe will depend on the astute adherence to the rule of law and the well-developed and advanced law and policy on multi-level governance. This largely emanates from the broad commitment to devolution of power and constitutionalism at the national level. Therefore, a significant determinant of how effective devolution and constitutionalism will be implemented in Zimbabwe lies with the nature of the necessary constitutional frameworks as well the existence of a tangible commitment to constitutionalism by the national government.

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<sup>522</sup> Chigwata TC 'Emerging debates about, and prospects for, devolution in Zimbabwe' (2019) 1 available at <<https://zimlil.org/zw/blog/Emerging%20debates%20about%20and%20prospects%20for%20devolution%20in%20Zimbabwe.pdf>> (accessed 15 September 2019).

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